



# How the Right to Privacy Became a Human Right

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## ABSTRACT

The right to privacy became an international human right before it was a nationally well-established fundamental right. When it was created in the years after World War II, state constitutions protected only aspects of privacy such as the inviolability of the home and of correspondence. This article analyses how the integral guarantee—the right to privacy or to respect of one’s private life—came into existence. It traces the drafting history on the global and the European level and argues that there was no conscious decision to create an integral guarantee. The right’s potential was dramatically underestimated at the time of its creation.

**KEYWORDS:** humans rights, right to privacy, Universal Declaration on Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights

## 1. INTRODUCTION

### A. A Nationally Well-established Right after World War II?

The ‘right to privacy’ was recognised as an international human right before it was included in any state constitution.<sup>1</sup> In the years after World War II, when the human rights system was devised, state constitutions protected only aspects of privacy. Such guarantees concerned, for example, the inviolability of the home and of correspondence and the classical problem of unreasonable searches of the body.<sup>2</sup> No state constitution, however, contained a general guarantee of the right to privacy. An

1 See Drafting Committee on an International Bill of Human Rights, Documented Outline, 11 June 1947, E/CN.4/AC.1/3/Add.1 (‘Drafting Commission Documented Outline’) at 78–94.

2 See, for example, United States Constitution Amendment IV (right to be secure against ‘unreasonable searches and seizures’ of one’s house, papers, effects and body).

integral guarantee protecting the more specific aspects in their entirety—with an ‘umbrella term’<sup>3</sup> such as ‘privacy’ or ‘private life’—was unknown at the time.

This development was highly remarkable and unusual. International human rights are the ‘hard core’ of the fundamental rights guaranteed by liberal state constitutions.<sup>4</sup> They are typically promoted from state level to the international level when they are well established and when the time is ripe—and not the other way around.<sup>5</sup> In the case of the right to privacy, the international guarantee went beyond the national guarantees from the beginning. Something new was created that knew no example in any state constitution.

## B. Aim of this Contribution

How was it possible that an international human right was recognised before it was a nationally well-established guarantee? This question is of particular interest for two reasons. First, the right to privacy made an impressive international career in the second half of the twentieth century, particularly because the umbrella notion lends itself to an application in diverse fields. In our age of information technology and electronic media, the integral guarantee of a right to privacy became a key right. Secondly, the importance of the right contrasts with the uncertainties about its conceptual basis. A generally recognised ‘definition’ of privacy does not exist.<sup>6</sup> There are two competing ‘core ideas’. Privacy is about creating distance between oneself and society, about being left alone (privacy as freedom from society), but it is also about protecting elemental community norms concerning, for example, intimate relationships or public reputation (privacy as dignity). These core ideas compete and partially even contradict each other.

Two questions are the focus of our interest. Why was an integral guarantee created after World War II? Does the drafting history contribute to clarifying the conceptual basis of the right to privacy? To answer these questions, we will scrutinise the drafting history of the human right to privacy, both on the global and on the European level. We will first look at the drafting of the Universal Declaration on

3 We use the notion ‘umbrella term’ for a notion with the potential of protecting privacy integrally, as opposed to guarantees that cover mere aspects such as secrecy, data or one’s identity. Cf. Rehof, ‘Article 12 UDHR’, in Alfredsson and Eide (eds), *The Universal Declaration of Human Rights*, 2nd edn (The Hague: Martinus Nijhoff, 1999) at 251 et seq.; Nowak, ‘Art. 17’, in Nowak (ed.), *CCPR Commentary*, 2nd edn (Kehl/Strassburg/Arlington: NP Engel Publishing, 2005) at 377, 385; and Schiedermaier, *Der Schutz des Privatens als internationales Grundrecht* (Tübingen: Mohr Siebeck, 2012) at 17.

4 Tomuschat, *Human Rights between Idealism and Realism*, 2nd edn (Oxford: Oxford University Press, 2008) at 9–14.

5 Kälin and Künzli, *Universeller Menschenrechtsschutz*, 2nd edn (Basel: Helbing Lichtenhahn, 2008) at 4, 31; Chinkin, ‘Sources’, in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law* (Oxford: Oxford University Press, 2010); and Tomuschat, *ibid.* at 22 et seq.

6 Numerous attempts to ‘define’ privacy have shown that the legal concept of privacy has no clear-cut edges. This article does not make an attempt at coming up with an own proposal of a definition. See, for example, Warren and Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193; Post, ‘Three Concepts of Privacy’ (2000–01) 89 *Georgetown Law Journal* 2087; Whitman, ‘The Two Western Concepts of Privacy: Dignity versus Liberty’ (2004) 113 *Yale Law Journal* 1153; Mindle, ‘Liberalism, Privacy and Autonomy’ (1989) 51 *The Journal of Politics* 575; Solove, ‘Conceptualizing Privacy’ (2002) 90 *California Law Review* 1087; Solove, ‘A Taxonomy of Privacy’ (2006) 154 *University of Pennsylvania Law Review* 477; and Griffin, ‘The Human Right to Privacy’ (2007) 44 *San Diego Law Review* 697.

Human Rights (UDHR) and of the International Covenant on Civil and Political Rights (ICCPR) and then turn our attention to the drafting of the European Convention on Human Rights (ECHR). We will argue that the potential of the right to privacy was simply not anticipated when the integral guarantee was created.

## 2. INTERNATIONAL CODIFICATION OF A HUMAN RIGHT TO PRIVACY

### A. Universal Declaration of Human Rights

The UDHR was drafted in the years 1946–48. From the beginning, it was clear that privacy would be guaranteed in one form or another. A discussion on whether to include a provision on privacy or not did not take place.<sup>7</sup> In the following, we will trace the codification of Article 12 of the UDHR step by step. We will highlight the numerous proposals and changes suggested during the codification process before the provision received its final wording:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Some remarks on the notion ‘International Bill of Rights’ are necessary at this stage. Nowadays, the term is understood as including the UDHR and the two United Nations Covenants of 1966, the ICCPR and the International Covenant on Economic, Social and Cultural Rights. The three are formally separate instruments with a partly common and partly distinct drafting history. Initially, however, when the Economic and Social Council (ECOSOC) mandated the Commission on Human Rights with the elaboration of an ‘International Bill of Rights’,<sup>8</sup> the term was used differently. The mandate to the Commission on Human Rights did not specify the number or nature of the instrument(s) that were to guarantee the intended ‘promotion and observance of human rights’.<sup>9</sup> Thus, the potential for disagreement on these issues was inevitable. Some members of the Commission on Human Rights endorsed an instrument with a strong enforcement component, such as a convention, while others were in favour of a more standard setting document (a declaration or a manifesto).<sup>10</sup> An agreement on this point could not be reached throughout the entire drafting process. The only common denominator was that a convention—or several conventions protecting specific groups of rights—should be put into

7 UN Secretary-General, Annotations on the Text of the Draft International Covenants on Human Rights, 1 July 1955, A/2929 at para 99 (‘UN Secretary-General, Annotations’).

8 ECOSOC, Commission on Human Rights and Sub-Commission on the Status of Women, 22 February 1946, E/27, section A at para 2(a); and ECOSOC Res 9(II), 21 June 1946, E/RES/9(II) at para 6.

9 ECOSOC Res 9(II), 21 June 1946, E/RES/9(II) at para 7. In particular, the term ‘bill’ had no accepted meaning in international law: see Commission on Human Rights, 2nd Session, Summary Record of the 29th Meeting, 8 December 1947, E/CN.4/SR/29 (‘Commission Summary Record 29’) at 4.

10 See, for example, Commission on Human Rights, 2nd Session, Summary Record of the 28th Meeting, 4 December 1947, E/CN.4/SR/28 (‘Commission Summary Record 28’).

place, even if a declaration were to precede it.<sup>11</sup> Accordingly, the Commission on Human Rights worked towards both goals—a declaration and a convention—simultaneously.<sup>12</sup> At the second session of the Commission on Human Rights in December 1947, three working groups were established. One was charged with the drafting of general principles, one with the preparation of legally binding guarantees and the last one with the framing of mechanisms for implementation.<sup>13</sup> This tripartition explicitly supported a simultaneous elaboration of a declaration and a convention and did not aim to give the drafting of legally non-binding principles any temporal priority.<sup>14</sup> The speedier finalisation of the declaration was merely due to the relative simplicity of reaching an agreement on general principles, compared with the more demanding task of drafting detailed provisions of a convention.

But even the drafting process of the UDHR became a complex undertaking. A number of bodies were involved, some of which were consulted several times. For our purpose, we can distinguish two main phases of the codification process:<sup>15</sup> in the first phase, the *preliminary draft*<sup>16</sup> was elaborated. It resulted from suggestions of the Drafting Committee<sup>17</sup> that were submitted to the Commission on Human Rights, revised by a special working group<sup>18</sup> and in turn submitted to the ECOSOC and the Member States for comments at the beginning of 1948.<sup>19</sup> In the second phase, the Drafting Committee considered the comments of the Member States and elaborated a *revised draft*.<sup>20</sup> It was resubmitted to the Commission on Human Rights whose *re-draft*<sup>21</sup> was then forwarded to the ECOSOC and, finally, to the General Assembly for final consideration in December 1948.

### (i) *First phase*

At the very beginning of the drafting process, before the Drafting Committee took up its work, a working paper called ‘Secretariat Outline’<sup>22</sup> was prepared by John P.

11 See Drafting Committee on an International Bill of Human Rights, Report on its 1st Session, 1 July 1947, E/CN.4/21 (‘Drafting Commission Report 21’) at 3.

12 See Commission Summary Record 28, supra n 10 at 3.

13 Commission Summary Record 29, supra n 9 at 12. For the sake of clarity, the Commission on Human Rights decided to apply the term ‘International Bill of Rights’ to the entirety of documents in preparation: the Declaration, the Convention and the Measures on Implementation: see Commission on Human Rights, Report on its 2nd Session, 17 December 1947, E/600 at 5 (‘Commission Report 600’); but see Commission on Human Rights, 2nd Session, Summary Record of the 42nd Meeting, 16 December 1947, E/CN.4/SR/42 at 12.

14 Commission Summary Record 29, supra n 9 at 13.

15 Cf. ECOSOC Res 46(IV), 28 March 1947, E/RES/46(IV) at 32 (timetable set by the ESCOR).

16 See Commission Report 600, supra n 13 at Annex A (Draft Articles for the International Declaration of Human Rights).

17 See Drafting Commission Report 21, supra n 11 at Annex F (Suggestions of the Drafting Committee for Articles of an International Declaration on Human Rights).

18 Working Group on the Declaration on Human Rights, Report to the Commission on Human Rights, 10 December 1947, E/CN.4/57 (‘Working Group Report 57’).

19 Commission Report 600, supra n 13.

20 See Drafting Committee on an International Bill of Human Rights, Report on its 2nd Session, 21 May 1948, E/CN.4/95 at Annex A (‘Drafting Commission Report 95’).

21 Commission on Human Rights, Report on its 3rd Session, 28 June 1948, E/800 at Annex A (‘Commission Report 800’).

22 See Drafting Commission Report 21, supra n 11 at Annex A.

Humphrey, Director of the United Nations Division of Human Rights. The aim of the paper was to facilitate the work of the Drafting Committee. It already contained a provision on the protection of privacy, even if not in a very prominent place. The provision was worded as follows:

No one shall be subjected to arbitrary searches or seizures, or to unreasonable interference with his person, home, family relations, reputation, *privacy*, activities, or personal property. The secrecy of correspondence shall be respected.<sup>23</sup> (emphasis added)

The Article begins by addressing the classical privacy topics ‘arbitrary searches and seizures’—in a language obviously borrowed from the US Constitution. It continues, in the second half of the first sentence, with a list of spheres protected against ‘unreasonable interferences’. The list is headed by the notion ‘person’, which is followed by ‘home’, ‘family relation’ and ‘reputation’. The umbrella term ‘privacy’ comes fifth in position, as if it denominated only an aspect of the private sphere. In the discussion records, there is neither an explanation for the use of the umbrella term ‘privacy’ nor for its position in the enumeration that would be inappropriate for an umbrella term.

When the Drafting Committee redrafted the above provision, it brought substantial changes to it. Committee member Professor René Cassin was in charge of writing a draft Declaration which would be submitted to the Commission on Human Rights as the Drafting Committee’s Suggestions for Articles of an International Declaration on Human Rights. The Secretariat Outline was to serve as a basis for his work, insofar as he considered its provisions appropriate. Cassin prepared two drafts, with remarkable differences in our field of interest. In the *first version* (‘Cassin Draft’), Cassin suggested—for the very first time—a provision on privacy headed by an umbrella term. His proposition was:

*Private life*, the home, correspondence and reputation are inviolable and protected by law.<sup>24</sup> (emphasis added)

The umbrella term in Cassin’s first version was not ‘privacy’, but the other candidate, ‘private life’. The *second version* (‘Revised Cassin Draft’), however, was worded completely differently. The notion ‘privacy’ was reintroduced, but not in the form of an umbrella guarantee. The second version did not protect privacy ‘as such’, but only the privacy of certain aspects of life:

The *privacy* of the home and of correspondence and respect for reputation shall be protected by law.<sup>25</sup> (emphasis added)

23 Article 11 see *ibid.* (Secretariat Outline).

24 Article 9 see Drafting Commission Report 21, *supra* n 11 at Annex D (‘Cassin Draft’).

25 Article 12 see Drafting Commission Report 21, *supra* n 11 at Annex F (‘Revised Cassin Draft’).

Consequently, the term privacy no longer had the function of an integral guarantee. An explanation for this move cannot be found in the records. This Revised Cassin Draft was submitted to the Commission on Human Rights in July 1947, as the Drafting Committee's Suggestions for Articles of an International Declaration of Human Rights.<sup>26</sup>

Subsequently, the Working Group on the Declaration of Human Rights went to work on the draft. Taking the Drafting Committee's suggestions (that is, the Revised Cassin Draft) as a starting point, and incorporating a proposal made by Panama,<sup>27</sup> it redrafted the provision on privacy completely. The new variant reintroduced 'privacy' in the form of an umbrella term, but second in position:

Every one shall be entitled to protection under law from unreasonable interference with his reputation, his *privacy* and his family. His home and correspondence shall be inviolable.<sup>28</sup> (emphasis added)

An explanation for the change was not given by the Working Group. Based on its report, the Commission on Human Rights submitted the *preliminary draft* in this form to the ECOSOC in late 1947.<sup>29</sup> The Member States were asked for comments on the *preliminary draft* in early 1948.

#### (ii) *Second phase*

A very remarkable development occurred at the beginning of the second phase. The Drafting Committee considered the comments by the Member States and then suggested a *revised draft* in which any mention of 'privacy' or 'private life' was eliminated:

Everyone is entitled to protection under the law from unreasonable interference with reputation, family, home or correspondence.<sup>30</sup>

This was once more a fundamental change, but again no explanation for the modification can be found in the records.<sup>31</sup> A careful analysis of the records seems to suggest that recommendations by the United States might have played a certain role. The United States had suggested a provision with a very similar wording in their

26 Drafting Commission Report 21, supra n 11.

27 Statement of Essential Human Rights presented by the Delegation of Panama, 26 April 1946, E/HR/3. This proposal (also referred to as the 'Declaration of Philadelphia') had been drawn up by lawyers from 24 countries under the auspices of the American Institute of Law, and was submitted to the UN in 1946: see Working Group Report 57, supra n 18 at 3. Its Article 6 ('Freedom from wrongful Interference') reads: 'Freedom from unreasonable interference with his person, home, reputation, *privacy*, activities, and property is the right of every one. The state has a duty to protect this freedom.' (emphasis added)

28 Article 12 see Working Group Report 57, supra n 18 at 8.

29 Commission Report 600, supra n 13.

30 Article 9 see Drafting Commission Report 95, supra n 20 at 7 ('Revised Draft').

31 For the Drafting Committees discussion of Article 9 of the Revised Draft, see Drafting Committee on an International Bill of Human Rights, 2nd Session, Summary Record of the 36th Meeting, 17 May 1948, E/CN.4/AC.1/SR.36 ('Drafting Comm. Summary Record 36') at 5–7.

comment.<sup>32</sup> It is likely that the participants thought that they made only minor editorial changes when they altered the wording. The Australian representative explicitly called the texts ‘very similar’.<sup>33</sup> The discussions in the Committee focused on whether to include family rights or not and on whether the provision should be designed as a guarantee to ‘protection from interference’ or as a guarantee to ‘freedom from inference’. ‘Protection’ implies more duties for the State than the obligation to respect the freedom from interference.

The most fundamental change was made by the Commission on Human Rights, when it redrafted the Drafting Committee’s revised draft. It not only re-introduced the notion ‘privacy’, but positioned it at the very beginning of Article 10, thus allowing for ‘privacy’ to be understood as an umbrella term:

No one shall be subjected to unreasonable interference with his *privacy*, family, home, correspondence or reputation.<sup>34</sup> (emphasis added)

The records of the deliberations in the Commission on Human Rights do not specify the considerations that lead this pivotal amendment. They only reveal that several variants were discussed and that finally the Chinese proposal was adopted.<sup>35</sup> The ECOSOC, to which the proposal was produced, did not alter the provision.<sup>36</sup> It submitted the draft to the General Assembly for final consideration where it was intensively discussed in the Third Committee that dealt with social, humanitarian and cultural affairs.<sup>37</sup> After the deliberations, the proposal by the Commission on Human Rights was modestly modified:

No one shall be subjected to arbitrary interference with his *privacy*, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.<sup>38</sup> (emphasis added)

The final wording with ‘privacy’ as an umbrella term was reached. It was adopted by the General Assembly as Article 12 of the UDHR on 10 December 1948.<sup>39</sup>

32 Drafting Committee, Draft International Bill of Rights (Document E/600) with United States’ Recommendations, 5 May 1948, E/CN.4/AC.1/20 at 5.

33 Drafting Comm. Summary Record 36, supra n 31 at 6.

34 Article 10 see Commission Report 800, supra n 21 (‘Redraft’).

35 Commission on Human Rights, 3rd Session, Summary Record of the 55th Meeting, 15 June 1948, E/CN.4/SR.55 at 2–3. It is not clear, however, why the Chinese proposal reintroduced the notion ‘privacy’ and why it was accepted. The question was not mentioned in the discussion. The Chinese representative said that the order of presentation of the provisions was more logical in his delegation’s text which began with the individual and went from there on to cover interference with the family, home, correspondence and reputation: see *ibid.*

36 ECOSOC Res 151(VII), 26 August 1948, E/RES/151(VII).

37 The Third Committee held 81 meetings to discuss the UDHR in its entirety or single Articles. One hundred and sixty-eight formal draft resolutions containing amendments to various Articles were submitted during the course of the debate.

38 Article 13 Draft Universal Declaration of Human Rights, Report of the Third Committee to the 3rd Session of the General Assembly, 7 December 1948, A/777 at 4.

39 Universal Declaration of Human Rights, GA Res 217A(III), 10 December 1948, A/810 at 71.

*(iii) Assessment of the drafting process*

The records and reports do not provide an explanation for the many fundamental changes that Article 12 of the UDHR experienced during the drafting process. The involved Commission and Committee members did not account for the potential implications of including an integral guarantee. There were no general deliberations on the basic options. A plausible explanation for this remarkable fact is that the changes simply were not considered to be fundamental. Most likely, they were regarded to be merely editorial modifications. A factor not to be underestimated in this context is that the drafters worked in more than one language. This required translations and sometimes retranslations that also had an impact on the text. Cassin, in particular, worked with French texts. According to John P. Humphrey, the retranslation of Cassin's drafts into English produced a text that seemed 'further removed from the original than it really was'.<sup>40</sup> Nevertheless, the range of proposals and unexplained changes in the absence of any general discussion remains remarkable.

This leads us to the question of the premises of the involved bodies. One might think that the lack of discussion could be due to a common understanding of the issue, to a wide recognition of the right to privacy within the Member States of the UN at the time. However, such hypothesis proves to be wrong. One of the bases for the drafting of the UDHR was a paper that contained an overview of the protection of the private sphere in Member States at the time. It was entitled 'Human Rights Commission Members' Observations' and submitted to the Drafting Committee together with the 'Secretariat Outline'.<sup>41</sup> Astonishingly enough, there is *not one* constitution in this document that contains an umbrella term of privacy or private life. The document reveals that prior to the adoption of the UDHR, national constitutions only protected the privacy of the home and correspondence more or less comprehensively.<sup>42</sup> The width of the concept of the home differed quite substantially; certain South American countries, for example, provided for a different level of protection of the privacy of the home at different times of day.<sup>43</sup> Moreover, only a minority of Member States protected honour and personhood or the individual's autonomy. The observations clearly show that the right to privacy was anything but an uncontested concept in the Member States.

The only provisions in the observations that somewhat resembled a general guarantee were clauses in draft declarations on the international protection of human rights submitted by Chile and Panama. The 'Draft Declaration of the International Rights and Duties of Man' submitted by Chile (and drawn up by the Inter-American Juridical Committee) contained a provision protecting the 'inviolability of the domicile of the individual and of his personal correspondence' as part of his 'right to

40 Humphrey, *Human Rights & The United Nations: A Great Adventure* (Dobbs Ferry: Transnational Publishing, 1984) at 43.

41 Drafting Commission Documented Outline, *supra* n 1.

42 Cf. *ibid.*

43 Generally speaking, the unauthorized entry into the home was absolutely prohibited by night, while it was subject to specific requirements by day. Cf. *ibid.* (Article 16 of the Bolivian Constitution at 80; Article 141 of the Brazilian Constitution at 80; Article 34 of the Cuban Constitution at 82; and Article 50 of the Honduran Constitution at 86).

personal liberty'.<sup>44</sup> The 'Statement of Essential Rights' presented by Panama guaranteed '[f]reedom from unreasonable interference with his person, home, reputation, *privacy*, activities, and property'.<sup>45</sup>

In our view, the involved drafting bodies most likely were not aware of the possible implications of the steps they were taking. It is even questionable whether they paid any attention to the Member States' observations which were meant to be the main source of information on the situation in the Member States. There is a remarkable passage in the memoirs of John P. Humphrey—Director of the UN Division of Human Rights at the time when the UDHR was drafted—in which he says that the extracts of the Member States' constitutions were not used for the preparation of the 'Secretariat Outline'.<sup>46</sup> He writes that they were finalised by the Secretariat *after* the drafting of the Outline in order to support it. The materials actually used for the preparation of the Secretariat Outline comprised several drafts of international declarations that had been drawn up during the last years of World War II. The Statement of Essential Human Rights presented by Panama,<sup>47</sup> which had been drafted under the auspices of the American Law Institute, seems to have been particularly useful.<sup>48</sup>

### B. Covenant on Civil and Political Rights

The provision on privacy in the ICCPR—adopted more than 17 years after the UDHR—is worded almost identically to Article 12 of the UDHR. The sole difference between the two norms is that Article 17 of the ICCPR not only prohibits 'arbitrary' interferences with one's privacy and with more specific aspects of the private sphere, but also 'unlawful' ones. Article 17 of the ICCPR is worded as follows:

1. No one shall be subjected to arbitrary or *unlawful* interference with his privacy, family, home or correspondence, nor to *unlawful* attacks on his honour and reputation. (emphasis added)
2. Everyone has the right to the protection of the law against such interference or attacks.

One might think, of course, that the drafters of the ICCPR simply took Article 12 of the UDHR and copied it into the Covenant. This is not wrong, but the story was, nevertheless, somewhat more complicated.<sup>49</sup>

44 See *ibid.* at 78. The provision reads: 'The right to personal liberty includes the inviolability of the domicile of the individual and of his personal correspondence'. For the entire Draft Declaration, see Inter-American Juridical Commission, 'Draft Declaration of the International Rights and Duties of Man and Accompanying Report' (1946) 40 *American Journal of International Law* 93.

45 *Supra* n 27.

46 Humphrey, *supra* n 40 at 32.

47 *Supra* n 27.

48 Humphrey, *supra* n 40 at 31.

49 The entire complexity of the drafting process of Article 17 ICCPR, however, cannot be grasped with utter certainty. The codification history is not nearly as abundant as that of the UDHR and numerous records are not publicly accessible. Nevertheless, for the sake of completeness, this article retraces those parts of the codification history that are documented.

The first precursor of the ICCPR that can be directly linked to the latter was elaborated before the UDHR was adopted. It was drawn up in the framework of the same drafting process, namely the creation of the 'International Bill of Rights', and transmitted to the Drafting Committee by Lord Dukeston, the United Kingdom Representative on the Commission on Human Rights. This so-called 'British Draft International Bill of Rights' did not protect privacy at all—not even aspects of it, such as the home or correspondence,<sup>50</sup> which were relatively widely recognised in national constitutions at the time.<sup>51</sup> However, it was accompanied by a Draft Resolution which was suggested should be passed by the General Assembly when the Bill of Rights would be adopted. This Draft Resolution did not contain any justiciable rights, but was meant to elucidate the background of the British Draft International Bill of Rights. It mentioned 'the sanctity of the home and the privacy of correspondence' as rights that would have to be respected in order for the International Bill of Rights to be fulfilled.<sup>52</sup> An umbrella term such as 'privacy' or 'private life' was not contained in the British proposal. Because the British Draft International Bill of Rights formed the basis for the first draft of the ICCPR prepared by the Drafting Committee, no protection of any aspect of privacy was contained therein.<sup>53</sup>

The Australian delegation came up with a first, yet unsuccessful, proposal for a provision on the protection of privacy in May 1948.<sup>54</sup> It was most probably doomed to failure because it was brought up simultaneously with several highly controversial rights, such as the right to asylum, property rights and the right to a nationality.<sup>55</sup> In 1950, the Philippines suggested a formulation that was directly inspired by the UDHR and which already had the final wording.<sup>56</sup> While the adoption of the UDHR over a year earlier arguably had an effect on the drafting process of the ICCPR and might have increased the overall inclination to create a provision on the protection of privacy, it was not until the Ninth Session of the Commission on Human Rights in 1953 that the Philippines proposal was included in the draft ICCPR as its Article 17.<sup>57</sup> Again, it appears that the discussion of the proposal was delayed because more

50 Cf. Drafting Commission Report 21, *supra* n 11 at 29–40.

51 *Supra* at 14.

52 Cf. Drafting Commission Report 21, *supra* n 11 at 27.

53 *Ibid.* at paras 14 and 18. For the 'Draft Articles on Human Rights and Fundamental Freedoms to be Considered for Inclusion in a Convention', see *ibid.* at Annex G, paras 82–86.

54 Article 9 see Australia: Draft of Additional Articles for the Draft International Covenant on Human Rights, 6 May 1948, E/CN.4/AC.1/21 ('Australian Proposal') at 1; and Drafting Committee on an International Bill of Human Rights, 2nd Session, Summary Record of the 29th Meeting, 20 May 1948, E/CN.4/AC.1/SR.29 at 9.

55 Australian Proposal, *supra* n 54.

56 Commission on Human Rights, Report on its 6th Session, 29 May 1950, E/CN.4/507 ('Commission Report 1681') at 26; Commission on Human Rights, Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation, 16 January 1950, E/CN.4/353/Add.3 at 10; cf. Commission on Human Rights, Observations of Governments of Member States on the Draft International Covenant on Human Rights, 26 February 1951, E./CN.4/515/Add.6 at 4 (Israeli proposal to insert an article on the protection of the 'dwelling' and of '[p]rivate correspondence, as well as telegraphic and telephonic communications')

57 Commission on Human Rights, Report on its 9th Session, 6 June 1953, E/CN.4/689 ('Commission Report 2447') at para 71.

controversial issues (such as economic and social rights and the measures of implementation) were dealt with first.<sup>58</sup> Article 17 of the ICCPR as proposed by the Philippines delegation survived the discussions in the Third Committee of the General Assembly in 1960 unaltered, and was adopted by the General Assembly in Resolution 2200A (XXI) on 16 December 1966. In the UN Secretary-General's Annotations on the draft for the ICCPR and in the Commission on Human Rights' Report on its Ninth Session, one can read that there were 'no differences of opinion...as to the principle involved' during the drafting process.<sup>59</sup> Apparently, this was because 'privacy, the sanctity of the home, the secrecy of correspondence and the honour and reputation of persons were protected under the constitutions or laws of most, if not all, countries'<sup>60</sup> (emphasis added). However, at least at the outset of the drafting process, this was not the case: not one of the constitutions contained in the Documented Outline<sup>61</sup> provided for an integral guarantee of 'privacy' or 'private life'.<sup>62</sup>

Instead of revolving around questions of principle, the discussions in the Commission on Human Rights concerned relatively detailed questions about the wording of the Article. They were related to the requirement of 'unlawfulness' of prohibited interferences, and to the question whether the individual should only be protected from acts by public authorities or also from acts by private persons. There were doubts whether the general principle contained in Article 12 of the UDHR could be translated into precise legal terms, applicable to all legal systems of the world.<sup>63</sup> In particular, the Anglo-Saxon countries' representatives feared the effect the provision might have on existing rules of private law in their countries. In the Commission on Human Rights, however, the wish to include a general rule prevailed over the doubts.<sup>64</sup> It was agreed that the Covenant should contain an Article enunciating the general rule and that each contracting State should be able to decide on exceptions thereto and on methods of application individually.<sup>65</sup> There was only some general criticism that the precise legal implications of the terms 'privacy, home or correspondence' were not clear.<sup>66</sup> In the Third Committee of the General Assembly, the discussions focused on the relationship between the protection of privacy in general, the family and the home.<sup>67</sup> The drafting history of the provision on privacy in the ICCPR tells us a story that is consonant with our remarks on Article 12 of the UDHR. A fundamental discussion of whether to include an umbrella term or not, or of the implications of such a step did not take place.

58 Commission Report 1681, supra n 56 at 6.

59 Commission Report 2447, supra n 57 at para 67.

60 Ibid.

61 Drafting Commission Documented Outline, supra n 1.

62 Ibid. at 9.

63 UN Secretary-General, Annotations, supra n 7 at para 99.

64 Ibid.

65 Ibid.

66 Ibid. at para 102.

67 Third Commission Report to the 15th Session of the GA, 8 December 1960, A/4625 at para 37 (reproduced in Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff Publishers, 1987) at 343).

### C. European Convention on Human Rights

We shall now turn our attention to Article 8 of the ECHR. The drafting of the ECHR within the framework of the Council of Europe started in August 1949, roughly half a year after the adoption of the UDHR by the UN General Assembly. The Committee of Ministers of the Council of Europe authorised the Consultative Assembly to include in its agenda ‘measures for the fulfillment of the declared aim of the Council of Europe...in regard to the maintenance and further realization of Human Rights and fundamental freedoms’.<sup>68</sup> The Consultative Assembly decided, at its first session, to establish a Committee on Legal and Administrative Questions (‘Legal Committee’), which was commissioned to conceive said measures.<sup>69</sup>

The work of the Legal Committee was influenced by three sources. The UDHR was clearly the most important point of reference.<sup>70</sup> Further sources were the recommendations by the International Committee of the Movement for European Unity<sup>71</sup> and the Draft ECHR drawn up by the International Judicial Section of said Movement.<sup>72</sup> Interestingly for our purpose, the only one of these sources to contain an umbrella term was the UDHR. The Draft ECHR simply mentioned family rights and the sanctity of the home. In the Consultative Assembly, many members expressly pointed to the encroachments on the sanctity of the home during World War II.<sup>73</sup>

#### (i) *First phase*

The first proposal for a ECHR was presented to the Legal Committee by its Rapporteur, the former and later French minister Pierre-Henri Teitgen.<sup>74</sup> He

68 Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights, Vol. I* (The Hague: Martinus Nijhoff, 1975) at 20, 26 (‘CoE’); and Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights*, 3rd edn (Oxford: Oxford University Press, 2012) at 2.

69 Mowbray, *ibid.* at 6; and CoE, *ibid.* at 154.

70 Frowein and Peukert, *Europäische Menschenrechtskonvention* (Kehl: Engel Verlag, 2009) at 1. The influence of the UDHR is further illustrated by the prominent mention of the UDHR in the preamble to the ECHR as well as in the *travaux préparatoires* to the ECHR: The Preparatory Commission mentioned the UDHR in one of its very first meetings, already, CoE, *ibid.* at 4. The Draft European Convention on Human Rights drawn up by the International Judicial Section of the European Movement explicitly mentioned the UDHR in its preamble, CoE, *ibid.* at 296.

71 Several non-governmental groups for the promotion of European integration, which were established in the years following the end of World War II, combined in 1948 to form the International Committee of the Movement for European Unity. Mr Pierre-Henri Teitgen and Sir David Maxwell-Fyfe, who were members of the International Judicial Section of the Movement, also participated in the drafting of the ECHR in the Consultative Assembly: see Mowbray, *supra* n 68 at 1–2; and CoE, *ibid.* at 92. They exerted a strong influence on the drafting process in the meetings of this body of the Council of Europe, as is shown in their passionate speeches in favour of the creation of an international Convention and Court to protect basic human rights: see CoE, *ibid.* at 38–56, 114–24.

72 CoE, *ibid.* at 296–302. The International Judicial Section of the Movement consisted of Pierre-Henri Teitgen, Sir David Maxwell-Fyfe and Professor Fernand Dehousse: see Mowbray, *supra* n 68 at 2.

73 CoE, *ibid.* at 46, 62, 104.

74 It is important in this context that Mr Teitgen had already been significantly involved in the work of the International Committee of the Movement for European Unity, namely as the Chairman of its International Judicial Section. Cf. Mowbray, *supra* n 68 at 2.

suggested a provision on privacy headed by the umbrella term ‘private life’ and referring explicitly to Article 12 of the UDHR as early as 29 August 1949:

The Convention... will guarantee... to every person... [i]nviolability of *privacy*, home, correspondence and family, in accordance with Article 12 of the United Nations Declaration.<sup>75</sup> (emphasis added)

The Legal Committee discussed the Teitgen proposal thoroughly. The British representative, Lord Layton, however, suggested the elimination of the provision on privacy.<sup>76</sup> The *travaux préparatoires* do not offer the reasons for the British move. A possible explanation is that such a position was in line with the United Kingdom’s position in the British Draft for the ICCPR (the British Draft International Bill of Rights), which did not contain a provision on privacy, either.<sup>77</sup> The United Kingdom was generally reluctant with respect to obligations with enforcement mechanisms that could potentially threaten its sovereignty.<sup>78</sup> The British request was rejected, however, by the Legal Committee.<sup>79</sup>

The second main point of discussion concerned family rights. Some regarded such rights as simply ‘not essential for the functioning of democratic institutions’ and therefore opposed their inclusion.<sup>80</sup> The majority of the Committee, however, was of the opinion that family rights should be protected in order to avoid a future re-occurrence of the racial restrictions of the right to marriage made by totalitarian regimes in the recent past. Also, the forced regimentation of children and young persons organised by these regimes should be absolutely prohibited.<sup>81</sup> This explicit and relatively detailed justification of the provision on privacy as a reaction to the atrocities of World War II on the one hand, and to fears over the spread of communism on the other hand, is unique.<sup>82</sup> In this respect, the *travaux préparatoires* of the ECHR are much more conclusive than the drafting records of the UDHR and the ICCPR.<sup>83</sup>

The Legal Committee elaborated a draft resolution indicating the general lines of the desired convention. Its provision on privacy (Article 2 paragraph 4) remained

75 CoE, supra n 68 at 168.

76 Ibid. at 172.

77 See section 2.B.

78 Bates, *The Evolution of the European Convention on Human Rights* (Oxford: Oxford University Press, 2010) at 6, 77–8.

79 CoE, supra n 68 at 172. Instead, an amendment proposed by Mr Rolin (Belgium) and Mr Teitgen (France) was adopted. Therein, the original text was substituted by the words ‘immunity from arbitrary interference in his private life, his home, his correspondence and his family, as laid down in Article 12 of the Declaration of the United Nations’: see *ibid.*

80 CoE, supra n 68 at 220.

81 Ibid.

82 The ECHR as a whole is said to have its seeds in the political upheaval of the post-World War II era. Under the impression of the war, the advancement of supranational cooperation and of a common civilizing basis of the European states was a top priority: see Bates, supra n 78 at 5–7.

83 For example, CoE, supra n 68 at 40–2, 48–50, 56, 62–6.

relatively close to the Teitgen proposal. The inviolability of privacy and family were drawn together in ‘private and family life’:

In this convention, the Member States shall undertake to ensure to all persons residing within their territories: ... (4) freedom from arbitrary interference in *private and family life*, home and correspondence, in accordance with Article 12 of the United Nations Declaration.<sup>84</sup> (emphasis added)

The draft resolution was submitted to the Consultative Assembly on 5 September 1949.<sup>85</sup> In the Consultative Assembly, the provision did not give rise to discussions.<sup>86</sup> It was directly incorporated into the Assembly’s recommendation to the Committee of Ministers.<sup>87</sup>

### (ii) *Second phase*

At this point, the Committee of Ministers unexpectedly decided to play it safe by submitting the Assembly’s recommendations to the Committee of Experts on Human Rights (‘Committee of Experts’), which was asked to re-examine whether a European human rights convention was necessary and what its content should be.<sup>88</sup> Despite the extensive work that had already been undertaken, the Committee should only begin with the drafting of the ECHR if it arrived at the conclusion that a European human rights convention was desirable. Several members of the Consultative Assembly considered this move a regrettable set-back.<sup>89</sup>

The Committee of Experts prepared a *Preliminary Draft Convention* whose provision on privacy was almost identical with Article 12 of the UDHR.<sup>90</sup> At the same time, it declared that the Preliminary Draft Convention did not intend to parallel the guarantees of the UDHR.<sup>91</sup> The only difference between the *Preliminary Draft Convention* and Article 12 of the UDHR, however, was that only the latter made

84 Ibid. at 228.

85 Ibid. at 216–37.

86 Ibid. at 238–64; and Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights, Vol. II* (The Hague: Martinus Nijhoff, 1975) at 2–12 (‘CoE, Coll. Edn Vol. II’).

87 CoE, Coll. Edn Vol. II, *ibid.* at 276, 288.

88 Bates, *supra* n 78 at 79.

89 CoE, Coll. Edn Vol. II, *supra* n 86 at 300.

90 Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights, Vol. III* (The Hague: Martinus Nijhoff, 1976) at 236 (‘CoE, Coll. Edn Vol. III’). It was stated in the Committee of Experts that the ECHR provision should preferably have the same wording as Article 12 UDHR: see *ibid.* at 262.

91 The preliminary draft report of the Committee of Experts explained that only some of the rights mentioned in Articles 12 and 16 UDHR were included in the Convention: see CoE, Coll. Ed. Vol. III, *supra* n 90, at 262; cf. Council of Europe, *Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights, Vol. IV* (The Hague: Martinus Nijhoff, 1977) at 22 (‘CoE, Coll. Ed. Vol. IV’) for the respective report.

mention of attacks on the honour and reputation as specific protected aspects of the private sphere. It was worded as follows:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. Everyone has the right to the protection of the law against such interference.<sup>92</sup>

On the basis of the *Preliminary Draft Convention*, the Committee of Experts went on to elaborate two alternatives, Alternatives A and B. They followed different conceptual ideas, corresponding to the two schools of thought in the Committee:<sup>93</sup> Alternative A followed the method of enumeration<sup>94</sup> while Alternative B contained precise definitions of the rights and freedoms that were to be protected.<sup>95</sup> Most importantly for our purpose, however, only Alternative B contained a provision on the protection of privacy. This provision was identical with the Preliminary Draft Convention's Article 2 paragraph 4.<sup>96</sup>

The Committee of Experts declared that it felt incompetent to reduce the options to one single draft and suggested that the Committee of Ministers take on this responsibility.<sup>97</sup> Apparently, the decision among the two methods on hand was a highly politicised issue that should be decided on the political level.<sup>98</sup> Thus, the Committee of Ministers decided to convene a meeting of senior officials to discuss the two alternatives.<sup>99</sup> Not everyone was happy that yet another working party was brought into being.<sup>100</sup>

At the conference, the representative of the United Kingdom, Mr S. Hoare, argued in favour of Alternative A, which had been proposed by the United Kingdom. He stated that the elimination of a provision on privacy was justified by the fact that Alternative A contained provisions on freedom of association and information that 'covered the contents' of the provision on privacy in Alternative B<sup>101</sup>—an allegation that was obviously incorrect. The reasons for the omission of a provision on privacy in Alternative A are not clear. In the course of the discussions at the conference, Alternatives A and B were combined into a New Draft Alternative B,<sup>102</sup> which still followed the method of precise definition, and left a blank space for an Article 'on privacy'.<sup>103</sup> As the drafting process continued, the UK delegation proposed a

92 CoE, Coll. Edn Vol. III, supra n 90 at 236 (Article 2 paragraph 4).

93 CoE, Coll. Edn Vol. IV, supra n 91 at 8.

94 CoE, Coll. Edn Vol. III, supra n 90 at 312–20.

95 Ibid. at 320–35.

96 Ibid. at 320.

97 Cf. Bates, supra n 78 at 79; and CoE, Coll. Edn Vol. IV, supra n 91 at 16.

98 CoE, Coll. Edn Vol. IV, supra n 91 at 86.

99 The senior officials were bound by their governments' instructions: see *ibid.* at 84, 92–4.

100 Ibid. at 88.

101 Ibid. at 110.

102 Ibid. at 182 et seq.

103 Ibid. at 188.

remarkably short and elegant provision to fill this blank. It would contain an umbrella guarantee, explicit family rights and protect the 'house' instead the 'home':

Everyone shall have the right to freedom from governmental interference with his privacy, family, house or correspondence.<sup>104</sup>

Subsequently, however, the Conference of Senior Officials came up with a completely different provision. It only protected the privacy of specific aspects of social life, and did not contain an umbrella term.<sup>105</sup> This suggestion was, however, also given up soon. In the Draft Convention annexed to the Report of the Conference of Senior Officials to the Committee of Ministers, it was replaced by a provision that reintroduced an umbrella term, which was now 'private life' instead of 'privacy', and was formulated as a 'right to respect for'-guarantee and not as a 'freedom from interference against'-clause. This proposal would turn out to be almost the final version:

Everyone's right to respect for his private and family life, his home and his correspondence shall be recognised.<sup>106</sup>

The many moves of the Conference of Senior Officials are not explained in the *travaux préparatoires*. In their commentary, the Senior Officials merely state the obvious and describe the steps they took, namely that they introduced into Alternative B the right to respect for private and family life, as it had appeared in the other Alternative.<sup>107</sup> Verbatim records of their meetings are not available.<sup>108</sup>

The proposal was again submitted to the Committee of Ministers. On 7 August 1950, it reached an agreement on the final version and changed the proposal of the Conference of Senior Officials in a minor detail. It replaced the formula 'everyone's right to respect for... shall be recognized' by '[e]veryone has the right to respect for'. The final version, the 'Draft Convention of Protection of Human Rights and Fundamental Freedoms', was reached:

Everyone has the right to respect for his private and family life, his home and his correspondence.<sup>109</sup>

The Consultative Assembly proposed no alteration. The provision did not receive a particular mention during the debate.<sup>110</sup> The English wording of Article 8 paragraph 1 remained unchanged and was adopted on 4 November 1950.<sup>111</sup>

104 Ibid. at 202.

105 The proposal was worded as follows: 'The right to privacy in respect of family, home and correspondence shall be recognized.' See *ibid.* at 222.

106 Ibid. at 278.

107 Ibid. at 158.

108 Bates, *supra* n 78 at 79.

109 Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights, Vol. V* (The Hague: Martinus Nijhoff, 1979) at 126.

110 Ibid. at 210–350; and Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights, Vol. VI* (The Hague: Martinus Nijhoff, 1985) at 72–228.

111 Council of Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights, Vol. VII* (The Hague: Martinus Nijhoff, 1985) at 46.

*(iii) Assessment of the drafting process*

The drafting history of Article 8 of the ECHR resembles the formation of Article 12 of the UDHR in several respects. There were many and even fundamental changes, but there are hardly any records of discussions of fundamental questions. Such discussions are not even documented in situations where the deletion of a provision on privacy was requested in the Legal Committee. There was also never a documented discussion whether ‘private life’ was intended to be an umbrella term, encompassing further, not explicitly mentioned aspects of privacy. The variation in the use of the terms ‘privacy’ and ‘private life’ and the change of meaning thereby implied is not explained either. It is noteworthy in this context that already the first Teitgen proposal suggested the notion ‘private life’, and not ‘privacy’. This is still the case: unlike Article 12 of the UDHR and Article 17 of the ICCPR, Article 8 of the ECHR protects ‘private life’. It is likely that ‘private life’ was used as a synonym for ‘privacy’.

### 3. CONCLUDING REMARKS

#### A. Silent Birth of an Important Human Right

Why was an integral guarantee created? At the beginning of this article, we expressed our hope that tracing back the history of the human right to privacy scrupulously would enable us to give a clear answer to this question. Our analysis of the drafting history of the right to privacy in the UDHR, ICCPR and the ECHR has shown, however, that there was no conscious decision to create an integral guarantee—neither on the global nor on the European level. Despite the fact that no existing national constitution contained such a right, a general discussion on the issue did not take place. Umbrella terms were introduced, eliminated and replaced as if such decisions were mere editorial details. Explanations were rarely offered. A vague—and not even uncontested—consensus on the necessity to include protection of privacy was regarded as a sufficient basis for the editorial work.

The codification history offers, on the whole, a picture in which coincidence played a key role. It seems impossible to give a clear answer to the question we raised. As remarkable as it may sound: the creators of the UDHR, the ICCPR and the ECHR did something new when they decided to include an umbrella term in the provisions on privacy, but they made this step without being aware of the potential implications of such a guarantee. It seems clear to us that they did not foresee the career of the right to privacy, particularly within the framework of the ECHR. They were not aware that the use of an umbrella term would open the door for the protection of further aspects of privacy not mentioned or not even imagined in the codification process.

#### B. Core of the Right to Privacy

We have explained in the introduction that the conceptual basis of the right to privacy is not clear. There are—at least—two competing core ideas. Privacy is, on the hand, about creating distance between oneself and society, about retiring and being left alone (privacy as freedom from society). On the other hand, it is also about protecting elemental community norms which concern, for example, intimate

relationships and public reputation (privacy as dignity). Does the codification history contribute to clarifying the conceptual basis of the right to privacy?

We would like to answer the question by looking at what was more or less uncontested during the codification processes. Two partial guarantees were mentioned in almost all proposals: the right to protection of the 'home'—or 'house' or 'domicile'—and the right to protection of one's correspondence. Protection of the home means protection of physical distance from society. It shields the person against unwanted gazes, protects retirement and recovering from society. But that is not everything. Protection of the house also means protection of close and intimate relationships as far as they take place in the house. Accordingly, it also means protection of some forms of participation in society. As far as the protection of correspondence is concerned, the picture is similar. It shields, on the one hand, an activity from other people's view. On the other hand, it protects a form of participation in social life. Both more or less uncontested aspects of privacy are connected to both ideas. So the drafting history of the right to privacy does not allow for the conclusion that one of the two competing ideas can claim the status of the primary idea. Rather, it seems to support the view that the very concept of privacy is inextricably linked to more than one idea.