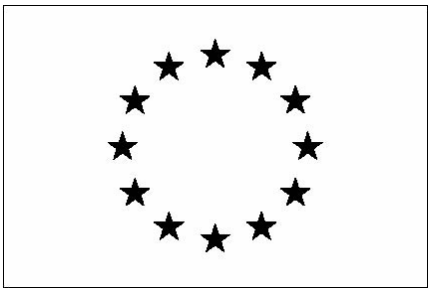

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SURVEILLE

Surveillance: Ethical issues, legal limitations, and efficiency

Collaborative Project

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SURVEILLE Deliverable D4.7 The scope of the right to private life in public places

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Executive Summary

This deliverable analyses whether, and, if so, to which extent, inhabitants of the member states of the Council of Europe, including all Member States of the European Union, have a right to private life in public places. The starting point for this analysis was a claim that a number of new technologies, including drones, location trackers and tools to analyse social networking sites, pose a unique 'threat' to the right to privacy, because they potentially interfere with the right to privacy in public places.

Section 1 describes the added value of drones, location trackers and tools to analyse social networking sites for law enforcement authorities, while highlighting at the same time the challenges that these technologies pose to the right to privacy. Section 2 then elaborates how the European Court of Human Rights' unwillingness to define the right to private life, coupled with its evolutive reading of article 8 of the Convention, has allowed it to take into account a broad range of social, legal and technological developments across the Council of Europe in order to extend the scope of the right to private life to public places. It is submitted that the Court's interpretation of the 'right to establish and develop relationships' and the protection of personal data have been two crucial concepts to widen the scope of the right to private life beyond a narrow, spatial interpretation of the right to privacy.

Section 3 attempts to systematize the case law of the ECtHR that developed the scope of the right to private life in public places. New developments in the Court's case law of the past years allow for a new attempt at categorization. At its most fundamental level, one can distinguish on the one hand cases in which a government interferes with a person's physical integrity, i.e. his body or physical health, or fails to adopt sufficient positive measures to safeguard a person's physical integrity. On the other hand we can distinguish cases where the right to private life protects an individual from mental stress that is the result of unwanted observation. It is the latter category of cases that has most significantly developed the scope of the right to private life in public places. This section further demonstrates that the scope of the right to private life is not limited by the nature of the premise in which an intrusion takes place. The relevant distinction to determine the scope of article 8 is not one between a 'private' and 'public' place, but whether a specific measure such as a search, or an interception of communications, affects a person's 'private sphere' as opposed to his 'public life'. This does not mean that article 8 protects every public activity a person engages in. In order to determine the scope of the right to private life, the court attaches importance to the nature of the activity a person undertook, and secondly, and more importantly – whether (visual) data were created and have been further disseminated.

Finally, this deliverable questions the use by the Court of the 'reasonable expectation of privacy' test as an additional factor to determine whether a person's private life is affected by measures effected outside a person's home or private premises. It is submitted that in those cases where there is no physical interference with a person's private premises, and a person's communications or movements are monitored or recorded, or even merely stored, the reasonable expectation of privacy test is subsumed by the Court's adherence to the protection of personal data, and the goal of Article 8 to protect a person's right to establish and develop relationships. The usefulness and added value of using the test in these cases is therefore questionable, and only adds confusion to the scope of the right to private life in

public. The reasonable expectation of privacy test only seems relevant in cases where the right to private life appears to clash with the freedom of expression.

1. New technological challenges to the right to private life in public places

There's nothing new in studying the impact of new technologies on the right to privacy. The first academic article in the U.S. that advocated the creation of a 'right to privacy' in 1890 was spurred by the use of new technological inventions such as "instantaneous photographs" that were made by "modern devices for recording or reproducing scenes and sounds" and used by a "too enterprising press".[1] In the 1960s and 1970s the increased processing of personal data by both governmental and commercial actors triggered a new debate on the scope of the right to privacy. While the first debates in the 1960s focused on the collection and storing of personal data on index cards or punch cards, it was the automatic, computerized processing of personal data that eventually led to new laws that tried to protect privacy against new challenges posed by the ubiquitous use of computers and – in the words of the Organisation for Economic Cooperation and Development *(*OECD*)* – "the vastly expanded possibilities of storing, comparing, linking, selecting and accessing personal data".[2] A study for the European Commission in 2010 identified "the internet" as one of the main challenges for the protection of privacy in the 21st century,[3] which required an update of the EU's data protection directive. There has been an abundant amount of European (academic) research into different technologies and their impact on the right to privacy: from 'smart meters'[4] to radio frequency identifications (RFID)[5], from CCTV[6] to

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[1] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193–220 at 195 and 206. It is interesting to note that one of the reasons why Warren and Brandeis advocated for the development of a new right was that the latest advances of photographic art made it possible to take pictures "surreptitiously", as opposed to earlier practices that required that one's picture could only be taken by consciously sitting in front of a camera. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 193–220 at 211.

[2] Explanatory memorandum to the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, 23 September 1980, available at http://www.oecd.org/internet/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm#theproblems

[3] European Commission, Director-General Justice, Freedom and Security, Comparative study on different approaches to new privacy challenges, in particular in the light of technological developments. European Commission, 20 January 2010, p.9, available at http://ec.europa.eu/justice/policies/privacy/docs/studies/new_privacy_challenges/final_report_en.pdf

[4] ARTICLE 29 Data Protection Working Party, "Opinion 12/2011 on Smart Metering. WP 183, 00671/11/EN," April 4, 2011. Rainer Knyrim and Gerald Trieb, "Smart Metering under EU Data Protection Law," *International Data Privacy Law* 1, no. 2 (2011): 121–28.Eoghan McKenna, Ian Richardson, and Murray Thomson, "Smart Meter Data: Balancing Consumer Privacy Concerns with Legitimate Applications," *Energy Policy* 41 (2012): 807–14.Colette Cuijpers and Bert-Jaap Koops, *Het wetsvoorstel "slimme meters": een privacytoets op basis van art. 8 EVRM* (Tilburg: Universiteit Tilburg, October 2008).

[5] ARTICLE 29 Data Protection Working Party, "Opinion 5/2010 on the Industry Proposal for a Privacy and Data Protection Impact Assessment Framework for RFID Application," July 13, 2010; Eleni Kosta and Jos Dumortier, "Searching the Man behind the Tag: Privacy Implications of RFID Technology," *International Journal of Intellectual Property Management* 2, no. 3 (January 1, 2008): 276–88; Paul De Hert et al., "Legal Safeguards for Privacy and Data Protection in Ambient Intelligence," *Personal and Ubiquitous Computing* 13, no. 6 (2009): 435–44; Mireille Hildebrandt and Bert-Jaap Koops, "The Challenges of Ambient Law and Legal Protection in the Profiling Era," *The Modern Law Review* 73, no. 3 (2010): 428–60.

[6] Fanny Coudert, "Towards a New Generation of CCTV Networks: Erosion of Data Protection Safeguards?," *Computer Law & Security Review* 25, no. 2 (January 2009): 145–54. ARTICLE 29 Data Protection Working Party, "Opinion 4/2004 on the Processing of Personal Data by Means of Video Surveillance. WP 89, 11750/02/EN," February 11, 2004, 29; Paul De Hert, "Balancing Security and Liberty Within the European Human Rights

biometric technologies.[7]

However, this research has not taken into account how a number of new technologies seem to pose a 'unique' threat to the right to privacy in the sense that they mainly affect the right to privacy in public places, i.e. places where one can be observed by others. Drones, location trackers and tools to analyse social networking sites affect this right in similar, yet different ways. They pose similar challenges to the right to privacy in the fact that they (1) increase the risk of secret, unwanted monitoring or surveillance[8] and (2) interfere with the right to privacy in a public place.[9] As a result, courts and law enforcement authorities often perceive the use of these technologies as relatively harmless. This is especially the case in the United States, where there is a different legal tradition in protecting privacy, which often equals 'private' matters with 'secret' matters[10] and which places strong emphasis on the notion of the 'home' as the ultimate private space that needs to be protected from unwanted (governmental) interference.[11] This traditional interpretation of privacy has been well-established in the EU as well.[12] The use of these technologies raises questions about the exact scope of the right to private life in public places, and – also – the extent to which European data protection law can address potential gaps in the scope of the right to private life.

Framework. A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies After 9/11," *Utrecht L. Rev.* 1 (2005): 68.

[7] ARTICLE 29 Data Protection Working Party, "Opinion 3/2012 on Developments in Biometric Technologies," April 27, 2012; Annemarie Sprokkereef, "Data Protection and the Use of Biometric Data in the EU," in *The Future of Identity in the Information Society* (Springer, 2008), 277–84.

[8] As Surveille deliverable 2.4 noted: "Any technology used covertly affects the rights of the data subject. First, the data subject is unable to consent, thus the processing must have a clear legal basis. Second, the data subject is uninformed, and cannot consequently enjoy his or her procedural rights: access the file and correct or object to the processing. Covertness can also affect control of the fulfilment of the obligations of the data controller, which can only be ensured by an independent authority, whose existence, though, cannot be appraised in the abstract". Maria Grazia Porcedda, *SURVEILLE Deliverable D2.4 Paper Establishing the Classification of Technologies on the Basis of Their Intrusiveness into Fundamental Rights.pdf* (Florence: EUI, April 30, 2013) at 40; 51-52.

[9] It can be assumed that people's legitimate expectation of privacy will be different on a public street compared to an online environment. For more on the notion of a "legitimate expectation of privacy", see section 3.2.3.

[10] See for instance U.S. Supreme Court, Smith v. Maryland, 442 U.S. 735 (1979); and Richard Posner's influential 'privacy as secrecy' chapter in 'The Economics of Justice'. Richard A. Posner, *The Economics of Justice*, p.231. (Harvard University Press, 1983).

[11] See for instance U.S. Supreme Court, Kylo v. United States, 533 U.S. 27 (2001), and Katherine J. Strandburg, "Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change," *Md. L. Rev.* 70 (2010): 614.

[12] See section 2 for earlier case law of the European Court of Human Rights, and see Georges Duby, "Foreword to A History of Private Life", in Philippe Ariès and Georges Duby (general eds.),A History of Private Life(trans.Arthur Goldhammer, Cambridge, Mass.: Belknap/Harvard University Press, 1987-1991, 5 vols.), vol. 1,From Pagan Rome to Byzantium,ed.Paul Veyne, p. viii, quoted in David Feldman, "The Developing Scope of Article 8 of the European Convention on Human Rights," *European Human Rights Law Review*, no. 3 (1997): 271 " … a clearly defined realm is set aside for that part of existence for which every language has a word equivalent to 'private,' a zone of immunity to which we may fall back or retreat, a place where we may set aside arms and armor needed in the public place, relax, take our ease, and lie about unshielded by the ostentatious carapace worn for protection in the outside world. This is the place where the family thrives, the realm of domesticity; it is also a realm of secrecy."

In the first section of this deliverable I want to focus briefly on the perceived added value these technologies deliver to law enforcement authorities, while highlighting at the same time the challenges that these technologies pose to the right to privacy.[13]

1.1 Drones

In a civilian, non-military context, a 'drone' usually refers to the flying element of an unmanned aircraft system (UAS).[14] A pilot operates the drone via a ground control system, or autonomously through the use of an on-board computer. Drones are also known as Remotely Piloted Aircraft (ROA), Remotely Piloted Vehicle (RPV) or Unmanned Aerial Vehicles (UAV). Drones come in a wide variety of formats, and they can carry a virtually unlimited amount of 'payloads', i.e. the elements that are attached to the drone, such as cameras, heat-sensors, facial recognition tools, audio recorders, wif-fi interception technology etc.

There is a virtually unlimited amount of commercial applications for which drones can be used. They can be used to support precision agriculture and fisheries, power/gas line monitoring, infrastructure inspection, communications and broadcast services, wireless communication relay and satellite augmentation systems, natural resources monitoring, media/entertainment, digital mapping, land and wildlife management, or air quality management/control. The list is endless.

Within the EU, the use of 'light' drones that weigh less than 150 kilograms, and the use of all types of drones for security or military purposes, are regulated by the Member States. The regulation of the use of larger drones for commercial purposes is currently being investigated by the European Commission, which aims to start integrating drones in the EU's civilian airspace by 2016. By 2028, drones should be fully integrated in the EU's civilian airspace.

Drones can efficiently complement existing infrastructure (manned aircraft or satellites) that is used by public actors to support crisis management, law enforcement, border control, traffic monitoring or fire fighting operations. In that capacity they can be used as 'flying cameras' that monitor public spaces in order to prevent or detect a wide range of security threats. Their huge comparative advantage is evident. Firstly, drones can monitor large and/or inaccessible areas. For example, in a search and rescue context, drones can be used to surveille large inaccessible areas such as dense forests. Drones can also monitor large border areas in order to detect unauthorized entries and to combat human trafficking. Secondly, drones are mobile. They can not only detect and register suspicious objects and individuals, but also further track these as they move in public spaces. Contrary to human teams that follow individuals or objects, drones don't lose their concentration and are less visible, so they are able to track objects and individuals for a long period of time. Finally,

[13] For an in-depth analysis of some of the technologies discussed, see the fundamental rights technology assessment sheets in John Guelke et al., "SURVEILLE Deliverable 2.6 Matrix of Surveillance Technologies" (Surveille, July 31, 2013).

[14] This section is based on earlier work done for the Surprise-project. See Kirstie Ball et al., *Surveillance, Privacy and Security. What's Your Opinion?*, Surprise Project information booklet (Vienna: ITA, 2014).

drones are less visible than CCTV-cameras, since they usually fly at a height of 50 to 200 metres. As a result, they are harder to be detected by potential wrongdoers.

This potential advantage at the same time represents the biggest threat to the right to privacy. The (relative) invisibility of drones makes it harder for people to know that they are being surveilled. When they see or hear the drone, it is hard to find out who exactly is operating it. As a result it is less easy for people to challenge or avoid this type of aerial surveillance. Contrary to CCTV-cameras, drones can also collect information from private places that individuals have tried to prevent from being seen, for instance by establishing walls, fences or other objects.

1.2. Location based services

Location-based services (LBS) are those applications that utilize the position of an individual based on a given device for a particular purpose, using a variety of positioning technologies such as satellite based global positioning systems, cell-based mobile communication networks (such as GSM and UMTS), wireless technologies such as radio-frequency identification tags or sensor-based systems. With the rise of smartphones and tablets, location-based services have become increasingly popular, as they allow for providing tailored services such as personalized weather services, finding the nearest restaurant, providing personalized adds or managing a car fleet.

The accuracy of the location depends on the type of technology that is being used. A GPS tracker for instance allows the continuous monitoring of the outside location of any object equipped with a GPS receiver anywhere on earth, with a range accuracy of 7,8 metres.[15] Information about the object's location may be stored in the receiver itself, but it can also be sent continually to another device, such as a computer. According to an amicus brief from, amongst others, Roger L. Easton, "most high-quality non-military receivers currently provide better than 3 meter horizontal accuracy", and with the use of augmentation systems, "GPS receivers can pinpoint locations to within a few centimeters".[16]

Cell-based communication Networks such as UMTS (3G), GSM (2G) offer less accuracy, depending on the size of the communication cell the mobile device resides in. According to one analyst the diameter of a cell can be "approximately 300 metres" in urban areas, while "in rural areas much larger cells (diameter up to approximately 30 km) exist. Additional technologies, for example using triangulation, allow more accurate positioning".[17] Location tracking using RFID-technology is more often used inside buildings. The location of an object that is equipped with an RFID-tag can be detected by an RFID-tagreader using radio signals. Some tags can only be read from a distance of 10 cm, others can be read from distances up

[15] US Department of Defense, GPS Navstar, Global Positioning System Standard Positioning service performance standard. September 2008, p. v. GPS signals are generally too weak to be received inside buildings.

[16] Amicus Brief of Center for Democracy & Technology, Electronic Frontier Foundation, Matt Blaze, Andrew J. Blumberg, Roger L. Easton and Norman M. Sadeh as amici curiae in support of respondent in United States v. Jones. October 2011, at 10.

[17] Martin Meints, Dennis Royer, Location Information from a technical perspective, in FIDIS *D11.5: The Legal Framework for Location-Based Services in Europe*, June 2, 2007.

to 200 metres.

Both GPS-trackers and location data that are being transmitted by mobile phones to phone masts can provide valuable services to law enforcement agencies. GPS trackers allow for the real-time depiction of every place the GPS receiver—and therefore the vehicle or person to which that receiver is attached—has been. The analysis of GPS-data is in most cases complemented with mapping software that transforms the GPS data into a visual depiction of the movements or routes of a person. Depending on the exact type of tracker used, evidence produced by GPS-trackers consists mainly of longitude, latitude, and altitude coordinates showing a person's locations at approximately ten-second intervals, and a map of a person's movements created with mapping software.[18]

According to the EU's Data Retention Directive, European telecom providers are obliged to retain data "necessary to identify the location of mobile communication equipment", including the Cell ID[19] for periods of not less than six months and not more than two years.[20] On the basis of national laws that implemented the Directive, law enforcement agencies can request these data. While the European Court of Justice invalidated the current Directive in April 2014[21], data still can be retained on the basis of article 15 of the e-privacy Directive.

Location data can be of crucial help in law enforcement investigations. Through a GPS-tracker law enforcement officials can watch how objects are moving in real time, and collect evidence on a person's movements in public spaces. Apart from this crucial factual information, which can conclusively link an individual to a crime-scene for instance, location data is able to reveal patterns in a user's movements, which can generate knowledge about sensitive personal data of a medical or religious nature.[22] According to U.S. Supreme Court Justice Sotomayor, location data is able to disclose "indisputably private" trips, such as "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on."[23] She even went as far as labelling GPS surveillance potentially *more* intrusive in comparison with other conventional surveillance techniques because the technology it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility." The result is that

> "GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its

[18] Maria Grazia Porcedda, Martin Scheinin, Mathias Vermeulen, SURPRISE Deliverable D3.2 – Report on regulatory frameworks concerning privacy and the evolution of the norm of the right to privacy, March 2013, pp.40-42, available at https://www.ta-swiss.ch/?redirect=getfile.php&cmd[getfile][uid]=2521

[19] This refers to the identity of the cell from which a mobile telephony call originated or in which it terminated.

[20] Article 6, Directive 2006/24/EC of the European Parliament and the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC

[21] European Court of Justice, Joined Cases C-292/12 and C-594/12, Digital Rights Ireland Ltd v. Minister for Commc'ns, Marine, and Natural Res.

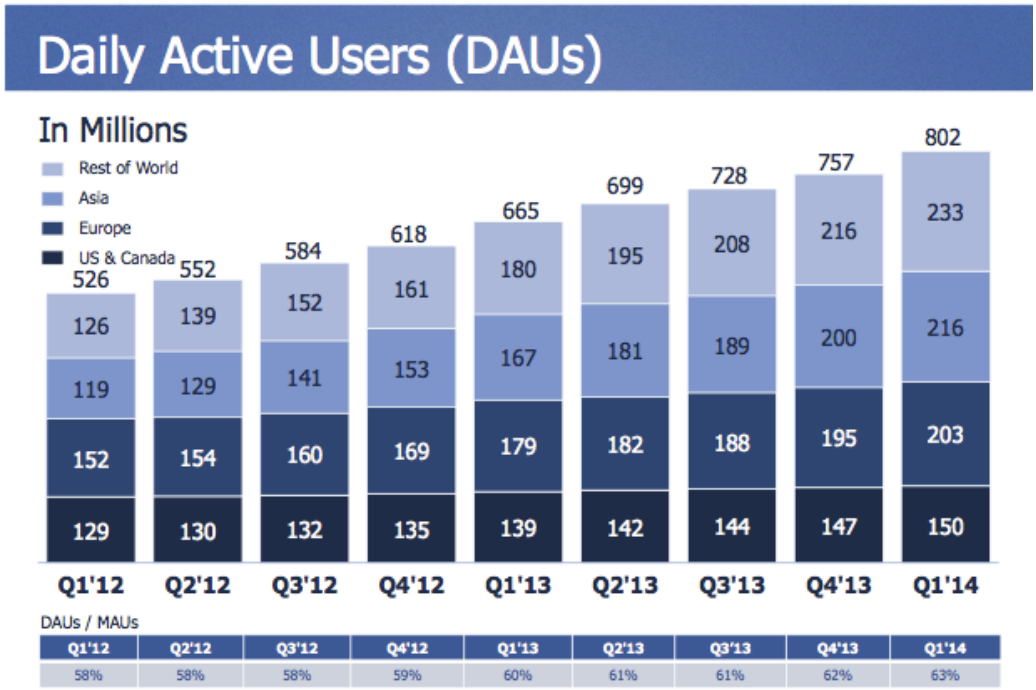
[22] Maria Grazia Porcedda, Martin Scheinin, Mathias Vermeulen, D 3.2 – Report on regulatory frameworks concerning privacy and the evolution of the norm of the right to privacy, March 2013, pp.40-42, available at https://www.ta-swiss.ch/?redirect=getfile.php&cmd[getfile][uid]=2521

[23] United States v. Jones, Justice Sotomayor concurring opinion, No. 565 U.S. (U.S. Supreme Court 2012) at 3.

unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society".[24]

1.3 Social network sites analytics

According to Boyd and Ellison, social network sites (SNS) are "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system".[25] Facebook, the largest SNS, had 1,28 billion monthly active users and 802 million daily active users on average in March 2014; 609 million people look at Facebook on a daily basis on their mobile phone.[26] Twitter has 255 million monthly active users and 198 million mobile active users.[27] Other important SNS are Google+, LinkedIn and Instagram.



(Source: Facebook, Quarterly earnings slides - Q1 2014, p.3.)

SNS need to be distinguished of course from spatial locations with geographical correlates, whose legal categorisation as a 'public' place depends on their accessibility in the sense that they may be entered and left at will.[28] This distinction does not make sense in 'cyberspace', where everybody can visit a public Twitter-timeline or a Facebook profile. At the same time,

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[24] Idem at 4 (Sotomayor J. concurring).

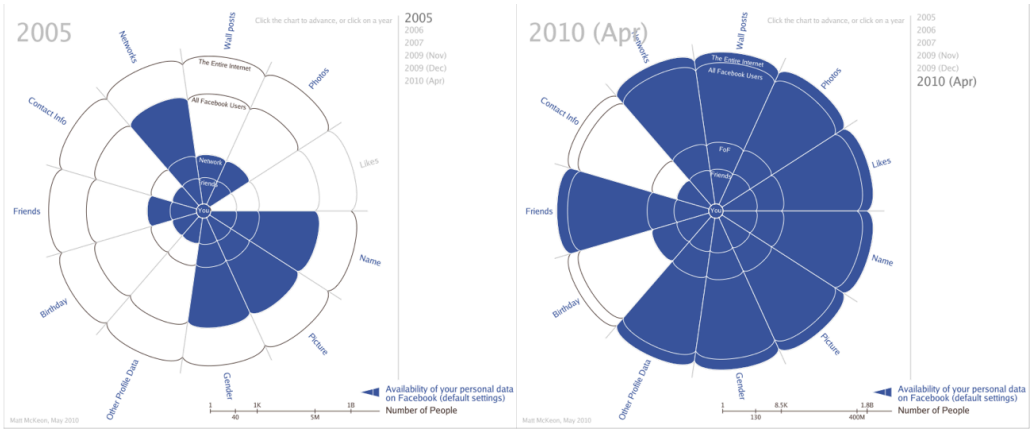
[25] danah m. boyd and Nicole B. Ellison, "Social Network Sites: Definition, History, and Scholarship," *Journal of Computer-Mediated Communication* 13, no. 1 (October 2007): 210–30, at 211.

[26] Facebook, Facebook reports first quarter 2014 results, 23 April 2014, http://investor.fb.com/releasedetail.cfm?ReleaseID=842071

[27] Twitter, Twitter reports first quarter 2014 results, 29 April 2014, http://files.shareholder.com/downloads/AMDA-2F526X/3294234402x0x748479/71daefb5-03dd-44e1-91d4-fb6e33ddaf7d/2014_Q1_Earnings_Release.pdf

[28] Gary T. Marx, "Murky Conceptual Waters: The Public and the Private," *Ethics and Information Technology* 3, no. 3 (2001): 157–69., at 161

people increasingly share intimate information about themselves and their friends or networks to a wider audience on SNS.[29] Every day more than 4.75 billion 'content items' are shared on Facebook, which includes status updates, wall posts, photos, videos and comments), more than 4.5 billion "Likes," and more than 10 billion messages are sent using the platform. More than 250 billion photos have been uploaded to Facebook, and more than 350 million photos are uploaded every day on average.[30] This sharing happens both knowingly and unknowingly, as it is not always obvious what is private or public on SNS. For example, Facebook's privacy settings have often changed, resulting in more permissive default privacy settings. What is 'public' and what is 'private' is therefore not always obvious to every user. SNS can therefore be referred to as 'quasi-public places' in the sense that they are platforms owned by commercial entities (as opposed to governments), which are able to determine the (privacy) rules on their platform.[31]



(Source: Matt McKeon, The evolution of Privacy on Facebook, May 2010, available at http://mattmckeon.com/facebook-privacy/)

Bartlett and others point out that new and emerging technology potentially allows more invisible and widespread intrusive surveillance on social network sites than ever before. Law enforcement and other security actors are interested in collecting and analysing publicly available SNS-data about specific individuals in order to identify and investigate criminal activity, for instance by conducting linguistic analysis of posts and status updates or by mapping social graphs' of relationships between people. SNS-data can also give these actors early warnings of "public disorder".[32] Finally, it might build "situational awareness" in rapidly

[29] Omer Tene, "Privacy: The New Generations," *International Data Privacy Law* 1, no. 1 (2011): 15–27.

[30] Internet.org - A focus on efficiency: a whitepaper from Facebook, Ericsson and Qualcomm. 16 September 2013, p.6 available at https://fbcdn-dragon-a.akamaihd.net/hphotos-ak-prn1/851575_520797877991079_393255490_n.pdf

[31] Jillian York, *Policing Content in the Quasi-Public Sphere*, Opennet Initiative Bulletin, September 2010. See also Daithí Mac Síthigh, "Virtual Walls? The Law of Pseudo-Public Spaces," *International Journal of Law in Context* 8, no. 03 (2012): 394–412.

[32] Omand and others describe how in the days in the run-up of the 2011 riots in London "social media channels showed increasing hostility, including explicit threats, against the police", including "content indicating criminal intent or action ratcheted in huge numbers", but also tips from the public about "an outbreak of disorder or the identities of the people behind it". David Omand, Jamie Bartlett, and Carl Miller, *#INTELLIGENCE* (London: DEMOS, 2012), p.23.

changing situations. [33] Social network sites constitute an attractive source of open source intelligence[34]. Andrew points out that there exists a danger that the public nature of this data may lead law enforcement authorities "to determine that the use of OSINT obviates the requirement to duly consider the right to respect for private life".[35]
He argues that such reasoning

> "attempts to categorize and render essentially interpersonal communications as public dialogue, bereft of the privacy protections existing legal provisions furnish (…) Accepting such a shift would be to begin to institute a rationale that undermines a principle of the inviolability of our personal communications absent a sound, compelling justification".[36]

2. Distinghuishing 'private life' from 'privacy', 'family life', 'correspondence' and 'home' in article 8 of the European Convention on Human Rights

The focus of this paper is on the scope of the right to private life, and therefore won't elaborate upon the peculiarities of the right to respect the home, correspondence and family life. This paper will only scrutinize the scope of these rights when they are relevant for the interpretation of the right to private life. The Court's case law has often blurred the boundaries between the different rights. The right to respect for correspondence is often subsumed by the right to private life, especially in surveillance cases,[37] while most cases related to the right to respect the home are taken together with private life as well, especially home searches.[38] On the other hand, those cases that deal exclusively with the right to respect for the home – such as physical destruction of housing cases - are often dealt with under he protection of property protected by article 1 of Protocol 1 of the Convention.[39] That is a broad subject that is outside the scope of the paper. Similarly, those

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[33] Omand and others describe how SNS-tools can rapidly identify 'bursts' of tweets that indicating a significant event often pre-empt conventional reporting. "With the application of geo-location techniques this could lead, for example, to a constantly evolving map showing spikes in possible violence-related tweets, facilitating a faster, more effective, and more agile emergency response". Ibid. At 25.

[34] The CIA lists for example information, information drawn from (a) the internet, (b) traditional mass media (e.g. television, radio, newspapers, magazines), (c) specialized journals, conference proceedings and think tanks studies, (d) photos and (e) geospatial information (e.g. maps and commercial imagery products) as OSINT, see Central Intelligence Agency, INTelligence: open source intelligence, available at https://www.cia.gov/news-information/featured-story-archive/2010-featured-story-archive/open-source-intelligence.html. Interestingly, the US military distinguishes "open source information" from "publicly available" information. "Open source is any person or group that provides information without the expectation of privacy– the information, the relationship, or both is not protected against public disclosure. Open-source information can be publicly available but not all publicly available information is open source. Open sources refer to publicly available information medium and are not limited to physical persons. Publicly available information is data, facts, instructions, or other material published or broadcast for general public consumption; available on request to a member of the general public; lawfully seen or heard by any casual observer; or made available at a meeting open to the general public. " US department of Defense, Open-Source Intelligence. ATP 2-22.9, July 2012 at 1-1.

[35] Jonathan Andrew, *SURVEILLE Deliverable 4.2: Paper on Legal Issues Related to the Use of Surveillance Data for Profiling* (Florence: EUI, April 30, 2013).

[36] Ibid.

[37] See section 3.2 of this deliverable.

[38] See European Court of Human Rights, Funke v. France, 10828/84 (1993). European Court of Human Rights, Keegan v. the United Kingdom, 28867/03 (2006).

[39] Article 1 states that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for

cases that deal with the protection of family life that have no immediate connection to the scope of the right to private life in public places, such as immigration control cases that limit governments' options to exclude or remove people whose families have acquired rights to reside in their territories, won't be scrutinized in this deliverable.

2.1 The right to private life and the right to develop relationships

On the 7th of August 1950, the Committee of Ministers agreed upon the following wording of Article 8 of the Convention, which was accepted without further debate by the Consultative Assembly.

> **Article 8 – Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is 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.

In the Convention, the right to private life may also act as a limitation to other rights, such as the right to fair trial and the right to freedom of expression. Article 6 of the Convention provides an exception to the rule that judgments shall be pronounced in a public setting where "the protection of the private life of the parties so require". Article 10(2) does not include an explicit reference to the right to private life, but refers to three concepts that are relevant to Article 8. The exercise of the freedom of expression may be subject to "formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society (...) for the protection of health or morals, for the protection of the reputation or rights of others" and "for preventing the disclosure of information received in confidence".

The drafting history does not provide much material for interpreting the meaning of the 'right to private life'[40], but it suggests at first sight that the drafters did not see any meaningful differences between the right to 'privacy' and 'private life', as a separate concept from the right to respect one's family life, home and correspondence. The wording 'private life' corresponded better with the French notion 'vie privée'. From the drafting history it is clear that the essential object of Article 8 is to protect the individual against arbitrary

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by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[40] Arthur Henry Robertson, *Privacy and Human Rights: Reports and Communications Presented at the Third International Colloquy about the European Convention on Human Rights* (Manchester University Press, 1973), 15–18.

interference by public authorities. As such, its protection is one of the necessary conditions under which democracy operates.[41]

One influential scholar of the Convention noted in 1974 that the scope of "the protection of privacy" under the Convention remained "largely unexplored" in the case law.[42] Only in 1976, the Commission took a closer look at the difference between the right to privacy and the right to private life. In one of the first cases where the Commission looked into the scope of the right to private life, it stated that for numerous "Anglo-Saxon and French authors the right to respect for "private life" is the right to privacy, the right to live, as far as one wishes, protected from publicity".[43] The Commission referred to a book that quoted common law jurists that referred to Warren and Brandeis' infamous statement that privacy is 'the right to be let alone', or Winfields' assertion that a violation of privacy is "the unauthorised interference with another's seclusion of himself, his family or his property from the public". French legal theory spoke at the time of the right to privacy as a 'droit à l'intimité', which was the right to "a private preserve which enables an individual to make the essence of his personality inaccessible to the public without his consent".[44] In the view of the Commission, the right to private life did not "end there".

> It comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality.[45]

The Commission thus acknowledged early on that the right to respect for private life "is not only the right to privacy".[46] In doing this, the Commission treated the 'right to private life' as an autonomous concept that is not necessarily similar to the meaning of the same concept in domestic laws.[47] In the book the Commission referred to, the French 'droit à l'intimité' is explained to in opposition to 'public life'. An individual's private life would be "everything that is not his public life", with the latter being defined by Martin in 1959 as "his life in the community, the life which in the normal way brings him into contact with his fellows: his professional and social life, in a word his outside life".[48] The Court did not pick up this private-public divide to explain the meaning of the right to private life. To the contrary, the

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[41] For an overview of evolution of the rights to privacy and data protection and their limitations, see Maria Grazia Porcedda, Martin Scheinin, and Mathias Vermeulen, *D 3.2 – Report on Regulatory Frameworks Concerning Privacy and the Evolution of the Norm of the Right to Privacy* (Surprise Project, March 2013).

[42] Francis G. Jacobs, The European Convention on Human Rights. Clarendon Press. Oxford 1975, Quoted in Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010), 59.

[43] European Court of Human Rights, X v. Iceland, 6825/74 (1976), p.2.

[44] Robertson, *Privacy and Human Rights*, 27–28.

[45] European Court of Human Rights, X v. Iceland, 6825/74 (1976), p.2. The Commission did not accept that the protection afforded by Article 8 extended to relationships of the individual with his "entire immediate surroundings, insofar as they do not involve human relationships" (such as the relationship between a man and his dog) and notwithstanding the desire of the individual to keep such relationship within the private sphere. In McFeeley v. the UK, the Commission argued that "the freedom to associate with others is a further feature of private life". European Court of Human Rights, McFeeley & Ors v. the United Kingdom, 8317/78 (1980), p.12.

[46] European Court of Human Rights, X v. Iceland, 6825/74 (1976).

[47] See in general George Letsas, "The Truth in Autonomous Concepts: How To Interpret the ECHR," *European Journal of International Law* 15, no. 2 (2004): 279–305.

[48] Quoted in Robertson, *Privacy and Human Rights*, 30.

right to develop relationships without unjustified interference would become – together with the notion of autonomy[49] and the protection of personal data – one of the three important principles that help the Court to identify which situations belong to the private sphere that is protected by Article 8.

In later cases the Court has gone so far as stating that the guarantee afforded by Article 8 is "primarily intended" to ensure the development, without outside interference, "of the personality of each individual in his relations with other human beings[50]. As a result there exists "a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life".[51] However, this broad construction of Article 8 does not mean that it protects every activity a person might seek to engage in with other human beings in order to establish and develop such relationships.[52] Conversely, it also does not mean that any regulation of an activity that allows an individual to establish and develop relationships, will amount to an interference.[53]

Within the context of article 8, a family can be seen as an especially important type of relationships between people – one that deserves a distinct type of protection. Close relationships short of family life would generally fall within the scope of private life. Early on, the Court has pointed out that the existence or non-existence of "family life" for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties.[54] This interpretation has allowed the court to take into account new social and cultural norms that have broadened the range of arrangements regarded as falling within the term 'family'.[55]

[49] The Court has often stated that the notion of personal autonomy is an "important principle underlying the interpretation of Convention guarantees. See European Court of Human Rights, Pretty v. the United Kingdom, 2346/02 (2002) 61. European Court of Human Rights, Christine Goodwin, 28957/95 (2002) at 90. European Court of Human Rights, Van Kuck v. Germany, 35968/97 (2003) 69.

[50] European Court of Human Rights, Von Hannover v. Germany (No.2), 40660/08 60641/08 (2012) 95.

[51] Idem. European Court of Human Rights, Petrina c. Roumanie, 78060/01 (2008) 27.

[52] In Botta the disabled applicant had complained that Italian government interfered with his right to private life because it had failed to properly regulate access to the beach for disabled persons at a place distant from his normal place of residence during his holidays. As a result, Botta claimed that he was "unable to enjoy a normal social life which would enable him to participate in the life of the community". According to the court the rights asserted by Mr Botta concerned "interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life". As a result, article 8 was not applicable. European Court of Human Rights, Botta v. Italy, 21439/93 (1998) 35.

[53] European Court of Human Rights, Friends and others v. The United Kingdom, 16072/06 27809/08 (2009) 41.

[54] See European Court of Human Rights, Marckx v. Belgium, 6833/74 (1979) 31. European Court of Human Rights, K. and T. v. Finland, 25702/94 (2001) 150.

[55] In X, Y, and Z v. the United Kingdom the Court stated that the notion of family life in Article 8 is not confined solely to families based on marriage, and may encompass other de facto relationships. When deciding whether a relationship may be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means. European Court of Human Rights, X, Y and Z. v. the United Kingdom, 21830/93 (1997).

2.2 The right to private life and new technological developments

From 1978 onwards the Court has embraced the notion that the Convention is a "living instrument, which must be interpreted in the light of present-day conditions".[56] The Court has considered it neither possible nor necessary to attempt an exhaustive definition of the notion of 'private life', 'family life', or 'correspondence'. Instead, the Court has treated these rights as "broad concepts"[57], whose meaning is capable of evolving. The Court has taken into account new technological developments to broaden the scope of the communications that are protected by the right to respect correspondence, which initially focused on letters in sealed envelopes or the sealed packages, whether sent by post or not. The Court has treated the notion of 'correspondence' for instance in a technology-neutral way, and has considered communications between individuals by phone[58], telex[59], pager messages[60], email[61], or by any other existing (online) communication method[62], as 'correspondence'. Finally, it has to be noted that the word 'correspondence' is not qualified by the word 'private'; the protection of correspondence extends to all types of communication.[63] In this context, it is important to note that information that is "an integral element in the communications made",[64] such as the numbers dialled in a telephone conversation[65], and the search and seizure of electronic data, are protected by the right to respect for correspondence as well[66]. It is therefore to be anticipated that the concept will protect new technological developments that will result in new methods of communication.

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[56] European Court of Human Rights, Tyrer v. The United Kingdom, 5856/72 (1978) 31. Letas argues that the importance that is being attached to "present-day conditions" in interpreting the Convention has three features: (1) the Court will very rarely inquire into what the intentions were of the drafters, or what was thought to be acceptable state conduct when the Convention was drafted, (2) the conditions have to be common or shared amongst contracting states and (3) the Court will not assign decisive importance to what the respondent state considers to be an acceptable standard in the case at hand.

[57] European Court of Human Rights, Costello-Roberts v. The United Kingdom, 13134/87 (1993) 36.

[58] European Court of Human Rights, Klass and others v. Germany, 5029/71 (1978) 41.

[59] European Court of Human Rights, Christie v. the United Kingdom, 21482/93 (1994).

[60] European Court of Human Rights, Taylor-Sabori v. the United Kingdom, 47114/99 (2002) 18.

[61] European Court of Human Rights, Copland v. the United Kingdom, 62617/00 (2007) 41.

[62] European Court of Human Rights, Copland v. the United Kingdom, 62617/00 (2007) 44. The Court "considered that the collection and storage of personal information *relating* to the applicant's use of the telephone, e - mail and internet, without her knowledge, had amounted to an interference with her right to respect for her private life and correspondence. *(emphasis added)*

[63] European Court of Human Rights, Niemietz v. Germany, 13710/88 (1992) 32.

[64] European Court of Human Rights, Malone v. the United Kingdom, 8691/79 (1984) 84. "The records of metering contain information, in particular the numbers dialled, which is an integral element in the communications made by telephone. Consequently, release of that information to the police without the consent of the subscriber also amounts, in the opinion of the Court, to an interference with a right guaranteed by Article 8 (art. 8)".

[65] European Court of Human Rights, P.G and J.H. v. the United Kingdom, 44787/98 (2001) 42. "the obtaining by the police of information relating to the numbers called on the telephone in B.'s flat interfered with the private lives or correspondence (in the sense of telephone communications) of the applicants who made use of the telephone in the flat or were telephoned from the flat."

[66] European Court of Human Rights, Wieser and Bicos Beteiligungen GMBH v. Austria, 74336/01 (2007) 45. Compare to European Court of Human Rights, G., S., and M. v. Austria, 9614/81 (1983), p.122., where the Commission had ruled that seized business documents "that had already reached their addressee" did not constitute "correspondence within the technical meaning of the term". The seizure of those documents could be seen as an interference with their property rights.

While the right to respect correspondence has often been portrayed as a right to "uninterrupted and uncensored communications with others"[67], the Court has never used this expression to describe the right to correspondence as such. Article 8 protects the means or method of expression (rather than content of a communication); it is inextricably linked to the right to freedom of expression as protected by article 10 of the Convention. [68]

The Court has noted that its broad interpretation of Article 8 corresponds with that of the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which came into force on 1 October 1985 and whose purpose is "to secure ... for every individual ... respect for his rights and fundamental freedoms, and in particular his right to privacy with regard to automatic processing of personal data relating to him" (Article 1), such personal data being defined in Article 2 as "any information relating to an identified or identifiable individual".[69] Already in 1984, the Court considered that the mere possibility of a transfer of "metering records", which register the numbers dialled on a particular telephone and the time and duration of each call, could give rise to issues under Article 8, "quite apart from any concrete measure of implementation taken against an applicant.[70] In a concurring opinion, Judge Petiti stated that the techniques for interfering in private life were still archaic in 1950; the meaning and import of the term 'interference' as understood at that time "cannot prevail over the current meaning". Consequently, he argued, "interceptions which in previous times necessitated recourse to tapping must be classified as "interferences" in 1984, even if they have been effected without tapping thanks to "bugging" and long-distance listening techniques". He continued:

> In this sphere (more than in the sphere of morality - cf. the Handyside judgment), it can be maintained that it is possible (…) to identify European standards of State conduct in relation to surveillance of citizens. The shared characteristics of statutory texts or draft legislation on data banks and interception of communications is evidence of this awareness (…) The comprehensive metering of telephone communications (origin, destination, duration), when effected for a purpose other than its sole accounting purpose, albeit in the absence of any interception as such, constitutes an interference in private life. On the basis of the data thereby obtained, the authorities are enabled to deduce information that is not properly meant to be

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[67] See for instance Ursula Kilkelly, The right to respect for private and family life. A guide to the implementation of Article 8 of the European Convention on Human Rights. Council of Europe Human Rights handbooks no.1. Council of Europe, Strasbourg, 2001, p.19. See also European Court of Human Rights, Bernh Larsen Holding AS and others v. Norway, 24117/08 (2013) 95. Three Norwegian companies had complained that handing over a copy of the contents of a server to the Norwegian tax authorities amounted to an interference with their right to correspondence, which implied "a right to uninterrupted and uncensored communication with others", but the Court did not address this issue in its judgment.

[68] In Silver, the Court famously noted that "in the context of correspondence, the right to free expression was guaranteed by Article 8 (art. 8)". Jacobs, White and Ovey state that "what appears to characterize 'correspondence' as distinct from materials constituting 'expression' within Article 10 is direct communication to another. If individuals wish to impart information and ideas to others through specific means of communication, their freedom of expression under Article 10 ECHR is absorbed by Article 8 ECHR. Jacobs, White and Ovey, *The European Court of Human Rights* (Oxford University Press, Oxford, 2010, p.361).

[69] See for instance European Court of Human Rights, Rotaru v. Romania, 28341/95 (2000) 43. European Court of Human Rights, Amann v. Switzerland, 27798/95 (2000) 65.

[70] European Court of Human Rights, Malone v. the United Kingdom, 8691/79 (1984) 86.

within their knowledge. It is known that, as far as data banks are concerned, the processing of "neutral" data may be as revealing as the processing of sensitive data.[71]

In a later case the Court confirmed that the mere storing of information relating to an individual's private life in a secret register and the release of such information come within the scope of Article 8.1.[72] The Court has ever since argued that the protection of personal data is of "fundamental importance" to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention.[73] Importantly, the Court has ruled that "public information" can fall within the scope of private life where it is systematically collected and stored in files held by the authorities. [74] This includes the compilation of data about the "whereabouts and movements of a person in the public sphere".[75]

The concept of the word 'home' is different in the English and French version of the Convention. While in English a home is limited to "the place where one lives permanently, especially as a member of a family or household"[76], the French version uses the word 'domicile', which can also include a person's professional office[77]. The Court has never defined a 'home' as such, but made it clear that a 'home' is an autonomous concept that does not depend on classification under domestic law.[78] In order to ascertain whether a certain living place can be regarded as "home" in Convention terms, the Court scrutinizes the specific circumstances of the case. In general, home has been identified as the place with which the person has "sufficient and continuous links".[79] The concept has been found to cover holiday homes, second homes and hotels providing long-term accommodation,[80] and even non-traditional residences such caravans.[81] Importantly, it has also protected business premises, when there is no clear distinction between a person's office and private residence or between private and business activities (see section 3.2.1).

The Court's unwillingness to define the scope of the right to private life and consequent treatment as an autonomous concept, coupled with the evolutive reading of the Convention, allowed it to take into account a broad range of social, legal and technological developments across the Council of Europe in its choice to interpret the scope of the right to private life. According to current British ECtHR judge Mahoney "in exercising that choice, particularly

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[71] Concurring opinion Petiti in European Court of Human Rights, Malone v. the United Kingdom, 8691/79 (1984) 86..

[72] European Court of Human Rights, Leander v. Sweden, 9248/81 (1987). 48.

[73] European Court of Human Rights, Z v. Finland, 22009/93 (1997) 95.

[74] European Court of Human Rights, Amann v. Switzerland, 27798/95 (2000) 65.

[75] European Court of Human Rights, Uzun v. German, 35623/05 (2010) 49.

[76] Oxford English Dictionary online, http://www.oxforddictionaries.com

[77] European Court of Human Rights, Niemietz v. Germany, 13710/88 (1992) 29.

[78] See in general Letsas, "The Truth in Autonomous Concepts: How To Interpret the ECHR."

[79] European Court of Human Rights, Gillow v. the United Kingdom, 9063/80 (1986) 46. This does not mean that there are no limits to the concept. In X v Belgium, the Commission stated that the home connoted what its literal meaning in English implied, and should not be "arbitrarily" interpreted. The search of a car parked in a public street was materially different compared to a search of a house for the purposes of Article 8. European Court of Human Rights, X v Belgium, 5488/72 (1974).

[80] European Court of Human RIghts, Demades v. Turkey, 16219/90 (2003).

[81] European Court of Human Rights, Buckley v. the United Kingdom, 20348/92 (1996) 53-54.

when faced with changed circumstances and attitudes in society, the Court makes new law".[82] This interpretation has been controversial, in particular in the United Kingdom, where a Supreme Court justice accused the ECtHR of violating the Vienna Convention of 1969 on the Law of Treaties, as some of its rulings go "well beyond interpretation, and well beyond the language, object or purpose of the instrument".[83] Lord Simpson specifically highlighted the Court's case law under Article 8:

> A good example is the steady expansion of the scope of Article 8. The text of Article 8 protects private and family life, the privacy of the home and of personal correspondence. This perfectly straightforward provision was originally devised as a protection against the surveillance state by totalitarian governments. But in the hands of the Strasbourg court it has been extended to cover the legal status of illegitimate children, immigration and deportation, extradition, aspects of criminal sentencing, abortion, homosexuality, assisted suicide, child abduction, the law of landlord and tenant, and a great deal else besides. None of these extensions are warranted by the express language of the Convention, nor in most cases are they necessary implications. They are commonly extensions of the text which rest on the sole authority of the judges of the court. The effect of this kind of judicial lawmaking is in constitutional terms rather remarkable. It is to take many contentious issues which would previously have been regarded as questions for political debate, administrative discretion or social convention and transform them into questions of law to be resolved by an international judicial tribunal.[84]

While it is beyond the scope of this paper to address the general criticisms of Lord Simpson in detail, it has to be noted that Lord Simpson's claim that Article 8 is a "straightforward provision", which can be interpreted according to its original meaning, is hard to sustain. Indeed, as former ECtHR judge Loucaides has noted, the Courts evolutive approach promises that "new rights derived from the notion of 'private life' will continually be recognized whenever required by the conditions of social life".[85] Similarly, Jacobs, White and Ovey note that article 8 rights "may be read together as guaranteeing collectively more than the sum of their parts".[86] This style of interpretation affected the scope of the right to private life in public places considerably.

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[82] Paul Mahoney, "Marvellous Richness of Diversity or Invidious Cultural Relativism?," *Human Rights Law Journal* 19 (1998): 1–5. Almost fifteen years later this statement was heavily criticised by the popular press in the UK as part of a broader wave of criticism against the European Court of Human Rights. See for instance Daniel Hannan, "We Make up the Law as We Go Along, Admits Britain's New Euro-Judge," *News - Telegraph Blogs*, June 28, 2012, http://blogs.telegraph.co.uk/news/danielhannan/100167991/we-make-up-the-law-as-we-go-along-admits-britains-new-euro-judge/.

[83] Lord Simpson, "The Limits of Law - 27th Sultan Azlan Shah Lecture, Kuala Lumpur," November 20, 2013, pp. 7-8, http://www.supremecourt.gov.uk/docs/speech-131120.pdf.

[84] Idem.

[85] Loukēs G. Loukaidēs, *Essays on the Developing Law of Human Rights* (Martinus Nijhoff Publishers, 1995, p.86).

[86] Jacobs, White and Ovey, *The European Court of Human Rights*, 335.

3. Making sense of the right to private life

Numerous commentators have complained about the conceptual confusion that characterizes the jurisprudence of the European Court of Human Rights on the right to private life. In 1983 Louise Doswald Beck spoke about the "existing confusion" in the case law of article 8.[87] Moreham states that the right is "not easily understood", "ill-defined" and "amorphous". Relatively few authors have tried to identify and categorize the different private life interests that article 8 covers. In 1970 Velu argued that the right to respect for private life covered a miscellany of rights that protected the individual against (1) attacks on his physical or mental integrity or his moral or intellectual freedom, (2) attacks on his honour and reputation and similar torts, (3) the use of his name, identity or likeness, (4) being spied upon, watched or harassed, (5) the disclosure of information protected by the duty of professional secrecy.[88] According to Gomez, the ECtHR recognizes two components of private life: a privacy component, which covers "information and matters that should be kept secret or free from publicity" and the "personal choice" component, which refers to "matters that relate to the development and fulfilment of a person's personality or autonomy".[89] Moreham has argued that the right to private life covers five distinct sub-categories: (1) the right to be free from interference with physical and psychological integrity, (2) from unwanted access to and collection of information and (3) from serious environmental pollution. Then there are (4) the right to be free to develop one's personality and identity and (5) the right to live one's life in the manner of one's choosing.[90]

New developments in the Court's case law of the past years allow for a new attempt at categorization. This section therefore is a first attempt to systematize the various categories of cases that the Court has addressed under the notion of private life. At its most fundamental level, one can distinguish on the one hand cases in which a government interferes with a person's physical integrity, i.e. his body or physical health, or fails to adopt sufficient positive measures to safeguard a person's physical integrity. These cases have generally been of little importance in developing the scope of the right to private life in public places, and as a result we will only briefly deal with these cases. On the other hand we can distinguish cases where the right to private life protects an individual from mental stress that is the result of unwanted observation. It is this category of cases that has most significantly developed the scope of the right to private life in public places.

3.1 The right to physical integrity

One of the core functions of the right to private life is to protect an individual's physical integrity against interferences that don't reach the article 3 treshold of 'inhuman and degrading treatment'. The Court has repeatedly stated that a person's body concerns "the

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[87] Doswald Beck, The meaning of the "right to respect for private life under the European Convention on Human Rights" .4 Human rights law journal 283 (1983) at 309.

[88] Quoted in Loukaidēs, *Essays on the Developing Law of Human Rights,* p.86.

[89] H. Tomas Gomez-Arostegui, "Defining Private Life under the European Convention on Human Rights by Referring to Reasonable Expectations," *Cal. W. Int'l LJ* 35 (2004): 153 at 155.

[90] N. A. Moreham, "The Right to Respect for Private Life in the European Convention on Human Rights: A Re-Examination," *European Human Rights Law Review*, no. 1 (2008): 44–79.

most intimate aspect of private life".[91] Early on the Commission argued that even a minor compulsory medical intervention (such as a blood test[92], or screening for tuberculosis by tuberculin skin-reaction tests or by x-ray test[93]) without the consent of an individual constitutes an interference with the right to respect for private life.[94] Interferences with the right to physical integrity often result in psychological distress as well, which might be the reason why the Court has often found interferences into the "physical and moral integrity" of applicants. The Court has used the latter concept in a haphazard way. It started using it in the case of X. and Y in 1985,[95] but has since used it interchangeably with the notion "physical and psychological integrity".[96] In some cases the Court has even referred to the "importance of protecting an individual's moral and psychological integrity".[97] Often the Court just says that this element is part of the right to private life, but sometimes it has said that it is an "element of a person's identity".[98] For analytical purposes, this paper separate interferences with a physical component from those where there is no interference with the body whatsoever. Using this criterion we can distinguish three broad categories of cases.

Firstly there are interferences with a person's physical integrity that can lead to distress, but which fall short of the minimum level of severity prohibited by Article 3. In Costello Roberts the Court submitted that the protection afforded by Article 8 to an individual's physical integrity could be wider than that contemplated by Article 3.[99] In Y.F. for instance the Court ruled that the forced gynaecological examination by a doctor while she was in police custody concerned a matter of 'private life'.[100] Similarly, the requirement to submit a group of relatives of a prisoner to a strip-search in prison amounts to an interference.[101] Secondly,

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[91] European Court of Human Rights, Y.F. v. Turkey, 24209/94 (2003) 33.

[92] European Commission of Human Rights, X. v. Austria, 8278/78 (1979).

[93] European Commission of Human Rights, Acmanne and others v. Belgium, 10435/83 (1984).

[94] European Commission of Human Rights, X. v. Austria, 8278/78 (1979). A forced medical intervention can also constitute a forced psychiatric examination in order to determine whether a person is in full possession of her mental faculties. See also European Court of Human Rights, Worwa v. Poland, 26624/95 (2003).

[95] See European Court of Human Rights, X and Y v. The Netherlands, 8978/80 (1985) 22.

[96] See for instance the Court's judgment in Sandra Jankovic v. Croatia, where the Court uses the two terms in the same paragraph. "As regards respect for private life, the Court has previously held, in various contexts, that the concept of private life includes a person's physical and psychological integrity. Under Article 8 the States have a duty to protect physical and moral integrity of an individual from other persons." European Court of Human Rights, Sandra Jankovic v. Croatia, 38478/05 (2009) 45.

[97] European Court of Human Rights, Kyriakides v. Cyprus, 39058/05 (2008) 54. See also European Court of Human Rights, Gillberg v. Sweden, 41723/06 (2012) 68.

[98] European Court of Human Rights, Von Hannover v. Germany (No.2), 40660/08 60641/08 (2012) 95.

[99] European Court of Human Rights, Costello-Roberts v. The United Kingdom, 13134/87 (1993) 34. At the same time the Court acknowledged "not every act or measure which may be said to affect adversely the physical or moral integrity of a person necessarily gives rise to such an interference". Idem at 36.

[100] European Court of Human Rights, Y.F. v. Turkey, 24209/94 (2003) 34.

[101] European Court of Human Rights, Wainwright v. the United Kingdom, 12350/04 (2006) 41-43. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim. In considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Furthermore, the suffering and humiliation must in any event go beyond the inevitable element of suffering

any detailed search of a person, his clothing and his personal belongings "irrespective of whether in any particular case correspondence or diaries or other private documents are discovered and read or other intimate items are revealed", amounts to a clear interference with the right to respect for private life.[102] Thirdly, the Court has argued that a state's positive obligation to protect a person against physical attacks under the right to private life requires effective measures, for instance to enact criminal-law provisions effectively punishing rape or other acts of violence by private individuals and to apply them in practice through effective investigation and prosecution.[103] Finally, there is a group of different cases that are informed by the right to live an autonomous life, which is a principle that underlies the interpretation of all the guarantees of the Convention. These cases confirm that the right to private life entails the right to make autonomous decisions about issues that have an impact on one's physical integrity, such as sexual orientation and activities, [104] the right to respect both the decisions to become and not to become a parent[105], and – perhaps – even the right to end one's own life[106]. In some cases Member States have a positive obligation to provide essential information that enables individuals to assess the health risks they might be exposed to, for example if they continued to live in a town that was exposed to toxic emissions from a nearby chemical factory[107], or if they participated in medical tests.[108] For the purposes of this paper it is important to note that the place of intrusion into this aspect of the right to private life has no negative effect on the determination of the severity of the intrusion. Even more, the publicness of the intrusion might even compound the seriousness of the interference because of the element of humiliation and embarrassment.[109]

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or humiliation connected with a given form of legitimate treatment or punishment, as in, for example, measures depriving a person of their liberty.

[102] European Court of Human Rights, Gillan and Quinton v. The United Kingdom, 4158/05 (2010) 63.

[103] European Court of Human Rights, M.C. v. Bulgaria, 39272/98 (2003) 153. See also See also European Court of Human Rights, Ebcin c. Turquie, 19506/05 (2011) 37.

[104] Early on the Commission noted that "there are no objections to the assumption that the arrangement of the sexual relations" come within the sphere of private life. European Commission of Human Rights, Brüggemann and Scheuten v. Germany, 6959/75 (1976) 106. The Court has later argued that there can be 'no doubt' that "sexual orientation and activity concern an most intimate aspect of private life", while admitting that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8 ECtHR, European Court of Human Rights, Laskey, Jaggard and Brown v United Kingdom, 21627/93 21826/93 21974/93 (1997) 36.

[105] European Court of Human Rights, Evans v. The United Kingdom, 6339/05 (2007) 71. In Ternovsky, the Court stated that "the notion of personal autonomy is a fundamental principle underlying the interpretation of the guarantees of Article 8. Therefore the right concerning the decision to become a parent includes the right of choosing the circumstances of becoming a parent". European Court of Human Rights, Ternovszky v. Hungary, 67545/09 (2010) 22.

[106] In Pretty the Court was not ''not prepared to exclude'' the possibility that sanctions preventing the applicant from choosing to avoid what she considered ''an undignified and distressing end to her life'' were an interference with the right to private life. European Court of Human Rights, Pretty v. the United Kingdom, 2346/02 (2002).

[107] European Court of Human Rights, Guerra and Others v. Italy, 14967/89 (1998) 60.

[108] European Court of Human Rights, Roche v. The United Kingdom, 32555/96 (2005) 162.

[109] European Court of Human Rights, Gillan and Quinton v. The United Kingdom, 4158/05 (2010) 63.

3.2 The right to psychological integrity

As stated above, the common denominator of these cases is the lack of a direct link with a person's physical integrity. In this section only cases are included where the right to private life protects the psychological integrity of an applicant, or – in other words – where the right to private life protects an individual from mental stress that is the result of unwanted observation. Looking at the Court's case law we can categorize different sources of mental stress: (1) physical intrusions into a person's private life, (2) non-physical intrusions into a person's private life, (3) the dissemination of the results of these intrusions and (4) the consequences of these intrusions, which primarily manifest itself in a loss of reputation. A fifth source of stress relates to a lack of information about establishing one's identity. This relates to issues like gender-recognition,[110] the right to retain one's name[111] and the right to know one's origin, which includes a positive obligation on behalf of governments to allow access by individuals to information about their childhood and early development.[112]

3.2.1 Physical intrusions into a person's private life

Numerous cases establish that the search of an individual's residential premises amounts to an interference with the right to respect for private life, often in conjunction with an interference with the right to respect the home, correspondence and/or family life. Early on, in Chappell v. the United Kingdom, the Commission submitted that a search of Chappell's home and business premises, and the seizure of private papers, impinged directly on the applicant's private life "and the private sphere of items and associations which are the attributes of a home". According to the Commission, this sphere "clearly includes the applicant's private papers whether in the form of letters or other material".[113] In later cases, the Court has decided to only focus on the search of computer systems and seizure of electronic data from business premises, thereby finding it unnecessary to determine whether there existed a separate interference with the right to private life.[114]

Importantly, these cases have been instrumental in clarifying the scope of the right to private life to places outside one's traditional home. Section 2 already elaborated that the word 'home' can cover a wide range of places, including lawyers' offices[115], business premises[116] or a combination of residential and business premises[117]. The landmark case in this context was the case of Niemietz v. Germany from 1992. Despite the earlier statements of the Commission in Chapman, the German government maintained that article 8 did not afford protection against the search of a lawyer's office. In its view, the Convention drew a clear distinction between private life and home, on the one hand, and professional and business life and premises, on the other.

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[110] European Court of Human Rights, Christine Goodwin, 28957/95 (2002) 77.

[111] European Court of Human Rights, Ünal Tekeli v. Turkey, 29865/96 (2004) 35.

[112] European Court of Human Rights, Gaskin v. The United Kingdom, 10454/83 (1989) 36.

[113] European Commission of Human Rights, Chappell v. The United Kingdom, 10461/83 (1987) 96.

[114] European Court of Human Rights, Sallinen and Others v. Finland, 50882/99 (2005) 71.

[115] European Court of Human Rights, Niemietz v. Germany, 13710/88 (1992) 33.

[116] European Court of Human Rights, Wieser and Bicos Beteiligungen GMBH v. Austria, 74336/01 (2007) 43.

[117] European Court of Human Rights, Buck v. Germany, 41604/98 (2005) 31.

The Commission noted that the scope the right to respect for private life was such that it secures to the individual "a sphere within which he can freely pursue the development and fulfilment of his personality".[118] . The Commission noted that this reading of the right to private life could constitute professional activities, and noted that "whether or not such matters have to be considered as relating to a person's private sphere, as opposed to public life, depends upon the relevant features of the activities and premises concerned".[119]In this context, the Commission noted that clients put trust in their lawyer by communicating confidentially. As "such privacy" is a "necessary basis for the lawyer-client relationship", the search of the law office amounted to an interference with his right to respect for his private life and home under Article 8.[120] This reasoning was not accepted by the Government or the Court, which questioned whether the confidential relationship between a lawyer and his client could serve as a "workable criterion for the purposes of delimiting the scope of the protection afforded by Article 8". As the Court notes: "virtually all professional and business activities may involve, to a greater or lesser degree, matters that are confidential, with the result that, if that criterion were adopted, disputes would frequently arise as to where the line should be drawn".[121]

The Court did not consider the 'secret' nature of the relationship between two individuals as the determining factor to delineate the scope of the right to private life, nor did it define the scope of the right to private life in opposition to "public life", which it defines as a person's "professional or business life".

> (…) Especially in the case of a person exercising a liberal profession, his work in that context may form part and parcel of his life to such a degree that it becomes impossible to know in what capacity he is acting at a given moment of time. To deny the protection of Article 8 (art. 8) on the ground that the measure complained of related only to professional activities - as the Government suggested should be done in the present case - could moreover lead to an inequality of treatment, in that such protection would remain available to a person whose professional and non-professional activities were so intermingled that there was no means of distinguishing between them.[122]

Instead, it focused again on the fact that one of the main purposes of the right to private life protects the right to establish and to develop relationships with other human beings. Crucially, the Court

> (does) not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears, furthermore, to be no reason of principle why this understanding of the notion of "private life" should be taken to exclude activities of a professional or business nature since it is, after all,

[118] See also European Commission of Human Rights, Brüggemann and Scheuten v. Germany, 6959/75 (1976).

[119] European Court of Human Rights, Niemietz v. Germany, 13710/88 (1992) 56.

[120] Idem at 59.

[121] Idem at 28.

[122] European Court of Human Rights, Niemietz v. Germany, 13710/88 (1992) 30.

> in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world.[123]

In this context, the notion of a private place or home was of lesser importance. The court argued that it might not be possible to draw precise distinctions between a home and business premises

> "since activities which are related to a profession or business may well be conducted from a person's private residence and activities which are not so related may well be carried on in an office or commercial premises. A narrow interpretation of the words "home" and "domicile" could therefore give rise to the same risk of inequality of treatment as a narrow interpretation of the notion of "private life".[124]

Finally, the Court argued that interpreting the words "private life" and "home" as including certain professional or business activities or premises would be "consonant with the essential object and purpose of Article 8 namely to protect the individual against arbitrary interference by the public authorities". Importantly, "such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to "interfere" to the extent permitted by paragraph 2 of Article 8 (art. 8-2); that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case".[125] The Commission elaborated upon this last point in Reiss v. Austria, stating that while business premises enjoyed the protection of article 8, "regard must nevertheless be had in this respect to the nature of such premises, the business activities exercised therein and the nature of the alleged interference".[126]

The main importance of the Niemitz case is that it demonstrated that that the scope of the right to private life is not determined by the place in which an intrusion takes place. A person's private sphere can extend to places outside one's home, such as an office or commercial premises, where one develops professional or business relationships with other people. In the next set of cases, a different aspect of the right to private life in public places

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[123] Idem, 28.

[124] Idem, 30

[125] Idem, 31.

[126] European Commission of Human Rights, Reiss v. Austria, 23953/94 (1995). Reiss was the owner of a gay bar in Vienna, which could only be entered after ringing the door. In November 1991 a homosexual pornographic videocassette was shown in the bar in his absence. Reiss was convicted for the public showing of the videocassette in his bar on the basis of the Austrian Pornography Act, which prohibited the showing of "obscene films" in public. Reis complained under Article 8 of the Convention that his conviction under the Pornography Act violated his right to respect for his private life. The Commission found it difficult to accept that the showing of the videocassettes at issue on the applicant's premises in his absence formed part of his private life or of a business activity, which cannot be separated therefrom. It continued: "The mere fact that an offence was committed on premises which for certain purposes could be considered as belonging to the sphere of the applicant's private life or constituting his home within the meaning of Article 8 para. 1 (Art. 8-1) of the Convention is not in itself sufficient to render his conviction for such an offence an interference with the rights protected by Article 8 (Art. 8) of the Convention. In this respect, the Commission considers it decisive that the offence the applicant was convicted of, namely the public showing of obscene video cassettes for the purpose of profit making, by its nature had nothing to do with the applicant's own private life or home." For the application of Article 8(2) in the search cases see European Court of Human Rights, Buck v. Germany, 41604/98 (2005) 52.

is of importance, namely whether the right to private life also extends to activities that one undertakes in the outside world, such as on public streets (section 3.2.2.2).

3.2.2 Non-physical intrusions in a person's private life through monitoring communications and individuals

This category of cases relates to two broad categories: the monitoring of communications, and the (visual) monitoring of a person. At the outset it is important to note that the Court has argued that an individual may, under certain conditions, claim to be the victim of a violation occasioned by the mere existence of secret surveillance measures or of legislation permitting such measures. If it would not allow this, the measure(s) may remain unchallengeable, which "might reduce article 8 to a nullity".[127] For instance, the German G-10 law that was challenged in Klass v. Germany allowed intelligence agencies to open and inspect mail and post, to read telegraphic messages and to monitor and record telephone conversations of all (potential) users of the postal and telecommunication services in Germany. According to the Court, "this menace of surveillance can be claimed in itself to restrict free communication through the postal and telecommunication services, thereby constituting for all users or potential users a direct interference with the right guaranteed by Article 8".[128] The Court accepts that the threats posed by "technical advances made in the means of espionage" and the "development of terrorism in Europe in recent years" require that a state must be able to undertake - under exceptional conditions - secret surveillance against those "subversive elements operating within its jurisdiction".[129] While the Court does not want to second-guess the assessment of relevant national authorities on how to counter these threats, it stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance.[130] Without referring to the conditions in which the Convention was drafted, the Court pointed out that it was "aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it".[131] As a result, it affirmed that Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate. The Court must be satisfied that whatever system of surveillance is adopted, there exist adequate and effective guarantees against abuse. The assessment of these guarantees has a "relative" character: it depends on all the circumstances of the case, "such as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures, and the kind of remedy provided by the national law".[132] The Court concludes as follows: "while the possibility of improper action by a dishonest, negligent or over-zealous official can never be completely ruled out whatever the system, the considerations that matter for the purposes of the Court's present review are the

[127] European Court of Human Rights, Klass and others v. Germany, 5029/71 (1978) 34-36.

[128] Idem, 37. See also European Court of Human Rights, Weber and Saravia, 54934/00 (2006) 78. European Court of Human Rights, Liberty and Others v. UK, 58243/00 (2008) 56.

[129] European Court of Human Rights, Klass and others v. Germany, 5029/71 (1978) 48.

[130] Idem 49.

[131] Idem.

[132] Idem 50. In the Court's view, the fact of not informing the individual once surveillance has ceased, cannot itself be incompatible with article 8 since it is "this very fact which ensures the efficacy of the interference". Idem 58.

likelihood of such action and the safeguards provided to protect against it".[133]

3.2.2.1 Monitoring of communications

The first category is relatively straightforward: the interception of telephone calls made to or from a person's home interfere with the notions of 'private life' and 'correspondence'.[134] Member states further interfere with private life if they install and use a covert listening device at a third person's flat to monitor and record conversations of others, [135] at a person's garage[136], in a police station[137], a police cell[138] a prison's visiting area,[139] or a person's workplace.[140] Depending on the surveillance measure that is used, the Court may also find an interference with the exercise of a person's right to respect for his home.[141]

Despite the dicta of the Court in Niemietz and Malone, the UK government argued that telephone calls made by Ms Halford, at that time the most senior-ranking female police officer in the United Kingdom, from her workplace fell outside the protection of Article 8. Halford had alleged that members of her department had intercepted calls made from her office phone. The UK government argued – without citing any concrete legal authorities – these calls fell outside the protection of Article 8 because "she could have had no reasonable expectation of privacy". At the hearing before the Court, counsel for the Government expressed the view that an employer should in principle, without the prior knowledge of the employee, be able to monitor calls made by the latter on telephones provided by the employer".[142] The Court referred to its earlier relevant case-law in Klass, Malone and Niemietz, which conclude that telephone calls made from business premises may be covered by the notions of "private life" and "correspondence", and could just have stopped the case there. Instead, it decided to engage with the UK government's novel legal argument that Ms. Halford had no 'reasonable expectation of privacy', and it used this test as an additional factor to establish that the interception indeed interfered with Halford's private sphere**.** According to the Court, Ms. Halford had such expectation of privacy, based on a number of factors. Firstly, there had been no warning that her office calls might be intercepted. This was the most important criterion to establish her expectation. Additional factors that she had a reasonable expectation of privacy were that the she had the 'sole use of her office', and that in the office one phone was specifically designated for her private use.[143] While the

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[133] Idem 59.

[134] Idem, 41. European Court of Human Rights, Malone v. the United Kingdom, 8691/79 (1984) 64. European Court of Human Rights, Craxi v. Italy, 25337/94 (2000) 57.

[135] European Court of Human Rights, Vetter v. France, 59842/00 (2004).See also European Court of Human Rights, P.G and J.H. v. the United Kingdom, 44787/98 (2001) 40.

[136] European Court of Human Rights, Hewitson v United Kingdom, 50015/99 (2003) 20.

[137] European Court of Human Rights, P.G and J.H. v. the United Kingdom, 44787/98 (2001) 60.

[138] European Court of Human Rights, Wood v. the United Kingdom, 23414/02 (2004) 33.

[139] European Court of Human Rights, Allan v United Kingdom, 48539/99 (2002) 36.

[140] European Court of Human Rights, Kopp v. Switzerland, 23224/94 (1998) 50. European Court of Human Rights, Huvig v. France, 11105/84 (1990) 25. European Court of Human Rights, Amann v. Switzerland, 27798/95 (2000) 45. European Court of Human Rights, Halford v. the United Kingdom, 20605/92 (1997) 43-46.

[141] See for instance Klass at 41, Malone at 64, Weber and Saravia at 78

[142] Halford at 43.

[143] Halford at 45.

Court did not elaborate further on the matter, its use of this new concept in its case law had an immediate influence in the UK, where the UK Press Complaints Commission (PCC) amended its Code of Practice to state that private places include “either public or private property where there is a reasonable expectation of privacy”.[144] The facts of this case were similar in Peev v. Bulgaria, where the applicant alleged that the search of his office on the premises of Bulgarian Supreme Cassation Prosecutor's Office and the seizure of one draft resignation letter from the drawer of his desk had interfered with his private life. The Court argued in 2007 that this situation should be assessed under the “reasonable expectation of privacy” test. In the Court's opinion, the applicant did have such an expectation, "if not in respect of the entirety of his office, at least in respect of his desk and his filing cabinets". This was demonstrated by the great number of personal belongings that Peev kept there (including medicines, compact discs with personal material, notes, notebooks, diplomas, personal photographs, books and personal documents, including medical ones). The Court further noted that:

> Such an arrangement is implicit in habitual employer-employee relations and there is nothing in the particular circumstances of the case – such as a regulation or stated policy of the applicant's employer discouraging employees from storing personal papers and effects in their desks or filing cabinets – to suggest that the applicant's expectation was unwarranted or unreasonable. The fact that he was employed by a public authority and that his office was located on government premises does not of itself alter this conclusion".[145]

In 1997 the Court assessed the test again in P.G. & J.H. v. the United Kingdom, where the UK police secretly recorded the applicants when they were held in custody in a police station. The UK government argued that this practice did not disclose any interference with the right to private life for three reasons. Firstly, the goal of the recording was not to “obtain any private or substantive information” – the goal was merely to obtain voice samples of the applicants for forensic purposes. Secondly, the government argued that the “aural quality of the applicants’ voices” was not part of private life but was rather a “public, external feature”. Finally, the recordings were made at the police station while the applicants were being charged; this “formal process of criminal justice” did not concern their private life. For these three reasons, the UK government argued that the applicants could have had “no expectation of privacy”.[146]

In response, the Court admitted that “a person’s reasonable expectations as to privacy may be a significant, although not necessarily conclusive, factor” in order to determine whether a person’s private life is concerned by measures effected “outside a person’s home or private premises”.[147] However, the wording of the judgment makes clear that such an expectation was less important to establish an interference with the right to private life compared to the

[144] Gomez at 166.

[145] European Court of Human Rights, Peev v. Bulgaria, 64209/01 (2007) 39.

[146] PG and JH v the UK, 54.

[147] Idem at 57.

creation of a "systematic or permanent record" of the activity in the public domain.[148] As stated above, the Court treats the protection of personal data as a general principle that applies to the interpretation of all the guarantees of article 8. In those cases where there is no physical interference with a person's private premises, and a person's communications are monitored, or even merely stored, the reasonable expectation of privacy test is subsumed by the Court's adherence to the right to protect personal data.[149] The usefulness and added value of using the test in these cases is therefore questionable, and only adds confusion to the scope of the right to private life. The weight that is given to the reasonable expectation of privacy test is different in the next section, where it is an independent factor to determine whether a person's activity in a public place belongs to the 'private' or 'public' sphere.

3.2.2.2 Visual monitoring and recording of private individuals

In general, the Court has recently argued that the right to the protection of one's image is one of the "essential components of personal development", which presupposes the right to control the use of that image.

> "Whilst in most cases the right to control such use involves the possibility for an individual to refuse publication of his or her image, it also covers the individual's right to object to the recording, conservation and reproduction of the image by another person. As a person's image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case (...) obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image".[150]

The Court's assessment will be influenced by the fact whether somebody is a public figure or not (see section 3.2.3). The Court has earlier held for instance that politicians ''inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large''[151] and therefore have ''to bear the consequences thereof''.[152]

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[148] Idem at 57 and 59: "Though it is true that when being charged the applicants answered formal questions in a place where police officers were listening to them, the recording and analysis of their voices on this occasion must still be regarded as concerning the processing of personal data about the applicants."

[149] Compare with Gomez at 169, who argues that "data protection should not be the dispositive test" (…) As I see it, how information is processed and by whom should simply be a factor to consider, among others, in determining whether an expectation was reasonable. This follows because I cannot imagine a situation where the Court would hold that the privacy component of private life applies – despite the case involving matters in which an applicant could have no reasonable expectation of privacy – solely because information was processed.

[150] European Court of Human Rights, Reklos and Davourlis v. Greece, 1234/05 (2009) 40.

[151] European Court of Human Rights, Craxi v. Italy, 25337/94 (2000) 64. European Court of Human Rights, Krone Verlag GmbH & Co. KG v. Austria, 34315/96 (2002) 35.

[152] Krone Verlag at 37.

Initially, the Commission and the Court dismissed the notion that the making of and retention of a photograph of an individual in a public place could interfere with the right to private life. In this context, the Commission found an application of Ms. X in 1973 manifestly ill founded. Ms. X attended a rugby match in 1969, when a number of people came on to the pitch in the course of a peaceful demonstration against the South African Government's apartheid policy. Ms. X joined the protesters, was forcibly restrained by a police constable and photographed against her will under such restraint. A constable stated that the police were going to keep her photograph for "future reference". Later she was brought to a temporary police station and photographed there against her will. The police retained the negatives and copies of the said photographs, and refused to destroy the photographs or hand them over to Ms. X. The Commission did not consider this as an interference with Ms. X private life for three reasons. First, there was "no invasion of the applicant's privacy in the sense that the authorities entered her home and took photographs of her there", secondly; "the photographs related to a public incident in which she was voluntarily taking part" and thirdly, the photographs were taken "solely for the purpose of her future identification on similar public occasions and there is no suggestion that they have been made available to the general public or used for any other purpose".[153]

The Commission reached a similar decision in Lupker and others vs. the Netherlands. In this case, the Dutch police was investigating a fire at the Town Hall of Nijmegen. According to the police, those who had caused the fire were to be found within a group of squatters that had earlier been removed from parts of an office building in Nijmegen. During the judicial investigation, the police tried to collect evidence by using a book containing photographs of persons who might have had something to do with the problems in connection with the removal of the squatter. This book, which contained photographs of the applicants, was shown only to potential witnesses, including pharmacists and car rental companies, who were asked about whether any of the persons appearing on the photographs had been their customers. These photographs had either been given to the authorities in connection with applications for a passport or a driving licence or been taken by the police in connection with a previous arrest. The applicants were later arrested, charged, and convicted. The applicants complained that the police had used the photographs without their consent, and that there was no legal basis for using such photographs in a subsequent criminal investigation. The Commission considered that the use of these photographs in the course of a criminal investigation could not be considered to amount to an interference with their private life because: (1) the photographs “were not taken in a way which constitutes an intrusion upon the applicants' privacy”, (2) the photographs were “kept in police or other official archives since they had been either provided voluntarily in connection with applications for a passport or a driving licence or taken by the police in connection with a previous arrest”; and (3) they were used “solely for the purpose of the identification of the offenders in the criminal proceedings against the applicants and there is no suggestion that they have been made available to the general public or used for any other purpose”.[154]

In another demonstration case, Mr. Friedl complained that the Austrian police had photographed him during a sit-in demonstration in an underground passage for pedestrians in Vienna. The police had asked the participants to leave as they were obstructing pedestrian

[153] European Commission of Human Rights, X. v. The United Kingdom, 5877/72 (1973).

[154] EComHR, Lupker and others v. The Netherlands, 18395/91, 07/12/1992

traffic. As those present did not immediately agree to leave, their identity was established. In the course of this police action, photographs were taken in order to record the conduct of the participants in the manifestation for the purposes of ensuing investigation proceedings for offences against the Road Traffic Regulations. These data were stored in a file by the Vienna Federal Police Department. In this case, the Commission reiterated its reasoning in X. v. the UK, namely that there had been no intrusion into the "inner circle" of the applicant's private life in the sense that the authorities entered his home and took the photographs there; that the photographs related to a public incident in which the applicant was voluntarily taking part; and thirdly, they were solely taken in order to ensuing investigation proceedings for offences against the Road Traffic Regulations.[155] In this context, the Commission attached weight to

> the assurances given by the respondent Government according to which the individual persons on the photographs taken remained anonymous in that no names were noted down, the personal data recorded and photographs taken were not entered into a data processing system, and no action was taken to identify the persons photographed on that occasion by means of data processing".[156]

As a result, the Commission did not find that that the taking of photographs of the applicant and their retention amounted to an interference with the right to private life. However, the questioning of the applicant in order to establish his identity, and the recording of these personal data, "though taking place in the course of the above public incident, was closely related to his private affairs and constituted, therefore, an interference with the right guaranteed by Article 8. 1".[157]

In sum, in the cases described above, the Commission established the existence of an interference with an individual's private sphere based on (1) the nature of the activity that took place in public[158], and (2) whether the data were used[159] or stored[160] for a legitimate and foreseeable purpose[161] or (3) was likely to be made available to a broader (unintended) audience such as the general public. The determination of the last factor was of crucial importance in Peck vs. the U.K., where the applicant did not complain that the collection of

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155 European Court of Human Rights, Friedl v. Austria, 15225/89 (1994) 49.

156 Idem at 50.

157 Idem at 52.

158 See also Campion v. France, where the Court declared that there had been no interference with the right to private life in a case where a speed enforcement camera had taken a photograph of a French lawyer who was driving his car on a public road. European Commission of Human Rights, Campion c. la France, 25547/94 (1995).

159 In Perry v.UK the Court stresses that in Lupker the photographs were voluntarily submitted, but used in an "unforeseen" way. European Court of Human Rights, Perry v. United Kingdom, 63737/00 (2003) 61.

160 The Court notes in Herbecq v. Belgium that the mere monitoring by technological means of "public behaviour" does not amount to an interference with the right to private life. If public CCTV-camera's don't record a situation, "it is difficult to see how the visual data obtained could be made available to the general public or used for purposes other than to keep a watch on places". European Court of Human Rights, Herbecq and the association "Ligue des droits de l'homme' v. Belgium, 32200/96 32201/96 (1998).

161 In Perry the Court argued that "the normal use of security cameras per se whether in the public street or on premises, such as shopping centres or police stations where they serve a legitimate and foreseeable purpose, do not raise issues under Article 8 § 1 of the Convention. " European Court of Human Rights, Perry v. United Kingdom, 63737/00 (2003) 40.

data through the CCTV-camera monitoring of his movements and the creation of a permanent record of itself amounted to an interference with his private life, but specifically complained that the disclosure of that record of his movements to the public interfered with his right to private life.[162] Peck had tried to commit suicide by cutting his wrists at a central junction in the centre of Brentwood, and a CCTV-camera had captured his movements before and after the attempt. Footage of the immediate aftermath was recorded and disclosed on a number of media outlets, including audio-visual media such "Crime Beat", a series on BBC national television with an average of 9.2 million viewers. In this context, the court noted that it is "commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media". Peck's identity was not adequately, or in some cases not at all, masked in the photographs and footage so published and broadcast. He was recognised by certain members of his family and by his friends, neighbours and colleagues. Therefore, the Court argued, "the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation (...) and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995".[163]

In Perry, the UK government argued again that an applicant "did not have a reasonable expectation of privacy" in a police station. The applicant had earlier been brought to the police station to attend an identity parade and had refused to participate. Instead, the police regulated the regular security camera in the police station so that it could take clear footage of the applicant in the custody suite and inserted it in a montage of film of other persons to show to witnesses for the purposes of seeing whether they identified the applicant as the perpetrator of a number of robberies under investigation. That material was subsequently used in the prosecution against him. The UK government had somewhat strangely argued that no data were "processed"; it submitted that "the section concerning the applicant was simply extracted and put with footage of the eleven volunteers".[164] The Court argued that

> Whether or not he was aware of the security cameras running in the custody suite, there is no indication that the applicant had any expectation that footage was being taken of him within the police station for use in a video identification procedure and, potentially, as evidence prejudicial to his defence at trial. This ploy adopted by the police went beyond the normal or expected use of this type of camera, as indeed is demonstrated by the fact that the police were required to obtain permission and an engineer had to adjust the camera. The permanent recording of the footage and its inclusion in a montage for further use may therefore be regarded as the processing or collecting of personal data about the applicant".[165]

The Court considers therefore that the recording and use of the video footage of the applicant in this case discloses an interference with his right to respect for private life. The Court accepts here that a person can have expectations about how a camera is used in a certain context, which is a factor that influences his reasonable expectation of privacy. Since the applicant could not reasonably anticipate that his image would be recorded and used for identification purposes, there was an interference with article 8.While this was a significant

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[162] European Court of Human Rights, Peck v. the United Kingdom, 44647/98 (2003) 60.

[163] Idem, 62.

[164] Idem, 33.

[165] Idem.

factor, the concluding factor to determine an interference was – again – that there had been a permanent recording of the data.

3.2.2.3 Visual monitoring and recording of public individuals

This type of cases is different from the other cases discussed in section 3.2.2 because the applicant did not complain of an action by the State, but rather of the lack of adequate State protection of her private life and her image.[166] Princess Caroline von Hannover had spent more than ten years in unsuccessful litigation in the German courts trying to establish her right to the protection of her private life. Since the early 1990s she has been trying to prevent the publication of photos about her private life in the tabloid press. She alleged that as soon as she left her house she was constantly "hounded by paparazzi who followed her every daily movement, be it crossing the road, fetching her children from school, doing her shopping, out walking, engaging in sport or going on holiday".[167] In its judgment on the case, the German Constitutional Court had weighed the requirements of the freedom of the press, and the public interest in being informed against the legitimate interest Princess Caroline had in protecting her private life. The European Court of Human Rights summarized the judgement as follows:

> "In doing so the Federal Constitutional Court took account of two criteria under German law, one functional and the other spatial. It considered that the applicant, as a figure of contemporary society "par excellence", enjoyed the protection of her private life even outside her home but only if she was in a secluded place out of the public eye to which persons retire "with the objectively recognisable aim of being alone and where, confident of being alone, they behave in a manner in which they would not behave in public". In the light of those criteria, the Federal Constitutional Court held that the Federal Court of Justice's judgment of 19 December 1995 regarding publication of the photos in question was compatible with the Basic Law. The court attached decisive weight to the freedom of the press, even the entertainment press, and to the public interest in knowing how the applicant behaved outside her representative functions".[168]

Princess Caroline submitted that the protection afforded to the private life of a public figure like herself was minimal under German law because the concept of a "secluded place" was much too narrow in that respect. Furthermore, in order to benefit from that protection the onus was on her to establish every time that she had been in a secluded place, which she said was "materially impossible to establish in respect of every photo". [169] In this case the Court noted that the photos of the applicant in the various German magazines show "activities of a purely private nature such as engaging in sport, out walking, leaving a restaurant or on holiday".[170]

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[166] According to the Court, the boundary between the State's positive and negative obligations under article 8 "does not lend itself to precise definition. The applicable principles are, nonetheless, similar". European Court of Human Rights, Von Hannover v. Germany, 59320/00 (2004) 57.

[167] Idem, 44.

[168] Idem, at 54.

[169] Idem at 44.

[170] Idem, at 61. Ironically, one of the titles was: "The kiss. Or: they are not hiding anymore".

This statement is interesting because the Court makes clear that "activities of a purely private nature" can take place in places where a person is fully exposed to the public view (for instance while shopping at the market, or while doing outdoor sports) or when they visit a semi-public place (i.e. places where only a limited amount of people can observe a person, such as, for instance, the Monte Carlo Beach Club, or the courtyard of a restaurant). It follows the approach in Friedl and X.Y. where the nature of the activity prevails over the location of the activity, rather than questioning whether a person might have a "reasonable" or "legitimate" expectation of privacy in a certain location.[171] As the Court states:

> "The public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public. Even if such a public interest exists ... in the instant case those interests must, in the Court's view, yield to the applicant's right to the effective protection of her private life".[172]

And:

> In the Court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case, merely classifying the applicant as a figure of contemporary society "par excellence" does not suffice to justify such an intrusion into her private life.

The Court suggests here that that the 'reasonable' or 'legitimate' expectation of private life is only to a limited extent relevant, namely as a factor to decide potential clashes with the freedom of expression. After reiterating that the protection of the right to private life – "extends beyond the private family circle and also includes a social dimension", the Court

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[171] In a separate concurring opinion Judge Zupancic was the only judge to explicitly endorse the broader use of the reasonable expectation of privacy test. "The context of criminal procedure and the use of evidence obtained in violation of the reasonable expectation of privacy in Halford do not prevent us from employing the same test in cases such as the one before us. The dilemma as to whether the applicant here was or was not a public figure ceases to exist; the proposed criterion of reasonable expectation of privacy permits a nuanced approach to every new case. (…) Of course, one must avoid a circular reasoning here. The "reasonableness" of the expectation of privacy could be reduced to the aforementioned balancing test. But reasonableness is also an allusion to informed common sense, which tells us that he who lives in a glass house may not have the right to throw stones." In another separate opinion, Judge Cabral Barreto seems to suggest that such a general approach might be problematic, as it would lead to many different opinions among the judges of the Court. "The majority attach importance, for example, to the fact that the photos at the Monte Carlo Beach Club had been taken secretly. I do not dispute the need to take account of the fact that the photos were taken from a distance, particularly if the person was somewhere they could legitimately believe did not expose them to public view. However, the Beach Club swimming pool was an open place frequented by the general public and, moreover, visible from the neighbouring buildings. Is it possible in such a place to entertain a reasonable expectation of not being exposed to public view or to the media? I do not think so. I believe that this same criterion is valid for photos showing the applicant in other situations in her daily life in which she cannot expect her private life to be protected. I have in mind the photos of her doing her shopping. However, other photos – for example those of the applicant on horseback or playing tennis – were taken in places and circumstances that would call for the opposite approach."

[172] Idem at 77.

considers that anyone, even if they are known to the general public, must be able to enjoy a "legitimate expectation of protection of and respect for their private life".[173]

In this context, it noted that

> "the distinction drawn between figures of contemporary society "par excellence" and "relatively" public figures has to be clear and obvious so that, in a State governed by the rule of law, *the individual has precise indications as to the behaviour he or she should adopt"*. Above all, they need to know exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press".[174]

The Court suggests here that 'public figures' have a right to private life in public places, but not to the same extent as private individual unknown to the public.[175] In determining the scope of the right to private life in public of a 'public' figure, the Court will take into account whether a public figure had a legitimate expectation to think he or she was "safe from the media".[176] In this context, it is important to note that the Court attached importance to the social and technological context in which these photos were taken in order to ensure that the protection of that article 8 offers remains "practical and effective, instead of theoretical and illusory.[177] It said it could not fully disregard the fact that these pictures were taken "without the applicant's knowledge or consent – and the harassment endured by many public figures in their daily lives".[178] It further noticed that one of the pictures was taken of the princess at the Monte Carlo Beach Club, where access to journalists and photographers was "strictly regulated". This picture was taken "secretly at a distance of several hundred metres, probably from a neighbouring house".[179] The court stated that increased vigilance in protecting private life was necessary "to contend with new communication technologies which make it possible to store and reproduce personal data. This also applies to the systematic taking of specific photos and their dissemination to a broad section of the public".[180]

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[173] Idem at 69. The Court referred to Halford, which spoke about a "reasonable expectation of privacy". Ever since Von Hannover the Court has used the phrase "legitimate expectation of protection of and respect for their private life" or "espérance légitime". See for instance European Court of Human Rights, Leempoel & S.A. Editions Cine Revue c. Belgique, 64772/01 (2006) 78. European Court of Human Rights, Standard Verlags GMBH v. Austria, 13071/03 (2006) 48. European Court of Human Rights, Hachette Filipacchi Associés v. France, 71111/01 (2007).at 53.

[174] Emphasis added. Idem at 73.

[175] This issue was confirmed in Sciacca v. Italy, where the applicant's status as an "ordinary person" (as opposed to "someone who featured in a public context (public figure or politician") *enlarges* the zone of interaction that may fall within the scope of private life.European Court of Human Rights, Sciacca v. Italy, 50774/99 (2005) 29.

[176] In his concurring separate opinion Judge Cabral Barreto stated that "whenever a public figure has a "legitimate expectation" of being safe from the media, his or her right to private life prevails over the right to freedom of expression or the right to be informed."

[177] Idem at 71.

[178] Idem at 68.

[179] Idem at 68

[180] Idem at.

Since 2004, the Court has used the concept of "a "legitimate expectation" of protection of and respect for their private life" only in article 10 cases that have an impact on the right to private life. In Standards Verlag v. Austria the Court ruled for instance that public figures may "legitimately expect to be protected against the propagation of unfounded rumours relating to intimate aspects of their private life".[181] When the publisher of weekly magazine was ordered to pay 20.000 euros in damages to French singer Johnny Hallyday because it had published promotional pictures of the singer without his express consent in a story that focused on the singer's financial difficulties, the Court ruled that the mere misuse of the picture for a purpose other than that for which a person had specifically authorised its reproduction did not suffice to justify the award against the publisher. The Court attached particular importance to the nature of the pictures, which had been earlier disclosed by the singer himself. According to the Court, "its disclosure had weakened the degree of protection to which he was entitled as regards his private life". This was a "decisive factor in assessing the balance to be struck between the applicant company's freedom of expression and the singer's right to respect for his private life".[182]

Particular importance had to be attached to the nature of the pictures published, which had been purely promotional. This case differed from those previously examined by the Court in which the offending photographs had been obtained fraudulently or taken in secret, or had revealed details of people's private lives by invading their privacy. In this case the pictures had not been altered or their commercial character changed, as they had been used to illustrate, albeit in a critical manner, the news that the singer was selling his image for use by a variety of consumer products in order to satisfy his financial needs. The information about the lavish way in which he managed and spent his money did not fall within the "inner circle" of private life protected by Article 8 of the Convention. The prior disclosure by Mr Hallyday himself of the relevant information was an essential element of the Court's analysis of the applicant company's interference with the singer's private life. Its disclosure had weakened the degree of protection to which he was entitled as regards his private life, as it was by then widely known news. This had not been taken into account in the determination of the applicant company's liability. Yet it was a decisive factor in assessing the balance to be struck between the applicant company's freedom of expression and the singer's right to respect for his private life.

4. Conclusion

The unwillingness of the European Court of Human Rights to define the right to private life, coupled with its evolutive reading of the Convention, allowed it to take into account a broad range of social, legal and technological developments across the Council of Europe in order to determine the scope of the right to private life in public places. The Court's interpretation of the right to establish and develop relationships and the protection of personal data have been two crucial concepts to widen the scope of the right to private life beyond a narrow, spatial interpretation of the right to privavcy.

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[181] ECtHR, European Court of Human Rights, Standard Verlags GMBH v. Austria (no.2), 21277/05 (2009).at 53.

[182] ECtHR, Hachette Filipacchi Associés (Ici Paris) v. France, 12268/03, 23/07/2009, 53. In Von Hannover II, the Court crystallized the criteria the Court it used to balance the right to freedom of expression with the right to respect for private life. European Court of Human Rights, Von Hannover v. Germany (No.2), 40660/08 60641/08 (2012) 106-113.

In its case law on searches in business premises, the Court has demonstrated that the scope of the right to private life is not limited by the nature of the premise in which an intrusion takes place. For the Court a private premise is a premise where activities occur that relate to the private sphere. The relevant distinction to determine the scope of article 8 is thus not one between a 'private' and 'public' place, but whether a specific measure such as a search, or an interception of communications, affects a person's 'private sphere' as opposed to his 'public life'. A person's private sphere can extend to premises outside one's home, such as an office or commercial premises, where one develops professional or business relationships with other people. The scope of protection that article 8 provides is not absolute, and will depend on the nature of such premises, the business activities exercised therein and the nature of the alleged interference.

The Court uses a similar interpretation to determine the scope of the right to private life outside private premises, in public places such as public streets. Here again the Court attaches special importance to a person's right to establish and develop relationships. According to the Court, Article 8 protects even in a public context "a zone of interaction of a person with others". This does not mean that article 8 protects every public activity a person might seek to engage in with other human beings in order to establish and develop such relationships. The court here attaches importance again first, to the nature of the activity that a person undertook, and secondly, and more importantly – whether (visual) data were created and have been further disseminated.

Until Friedl, the Court developed its case law on photographs in public places on demonstration cases. The main reason for demonstrating is to be seen and/or heard, or, in other words, to draw attention to oneself. The Court seems to suggest that participants of such events should expect less privacy. It is in this context that we could interpret the Court's statement in PG and JH that "[s]ince there are occasions when people *knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner*, a person's reasonable expectations as to privacy may be a significant, though not necessarily conclusive factor".[183] Such activities can be distinguished from the activities in which a person is vulnerable – or engages in activities that belong to the private sphere. In the case of Peck, for instance, the Court noted that the applicant was in a public street "but he was *not there for the purposes of participating in any public event* and he was not a public figure. It was late at night, *he was deeply perturbed and in a state of some distress*".[184] In Von Hannover I, the Court argued that "activities of a purely private nature" can take place in places where a person is fully exposed to the public view (for instance while shopping at the market, or while doing outdoor sports) or when they visit a semi-public place (i.e. places where only a limited amount of people can observe a person, such as, for instance, a beach club, or the courtyard of a restaurant). In another case, the Court has noted that he scope of article 8 does not extend to activities which are of an "essentially public nature", such as

[183] Emphasis added. European Court of Human Rights, P.G and J.H. v. the United Kingdom, 44787/98 (2001) 57.

[184] Emphasis added. European Court of Human Rights, Peck v. the United Kingdom, 44647/98 (2003) 62.

hunting, which is carried out in the open air, across wide areas of land, and which attracts many spectators.[185]

In its case law on the scope of the right to private life in private premises and public places the court has questioned – in a rather confusing and incoherent way – whether an applicant has a 'reasonable expectation of privacy'. According to the Court, this test could be a "significant, although not necessarily conclusive factor" in order to determine whether a person's private life is concerned by measures effected outside a person's home or private premises. The 'reasonable expectation of privacy' test was first used in cases in which an applicant's communications were monitored in the workplace. The Court uses this test as an additional factor to establish that a measure indeed interfered in a person's private sphere. In Halford, the court took into account the fact that there had been no warning that her office calls might be intercepted. This was the most important criterion to establish her expectation. Additional factors that she had a reasonable expectation of privacy were that Halford had the 'sole use of her office', and that in the office one phone was specifically designated for her private use. In Peev the Court also used the test to argue that an employee had a reasonable expectation of privacy in respect of his desk and his filing cabinets. This was demonstrated by the great number of personal belongings that the applicant kept there. The Court has also mentioned the test in a case that dealt with the interception of communications (see section 3.2.1 and the visual observation and recording of private individuals (see section 3.2.2). In this last set of cases, the Court has accepted that a person can have certain expectations about how a camera is used in a public context, and that this expectation in turn influences his or her reasonable expectation of privacy in a certain place.

However, the wording of these judgments makes clear that such an expectation is less important to establish an interference with the right to private life compared to the creation of a "systematic or permanent record" of the activity in the public domain that can be further disseminated. In those cases where there is no physical interference with a person's private premises, and a person's communications or movements are monitored or recorded, or even merely stored, the reasonable expectation of privacy test is subsumed by the Court's adherence to the right to protect personal data, and the goal of Article 8 to protect a person's right to establish and develop relationships. The usefulness and added value of using the test in these cases is therefore questionable, and only adds confusion to the scope of the right to private life in public. The reasonable expectation of privacy test only seems relevant in cases where the right to private life clashes with the freedom of expression. The Court suggests here that 'public figures' have a right to private life in public places, but not to the same extent as private individuals unknown to the public. In determining the scope of the right to private life in public of a 'public' figure, the Court will take into account whether a public figure had a legitimate expectation to think he or she was "safe from the media".

[185] European Court of Human Rights, Friends and others v. The United Kingdom, 16072/06 27809/08 (2009) 43. While the court acknowledged that the applicants derived an "obvious sense of enjoyment and personal fulfilment from hunting and the interpersonal relations they have developed through it", the interpersonal relations they rely on were too broad and indeterminate in scope, for the hunting bans to amount to an interference with their rights under Article 8.

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