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Can You Hear Me Now?: Private Communication, National Security, and the Human Rights Disconnect

Jordan J. Paust*

Abstract

This Article addresses the question whether global human rights law adequately protects private communications of individuals from state and non-state actor eavesdropping, data collection, and data mining engaged in for national security purposes. It concludes that human rights protection is lacking and needs to be reformed if what are apparently current public expectations about privacy are to be adequately met. Not all persons are protected from extraterritorial infringement of their privacy interests, and there is a well-recognized test regarding who is entitled to extraterritorial protection that precludes protection for most persons. Further, the human right to private communication is not absolute. For those who have such a right, significant and far-reaching limitations exist that will often assure the propriety of various forms of national security intrusion, especially in contexts of self-defense and war.

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“[W]e must continue to ensure that our signals intelligence policies and practices appropriately take into account . . . the leadership role that the United States plays in upholding democratic principles and universal human rights.”¹

¹ President Barack Obama, *Presidential Policy Directive/PPD-28 – Signals Intelligence Activities* (Jan. 17, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities> [hereinafter Presidential Policy Directive].

I. INTRODUCTION

Revelations regarding widespread and extraterritorial U.S. governmental surveillance and data collection—and private corporations’ facilitating role—have sparked international debate about whether the U.S. surveillance program is lawful under domestic and international law, especially relevant human rights law. What has not been the primary concern in the U.S. is the equally important question whether international law regulates increased foreign governmental surveillance of natural and juridic persons in the U.S. for alleged foreign security purposes, the answer to which cannot rely on the U.S. Constitution and domestic laws. Human rights law recognizes a right to privacy that can restrain some forms of extraterritorial surveillance, but is its reach sufficient?

This Article addresses the question whether global human rights law adequately protects private communications of individuals from state and non-state actor eavesdropping, data collection, and data mining for national security purposes. It concludes that human rights protection is lacking and needs to be reformed if current public expectations about privacy are to be adequately met.

As noted in Part II of this Article, relevant human rights law is universal in reach despite a serious misunderstanding by prior U.S. administrations and a putative U.S. reservation to a global human rights treaty. Although still insufficiently understood, human rights law can reach non-state aiders and abettors of human rights violations as well as state actor perpetrators and facilitators—and both have participated in extraterritorial intelligence gathering that has eroded individual and group privacy. However, as recognized in Part III, not all persons are protected from extraterritorial infringement, and there is a well-recognized test governing who is entitled to extraterritorial protection that precludes most persons under most human rights instruments. This lack of extraterritorial protection results in one form of human rights disconnect. Another disconnect results from the nature of relevant substantive rights. As noted in Part IV, the human right to private communication is not absolute. For those who have such a right, significant and far-reaching limitations exist under global human rights law that will often assure the propriety of various forms of national security intrusion, especially in contexts of self-defense and war. Having identified why extraterritorial human rights protection is generally lacking, this Article suggests a modest policy-serving reform in Part V.

II. THE UNIVERSAL REACH OF RELEVANT HUMAN RIGHTS LAW

A. The UN Charter

Article 55 of the UN Charter mandates that “the United Nations shall promote . . . universal respect for, and observance of, human rights and

fundamental freedoms for all.”² In referring to human rights, the Charter-based mandate incorporates by reference human rights that are part of customary international law and requires global respect for and observance of them.³ Whether the rights to privacy and private communication—or at least the particular privacy interests—documented in several human rights instruments are part of customary international law determines whether they are included in those customary rights the UN Charter protects without geographic limits or exclusions for persons outside the jurisdiction, actual power, or effective control

² UN Charter art. 55(c). *See id.* art. 1(3).

³ *See, for example*, THOMAS BUERGENTHAL, DINAH SHELTON & DAVID STEWART, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 30–33, 39–40, 124 (3d ed. 2002); MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 274, 302, 325–27 (1980); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882–83 (2d Cir. 1980) (adding that Charter based “guaranties include . . . the right to freedom from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights [“UDHR”]. . . . Charter precepts embodied in this Universal Declaration ‘constitute basic principles of international law.’”). The U.S. had previously claimed that the right to freedom from arbitrary interference with privacy or correspondence reflected in Article 12 of the UDHR is part of customary international law. *See* Memorial of the United States (U.S. v. Iran), 1980 I.C.J. Pleadings 121, 182 n.36 (Jan. 12) (“[F]undamental rights for all human beings . . . , and the existence of a corresponding duty on the part of every State to respect and observe them, are now reflected, *inter alia*, in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the International Covenant on Civil and Political Rights.”); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, cmt. m (1987) (stating that “a ‘consistent pattern of gross violations’ as state policy,” such as “invasions of the privacy of the home . . . [and] denial of basic privacy such as the right to marry and raise a family,” is a violation of customary international law but not “when [violations are] committed singly or sporadically”) [hereinafter RESTATEMENT]; George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy*, 26 YALE J. INT’L L. 323, 390 (2001) (“A compelling case can be made that the search and seizure right to privacy has risen to the level of customary international law.”); *Beharry v. Reno*, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002) (“The rights to be free from arbitrary interference with family life and arbitrary expulsion are part of customary international law.”) (quoting *Maria v. McElroy*, 68 F. Supp. 2d 206, 234 (E.D.N.Y. 1999)). *But see* International Law Association, Committee on the Enforcement of Human Rights Law, *Final Report on the Status of the Universal Declaration of Human Rights in National and International Law*, in Report of the Sixty-Sixth Conference 525, 547 (Buenos Aires 1995) (noting the U.S. claim before the ICJ but stating that “the content of the right would varies [sic] considerably among states, and the contours of that realm of privacy which is beyond the reach of government is perhaps too vague to be deemed a useful part of customary law.”) [hereinafter ILA H.R. Report]; *United States v. Covos*, 872 F.2d 805, 808 (8th Cir. 1989), *cert. denied*, 493 U.S. 840 (1989) (finding that despite citation to a case before the European Court of Human Rights that addressed privacy under European treaty law, defendant “has not provided us with sufficient authority . . . [to prove] that the warrantless use of a pen register [regarding phone numbers called] is such an invasion of privacy as to violate [the customary] international law of human rights”); sources cited *infra* notes 36, 118. For a right or particular aspect thereof to be part of customary international law, it would have to be supported by general patterns of practice and *opinio juris*. *See* RESTATEMENT, *supra*, § 102(1)(a)–(2), cmts. b, c; sources cited *infra* notes 46, 114.

of a state. If not, such rights and privacy interests will be protected merely through particular human rights treaties where those instruments reach. This UN Charter-based mandate also conditions the authority of its entities, such as the Security Council, the General Assembly, the Secretariat, and even individual UN personnel.⁴

UN members are similarly bound under Article 56 of the UN Charter “to take joint and separate action . . . for the achievement of the purposes set forth in Article 55.”⁵ Under Articles 55(c) and 56, the U.S. and other UN members necessarily have a duty to promote through joint and separate action “universal respect for, and observance of, human rights and fundamental freedoms for all” and not to violate human rights within or outside of their territory.⁶ Clearly, there are no geographical limitations on the obligation to promote universal

⁴ See, for example, MCDUGAL, LASSWELL & CHEN, *supra* note 3, at 332–34; THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 920, 923 (Bruno Simma et al. eds., 2d ed. 2002) [hereinafter CHARTER COMMENTARY].

⁵ UN Charter art. 56. Article 103 of the UN Charter mandates that, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” *Id.* art. 103. For this reason, if a particular human rights treaty does not have universal reach, and there is a clash or inconsistency with respect to the universal character of the obligation of a party under the UN Charter, the obligation under the Charter remains extant and “shall prevail.” As noted in Section III, most human rights instruments only reach persons within the jurisdiction, actual power, or effective control of a state. The reach of the UN Charter is not so limited and will prevail with respect to customary human rights guaranteed thereunder. Therefore, the critical issue will shift from who is protected under customary human rights incorporated into universal UN Charter obligations to what protections and limitations of rights pertain. See *infra* Section IV.

⁶ See UN Charter arts. 55(c), 56; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970), U.N. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121 (1971) (“Every State has the duty to promote through joint and separate action *universal* respect for and observance of human rights.”) (emphasis added); HURST HANNUM, S. JAMES ANAYA & DINAH L. SHELTON, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 83 (5th ed. 2011) (“[M]embers of the United Nations have a legal duty to promote respect for and protection of human rights around the world.”) (quoting George Aldrich, Acting Legal Adviser, U.S. Dep’t of State); MCDUGAL, LASSWELL & CHEN, *supra* note 3, at 339 (“[H]uman rights prescriptions are applicable . . . to all the activities of nation-states and their officials.”). Concerning Charter-based human rights duties of states, see also Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 3, 42 (May 24) (“Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights.”); Advisory Opinion on the Legal Consequences for States of the Continued Presence of South-Africa in Namibia (South West Africa) *Notwithstanding* Security Council Resolution 276 (1970), 1971 I.C.J. 3, 57 (June 21) [hereinafter Advisory Opinion South West Africa]; see generally Memorial of the United States (U.S. v. Iran), 1980 I.C.J. Pleadings, *supra* note 3.

respect for and observance of human rights, and there are no other limits with respect to social or political contexts, such as those involving terrorism, self-defense, war, or threats to national security.⁷ Any limits that exist with respect to relevant customary human rights of particular persons depend on the nature and reach of relevant human rights law that is incorporated by reference through Articles 55(c) and 56 of the Charter. Importantly, the International Court of Justice (ICJ) has recognized that “a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter,”⁸ a recognition that must necessarily pertain to conduct engaged in for national security purposes that violates relevant customary human rights.

B. The International Covenant on Civil and Political Rights

The reach of one of the major human rights treaties, the International Covenant on Civil and Political Rights (ICCPR),⁹ is also universal. The Preamble to the ICCPR expressly refers to the extraterritorial nature of all UN members’ human rights obligations while “[c]onsidering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.”¹⁰ This recognition is crucial to proper

⁷ Human rights law applies during war. *See, for example*, JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 674, 687–88 (4th ed. 2013); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT’L L. 811, 820–23 (2005).

⁸ Advisory Opinion South West Africa, *supra* note 6, at 57, ¶ 131. *See* sources cited *supra* notes 3, 6. In 1948, two Justices of the U.S. Supreme Court recognized that a California law barring land ownership and occupancy by aliens on account of race “stands as a barrier to the fulfillment of” the obligation under Articles 55(c) and 56 of the Charter, and “[i]ts inconsistency with the Charter . . . is but one more reason why the statute must be condemned.” *Oyama v. California*, 332 U.S. 633, 672–73 (1948) (Murphy and Rutledge, JJ., concurring).

⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁰ *Id.* pmb. Importantly, other global human rights treaties contain the same express recognition. *See, for example*, International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), pmb., U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966), 993 U.N.T.S. 3; International Convention for the Protection of All Persons from Enforced Disappearance pmb., adopted by U.N. G.A. Res. 61/177 (Dec. 20, 2006); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmb., Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; *see also* Protection of Human Rights and Fundamental Freedoms While Countering Terrorism pmb., U.N. G.A. Res. 61/171 (Dec. 19, 2006) (“Reaffirming that States are under the obligation to protect all human rights and fundamental freedoms of all persons.”); 2005 World Summit Outcome, ¶ 121, U.N. G.A. Res. 60/1 (Oct. 24, 2005) (“[A]ll human rights are universal . . . [and] all States . . . have the duty to promote and protect human rights.”); Promotion of a Democratic and Equitable International Order, U.N. G.A. Res. 107, ¶ 5, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/107, at 3 (Dec. 4, 2000) (stressing “that all human rights are universal . . . and that all human rights must be treated in a

interpretation of the ICCPR and its extraterritorial reach.¹¹ Additionally, Article 2 of the ICCPR affirms that each party must “respect and . . . ensure to all individuals within its territory and subject to its jurisdiction the rights recognized” in the ICCPR.¹² As documented below in Section III, persons protected outside a state’s territory include those who are within the actual power or effective control of a party to the ICCPR.

During the Bush-Cheney era, the U.S. executive claimed ICCPR

fair and equal manner”); World Conference on Human Rights, Final Declaration and Programme of Action, Sec I, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally . . . [and] it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”); Universal Declaration of Human Rights pmbl., G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) (promoting “universal respect for and observance of human rights”), art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration . . . no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs.”) [hereinafter UDHR].

¹¹ See, for example, Vienna Convention on the Law of Treaties art. 31(2), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. As the Preamble notes, the creators of the ICCPR were “[c]onsidering” this universal Charter-based obligation when drafting it. ICCPR, *supra* note 9, pmbl. Because Article 16, refers to a “right . . . everywhere” and the object and purpose of the ICCPR is to assure real rights for all humans, the proper interpretation of the ICCPR is that it reaches beyond the territory of a state party. See also Vienna Convention, *supra*, art. 31(1) (“A treaty shall be interpreted in good faith . . . and in the [sic] light of its object and purpose.”); U.N. H.R. Comm., General Comment No. 24, General Comment on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols, ¶¶ 7, 11–12, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 2, 1994). The principle of *pacta sunt servanda* (which requires performance of a treaty in good faith, see Vienna Convention, *supra*, art. 26) requires parties to a treaty to adhere to its purpose and shared meaning “in such a manner that its purpose can be realized.” Gabcikovo-Nagymaros Project (Hungary v. Slovakia), 1997 I.C.J. 7, ¶ 133 (Sept. 25). Moreover, while interpreting a treaty, “[t]here shall be taken into account . . . [a]ny relevant rules of international law applicable,” Vienna Convention, *supra*, art. 31(3)(c), meaning that the universal human rights obligations under both the UN Charter and the other aforementioned instruments bear on interpretation of ICCPR obligations. Importantly, the ICCPR also proscribes restrictions “upon or derogations from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, . . . or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.” ICCPR, *supra* note 9, art. 5(2). Further, Article 46 states: “Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations.” *Id.* art. 46. With respect to derogable rights, the Covenant also requires that states adopting derogating measures assure that they “are not inconsistent with their obligations under international law.” *Id.* art. 4(1).

¹² ICCPR, *supra* note 9, art. 2(1). The language is read as including all individuals who are “within its territory” and all individuals who are otherwise “subject to its jurisdiction.” Limiting the word “jurisdiction” to territory of a state would make the phrase “and subject to their jurisdiction” nonsensically redundant, contradict the recognition in general international law of forms of extraterritorial jurisdiction and responsibility, and operate contrary to the universal reach of human rights obligations under the UN Charter. See discussion *supra* note 11; see also discussion *infra* notes 30, 33.

obligations did not apply outside of U.S. territory. The claim was manifestly in error, not only with respect to the universal nature of the ICCPR but also its widely recognized extraterritorial reach to any person who is within the actual power or effective control of a member nation.¹³ Moreover, domestic intelligence gathering, storage, and data mining, as well as decisions to engage in such activities abroad, evidently take place within or emanate from the U.S.—circumstances that are relevant to application of the ICCPR within the U.S.¹⁴

With respect to direct application of the ICCPR as U.S. treaty law, one must ascertain whether its relevant provisions are self-executing. Provisions of a treaty that are set forth in mandatory “shall” language are typically self-operative or directly enforceable,¹⁵ and many of the provisions in the ICCPR contain such language. When the U.S. ratified the ICCPR, it sought to change the self-operative reach of most of the treaty’s provisions by declaring it partially non-self-executing,¹⁶ but because the declaration attempted to change the nature of legal obligations under the treaty, it was treated as an attempted reservation.¹⁷ Further, because it attempted to obviate the direct effect of most of the treaty’s provisions, the putative reservation, if operative, would have been seriously

¹³ See, for example, Jordan J. Paust, *The Bush-Cheney Legacy: Serial Torture and Forced Disappearance in Manifest Violation of Global Human Rights Law*, 18 BARRY L. REV. 61–64, 71–74 & n.7 (2012); Beth Van Schaack, *The United States’ Position on the Extraterritorial Application of Human Rights Obligations: Now is the Time for Change*, 90 INT’L L. STUD. 20, 24 (2014) (“The United States’ so-called ‘legal position’ actually reflects a strategic policy choice to endeavor to evade scrutiny of its extraterritorial exploits on the merits.”); Marko Milanovic, *Foreign Surveillance and Human Rights: Part 2: Interpreting the ICCPR*, EJIL Talk (Nov. 26, 2013), <http://www.ejiltalk.org/foreign-surveillance-and-human-rights-part-2-interpreting-the-iccpr/?pfstyle=wp> (last visited Nov. 18, 2014).

¹⁴ See, for example, Rebecca A. Copeland, *War on Terrorism or War on Constitutional Rights? Blurring the Lines of Intelligence Gathering in Post-September 11 America*, 35 TEX. TECH L. REV. 1, 14 (noting that the Foreign Intelligence Surveillance Court’s “secret meetings in which the court considers applications for electronic surveillance take place in the ‘Special Compartmentalized Intelligence Facility’ within the Department of Justice in Washington, D.C.”).

¹⁵ See JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 278, 289 (3d ed. 2009). As the U.S. Supreme Court has often affirmed, treaties are also to be construed in a broad manner to protect express and implied rights, and whenever a right grows out of or is protected by a treaty, it is self-executing. See also *id.* at 274, 279, 284–85. Clearly, the ICCPR contains several express rights and often phrases them in mandatory (“shall”) language.

¹⁶ See COMMITTEE ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 19 (1992), reproduced in PAUST, VAN DYKE & MALONE, *supra* note 15, at 331 (“[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.”).

¹⁷ See Vienna Convention, *supra* note 11, art. 2(1)(d) (“‘Reservation’ means a unilateral statement, however phrased or named, made by a State, when . . . ratifying . . . whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty.”).

incompatible with the object and purpose of the ICCPR.¹⁸ Therefore, under a well-recognized rule regarding putative reservations known as the object and purpose test, such a declaration is void *ab initio* as a matter of law.¹⁹ In any event, there was no attempted reservation to Article 50 of the ICCPR,²⁰ and Article 50 provides in express, self-operative, and unavoidable language that all of “[t]he provisions of the present Covenant *shall* extend to all parts of federal States without any limitations or exceptions.”²¹

C. The Reach to Non-State Actor Aiders and Abettors

It is also important to note that private actors can have human rights obligations under the ICCPR. More generally, for at least the last 300 years, international law has never been merely state-to-state,²² and, as the U.S. Supreme Court has recognized in twenty cases, private companies and corporations can have duties as well as rights under treaty-based and customary international law,²³ including human rights law.²⁴

The Preamble to the ICCPR expressly affirms “that the individual, *having duties* to other individuals and to the community to which he belongs, *is under a responsibility* to strive for the promotion and observance of the rights recognized in the present Covenant.”²⁵ Therefore, at a minimum, individuals have duties not to violate human rights recognized in the ICCPR. Article 5 also bars “any . . . group or person . . . [from engaging] in any activity or [performing] any act aimed at the destruction of any of the rights and freedoms” set forth in the Covenant “or at their limitation to a greater extent than is provided for” in the

¹⁸ See, for example, PAUST, VAN DYKE & MALONE, *supra* note 15, at 83–84, 87.

¹⁹ See Vienna Convention, *supra* note 11, art. 19(c); U.N. H.R. Comm., General Comment No. 24, *supra* note 11, ¶¶ 7, 9, 11–12, 16; PAUST, VAN DYKE & MALONE, *supra* note 15, at 87; Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT’L L. 301, 323 (1999).

²⁰ See PAUST, VAN DYKE & MALONE, *supra* note 15, at 83–84, 87, 590; Paust, *supra* note 19, at 325–26.

²¹ ICCPR, *supra* note 9, art. 50 (emphasis added).

²² See generally Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT’L L. 977 (2011).

²³ See, for example, *id.* at 986–89.

²⁴ See *id.* at 987–89 n.38; Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT’L L. 801 (2002). See also *infra* text accompanying note 28. With respect to the human right to privacy and non-state actor duties, the U.S. Supreme Court has recognized that “[a] most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable.” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974), quoted in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 155 (1989). See *Smith v. Healy*, 744 F. Supp. 2d 1112, 1118 (D. Or. 2010).

²⁵ ICCPR, *supra* note 9, pmbl. (emphasis added).

Covenant, thereby affirming impliedly the correlative duty of any group or person not to abrogate or limit those human rights set forth in the ICCPR.²⁶ Significantly, the Human Rights Committee that functions under the auspices of the ICCPR has affirmed that private persons can have duties under the treaty,²⁷ and it has guaranteed the human right to privacy in particular against interferences by “State authorities or . . . natural or legal persons.”²⁸ The reach of the right to privacy under the ICCPR to private actors has obvious but largely untested implications for internet and telephone service providers as well as those otherwise involved in the transmission, storage, and search of domestic and international communications, including those operating private communications satellites.²⁹ Private liability can attach to non-state actor interferences with a protectable human right to privacy and can also exist where the private actor is complicit in impermissible interference by a state. Moreover, direct responsibility of a private actor under human rights law can reach an impermissible interference with privacy that is not regulated under the Fourth Amendment to the U.S. Constitution when the private actor lacks the necessary color-of-law connections to the state.

III. PERSONS PROTECTED EXTRATERRITORIALLY

Although relevant human rights law generally has universal reach, a critical

²⁶ *Id.* art. 5(1). See Paust, *supra* note 24, at 813, 816 & n.64; see also UDHR, *supra* note 10, pmbi., arts. 29–30.

²⁷ See, for example, U.N. H.R. Comm., General Comment No. 20, Concerning Violations of Article 7 of the Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/21/Rev.1 (Oct. 3, 1992), in INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, U.N. Doc. HRI/GEN/1/Rev. 9 (Vol. 1) (May 27, 2008), at 200–02 (rendering it immaterial “whether [violators act] in their official capacity, outside their official capacity or in a private capacity”; mandating criminalization of torture and cruel, inhuman, and degrading treatment “whether committed by public officials or other persons acting on behalf of the State, or by private persons”).

²⁸ U.N. H.R. Comm., General Comment No. 16, Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, U.N. Doc. CCPR/C/21/Rev.1 (Apr. 8, 1988), in INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, *supra* note 27, at 191. See also *id.* at 192 (“States parties are under a duty . . . to provide the legislative framework prohibiting such acts by natural or legal persons.”), 193 (pertaining to “private individuals and bodies”).

²⁹ Regarding significant and widespread private participation in mobile monitoring and mass surveillance, see Report of the Special Rapporteur on the Promotion and Prevention of the Right to Freedom of Opinion and Expression, ¶¶ 14–15, 30, 34–35, 40–43, 57, 61, 64–65, 68–70, 73–76, U.N. Doc. A/HRC/23/40 (Apr. 17, 2013) (Rapporteur Frank La Rue) (also noting the problem of “violations of human rights perpetuated by corporate actors”) [hereinafter La Rue Report]; Gus Hosein & Caroline Wilson Palow, *Modern Safeguards for Modern Surveillance: An Analysis on Innovations in Communications Surveillance Techniques*, 74 OHIO ST. L.J. 1071, 1080–83, 1086 & n.75, 1089 (2013).

question remains concerning whether a person situated outside U.S. territory is protected from an allegedly impermissible human right infringement. Human rights law is decidedly extraterritorial, but is every person entitled to enjoyment of a human right in every social context? The answer is that, under most human rights instruments, only certain persons are entitled to enjoy protection against state actors when they are situated outside the territory of an alleged state violator and not otherwise subject its jurisdiction.

For example, with respect to extraterritorial application of the ICCPR, the critical question is whether an alleged victim is within the jurisdiction, actual power, or effective control of the state. Article 2 of the ICCPR requires a state party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.”³⁰ Because persons within a state’s territory are manifestly subject to its jurisdiction—as are others who are outside of the state’s territory but within the equivalent of its territory under international law or within its occupied territory³¹—the question

³⁰ ICCPR, *supra* note 9, art. 2(1). Protections under the Arab, American, and European Human Rights Conventions and the Rights of the Child Convention also apply to persons when they are within the “jurisdiction” of the member state. *See* Arab Charter on Human Rights art. 3(1), adopted by the League of Arab States, May 22, 2004, *reprinted in* 12 INT’L. HUM. RTS. REP. 893 (2005) (applying to “all individuals subject to its jurisdiction”); American Convention on Human Rights art. 1(1), Nov. 22, 1969, O.A.S. Treaty Ser. No. 36, 144 U.N.T.S. 123 (extending to “all persons subject to their jurisdiction”) [hereinafter American Convention]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221, Eur. T.S. No. 5, revised by Protocol 11, Eur. T.S. No. 155 (1998) (reaching “everyone within their jurisdiction”) [hereinafter European Convention]; Convention on the Rights of the Child art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3 (protecting “each child within their jurisdiction”); *see also* Al-Skeini v. United Kingdom, App. No. 55721/07, 53 Eur. Ct. H.R. 589 (Grand Chamber Judgment), ¶¶ 131–36 (2011), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606> (finding the European Convention applicable where state authorities carry out official functions in another state’s territory (that is, permitted enforcement jurisdiction) and where “an individual is [physically] taken into the custody of State agents abroad” and subjected to their control); *accord* Issa v. Turkey, 41 Eur. Ct. H.R. 567 (Judgment), ¶¶ 69–70 (2004), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67460> (detailing how the Convention applies as a consequence of effective military control over an area); Banković v. Belgium, App. No. 52207/99, 2001-XII Eur. Ct. H.R. 333 (Grand Chamber Decision on Admissibility), ¶¶ 61, 67, 75 (2001), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22099> (finding Article 1 of the European Convention to reflect the “essentially territorial notion of jurisdiction”; circumscribing the “effective control” criteria” so as not to reach everyone “adversely affected by an act imputable to a . . . State”); Loizidou v. Turkey, 20 Eur. Ct. H.R. (Ser. A) (Judgment on Preliminary Objections), ¶ 24 (1995), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920> (applying the European Convention when the state “exercises effective control of an area outside its national territory”); RESTATEMENT, *supra* note 3, § 701 (“A state is obligated to respect the human rights of persons subject to its jurisdiction.”).

³¹ Forms of enforcement jurisdiction under international law that are applicable outside the actual territory of a state include those exercisable on a vessel, aircraft, space craft, satellite, space station

becomes whether other persons can have human rights protections under the ICCPR outside of a state's territory as persons "subject to its jurisdiction."³² The Human Rights Committee under the ICCPR has affirmed a widely shared expectation that those who are outside of a state's territory and included as persons subject to the state's "jurisdiction" are those who are within the actual "power or effective control" of the state party.³³ There has not been full

that has the state's flag or registry, and territory that the state occupies under the law of occupation. *See, for example*, PAUST ET AL., *supra* note 7, at 196–97, 200, 490; PAUST, VAN DYKE & MALONE, *supra* note 15, at 79, 596 & n.2. Persons on board such vessels and objects or within occupied territory are decidedly among those subject to the jurisdiction of the state. *See* Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 168, ¶ 178 (Dec. 19) (finding a "duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory"); *id.* at ¶¶ 179, 206, 219, 345; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 128, 136 (July 9) (holding that Articles 12 and 17 of the ICCPR apply to persons in occupied territory); *see also* Hirsi Jamaa v. Italy, App. No. 27765/09, 2012 Eur. Ct. H.R. (Grand Chamber Judgment), ¶ 180 (Feb. 23), *available at* <http://www.refworld.org/pdfid/4f4507942.pdf>; cases cited *supra* note 30; U.N. Comm'n on Human Rights, Res. 1991/67, U.N. Doc. E/CN.4/1991/91 (Mar. 6) (recognizing Iraq's grave violations of human rights in occupied Kuwait); Van Schaack, *supra* note 13, at 35–37.

³² ICCPR, *supra* note 9, art. 2(1). The phrase "subject to its jurisdiction" is clearly a limiting phrase and does not allow the ICCPR to reach persons who are merely affected by a state's conduct abroad.

³³ *See* U.N. H.R. Comm., General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (finding treaty rights applicable "to anyone within the power or effective control of [the] State Party, even if not situated within the territory of the State" and also to "those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained"); *see also* Consequences of a Wall in Occupied Palestine Territory, Advisory Opinion, *supra* note 31, ¶¶ 108–11 (the ICCPR "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"); U.N. H.R. Comm., *Concluding Observations on the Fourth Report of the United States of America*, 110th Sess., Mar. 10–28, 2014, ¶ 4(a), U.N. Doc. CCPR/C/USA/CO4 (Apr. 23, 2014) (recommending that the U.S. "[i]nterpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context" and "acknowledge the extraterritorial application of the Covenant under certain circumstances"); U.N. H.R. Comm., *Concluding Observations of the Human Rights Committee, United States of America*, 87th Sess., July 10–28, 2006, ¶¶ 10, 16, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1 (Dec. 18, 2006); U.N. H.R. Comm., *Concluding Observations of the Human Rights Committee, Israel*, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003) (finding that the ICCPR applied to Israeli conduct in occupied territory); U.N. H.R. Comm., Delia Saldias de Lopez v. Uruguay, Communication No. 52/1979, ¶ 12(3), U.N. Doc. CCPR/C/13/D/52/1979, U.N. Doc. A/36/40 (July 29, 1981) (finding the ICCPR applicable to a Uruguayan kidnaping in Argentina); Coard et al. v. United States, Case No. 10.951, Report No. 109/99, Annual Report of the Inter-Am. Comm. H.R. (Sept. 29, 1999), OEA/Ser.L/V/11.106, doc. 6 rev. (1999), ¶ 37 (finding the U.S. bound to recognize the rights of persons "subject to its authority and control"); KAREN DA COSTA, *THE EXTRATERRITORIAL APPLICATION OF SELECTED HUMAN RIGHTS TREATIES* 40 (2013); MANFRED NOWAK, *UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY* 43–44 (2d ed. 2005);

clarification of who might be within the actual power or effective control of a state outside its territory or the equivalent of its territory, but a person detained by the state (for example, by U.S. CIA or military personnel in Germany) would definitely be covered.

With respect to U.S. eavesdropping and data collection from various forms of communication, the critical question under the ICCPR becomes whether a human rights claimant outside of U.S. territory, the equivalent of U.S. territory, and U.S.-occupied territory, may still be within the actual “power or effective control” of the U.S. There is no evident test concerning protection abroad from interference by private actors who do not act with or in support of a state. Perhaps an analogous test would inquire into whether a privacy claimant is within the power or effective control of an alleged private perpetrator. Apparently, very few persons would be covered under such a test. As previously noted, a person detained by the U.S. would be within its actual power or effective control and, therefore, protected under the ICCPR, but most who allege that they are victims of an extraterritorial interference would not be. For example, a suspected member of al-Qaeda residing in Germany whose cell phone and computer are under surveillance by the U.S. would not be protected under the ICCPR—even if the *data collected* is within the power or effective control of the U.S.³⁴ Some have suggested that such a person should nonetheless

CHARTER COMMENTARY, *supra* note 4, at 930; Anne Peters, *Surveillance without Borders: The Unlawfulness of the NSA Panopticon, Part II*, EJIL Talk (Nov. 4, 2013), <http://www.ejiltalk.org/surveillance-without-borders-the-unlawfulness-of-the-nsa-panopticon-part-ii> (last visited Nov. 18, 2014) (“The state is bound either within its territory or vis-à-vis persons under its ‘jurisdiction.’”). The Convention Against Torture also applies extraterritorially and covers a particular person when the person is within the jurisdiction or “effective control” of a State. *See* PAUST ET AL., *supra* note 7, at 860–61. Regarding the “effective control” and “control and authority” criteria used in connection with the European Convention, see sources cited *supra* note 30. Some human rights instruments do not contain an express limitation to persons subject to a state’s jurisdiction. *See* discussion *supra* notes 3, 10 (regarding the UN Charter, which provides a universal reach for human rights under customary international law, and the UDHR, respectively); *see also* discussion *infra* note 62 (analyzing the American Declaration of the Rights and Duties of Man); Van Schaack, *supra* note 13, at 25 (noting that the UDHR does “not contain any jurisdictional limitations at all, framing [its] articulated rights as universally applicable to all persons under all circumstances”).

³⁴ An interesting new claim has been made that, when data or “communications are intercepted within [a] State’s territory,” the State should owe obligations to individual communicators “regardless of their location” and that the obligation would be “not to interfere with communications that pass through their territorial borders,” especially where interference has “extra-territorial effects.” Carly Nyst, *Interference Based Jurisdiction Over Violations of the Right to Privacy*, EJIL Talk (Nov. 21, 2013), <http://www.ejiltalk.org/interference-based-jurisdiction-over-violations-of-the-right-to-privacy> (last visited Nov. 18, 2014). Nonetheless, the ICCPR and most human rights instruments focus on whether the person is within the jurisdiction of a State, as supplemented by the “actual power or effective control” test, and not whether data is collected within its jurisdiction. *See* ICCPR, *supra* note 9, art. 2(1). Moreover, questions would arise under Nyst’s approach as to whether communications are interfered with if they are secretly monitored

be considered within the “virtual” control of the U.S. and that this should suffice. However, this claim regarding virtual “extraterritorial control over persons” where actual physical power or effective control of persons is lacking, while interesting, is new and without support in patterns of generally shared legal expectations about personal jurisdiction.³⁵ Moreover, what would be controlled extraterritorially would be communications and data, not persons, and the focus of the text of Article 2 of the ICCPR is unavoidably on “individuals” who are within the “jurisdiction” of a state.

The same circumstance is likely to occur with respect to claims concerning extraterritorial interference by non-state actors. Even in a “virtual” cyber world, merely viewing or listening to a person will not result in a limitation on what the person can do or will refrain from doing. There will be no virtual control of the person. Similarly, if a photographer uses a powerful telephoto lens to take a picture of a person standing in another country, she will have no control over the subject. For many who expect that they have a transnational human right to privacy and private communications in such a circumstance, this clear lack of extraterritorial protection for persons outside the actual power or effective control of the monitoring state is merely one of the major forms of a human rights disconnect. Another disconnect involves the actual human rights that would be at stake even if an alleged victim *is* within the actual power or effective control of the monitoring state (for our purposes, the U.S.).

or collected. A newer claim has been made in a report of the Office of the UN High Commissioner for Human Rights. After rightly noting that “anyone within the power or effective control” of a party to the ICCPR is covered, the report offers an unsupported sleight-of-hand assertion: “It follows that . . . [a] State’s exercise of power or effective control in relation to digital communications infrastructure . . . for example, through direct tapping or penetration of that infrastructure” engages the State’s obligation. Report of the Office of the United Nations High Commissioner for Human Rights, *The Right of Privacy in the Digital Age*, at 11–12, ¶¶ 32, 34, U.N. Doc. A/HRC/27/37 (June 30, 2014). While similarly confusing control of data with control of persons, the report asserts that this duty applies “[e]qually, where the State exercises regulatory jurisdiction over a third party that physically controls the data.” *Id.* at 12, ¶ 34.

³⁵ See Peters, *supra* note 33 (“The mere surveillance as such does not constitute *physical* control, but it may (depending on the extent and intensity) constitute virtual control. It is not too far-fetched in the cyber-age to imagine that this type of control might also trigger the human rights obligation of the ‘virtual’ controller.”) (emphasis in original); Peter Margulies, *The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism*, 82 *FORDHAM L. REV.* 2137 (2014) (preferring a “virtual control” test).

IV. THE RELATIVE HUMAN RIGHT TO PRIVATE COMMUNICATION

A. “Arbitrary” or “Unlawful”

The human right to private communication is not absolute.³⁶ For example, Article 12 of the Universal Declaration of Human Rights (UDHR) declares that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.”³⁷ Necessarily, one has to be subjected to an “interference” and, under the UDHR, the interference must be arbitrary before there can be an impermissible infringement of the right. The ICCPR also uses the arbitrary interference test, but it adds an alternative standard regarding an impermissible interference—an interference is also impermissible when it is “unlawful.” As noted in Article 17 of the ICCPR, a person “shall [not] be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”³⁸

³⁶ See U.N. H.R. Comm., General Comment No. 16, *supra* note 28, ¶ 7 (“As all persons live in society, the protection of privacy is necessarily relative.”); Peters, *supra* note 33 (“The right to privacy is not absolute. It may be lawfully restricted; it is violated only if the restrictions are not justified.”); La Rue Report, *supra* note 29, at ¶ 21 (“As the right to privacy is a qualified right, its interpretation raises challenges with respect to what constitutes the private sphere and in establishing notions of what constitutes public interest.”). More generally, the legal meaning of a treaty-based or customary norm will have as its core a generally shared expectation or *opinio juris* that can expand or contract over time. See discussion *infra* notes 46, 114.

³⁷ UDHR, *supra* note 10, art. 12. The UDHR mentions the Charter-based duty of all UN members to promote “universal respect for and observance of human rights.” *Id.* pmb. The UDHR also states that “every individual and every organ of society . . . shall strive . . . to secure their universal . . . observance . . . among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.” *Id.* The phrase “peoples of territories under their jurisdiction” might be a limiting phrase regarding contemplated extraterritorial state duties, but this is not clear. The UDHR adds that there should be “no distinction . . . on the basis of the . . . jurisdictional or international status of the country or territory to which a person belongs.” *Id.* art. 2. These two phrases in conjunction might suggest the existence of an implied limitation to persons under a state’s “jurisdiction,” but this is not certain. If such a limitation does not exist, all persons in any location can have relevant protections, and the questions become: what are the types of protection under the UDHR, and what are the limits to relevant rights that appear in its Article 29? See discussion *infra* note 57. In any event, the UDHR is not technically binding like an international agreement, and what becomes most important is not whether it contains an implied limitation regarding jurisdiction, but whether rights and limitations reflected in it have become part of customary international law that is universally applicable through Articles 55(c) and 56 of the UN Charter. See discussion *supra* note 3.

³⁸ ICCPR, *supra* note 9, art. 17(1). The “arbitrary or unlawful” standard is also used in the Arab Charter on Human Rights, *supra* note 30, art. 21(1), and in the Convention on the Rights of the Child, *supra* note 30, art. 16(1). The American Convention on Human Rights uses the “arbitrary or abusive” standard. American Convention, *supra* note 30, art. 11(2). The UDHR uses merely the “arbitrary” standard. UDHR, *supra* note 10, art. 12. Only the European Convention uses the

Under either substantive legal standard, three questions arise: (1) does the person have a protectable privacy interest; (2) if so, has there been an interference with it; and (3) is the interference permissible in view of substantive standards or limitations? The first two questions will be addressed in this subsection in reverse order, and the third question will be addressed in detail in the next subsection. With respect to the second question, a choice must be made regarding what constitutes subjection of a person to an interference. For example, will secret governmental eavesdropping, data collection, or data mining constitute an interference with one or more of the four relational, spatial, and physical categories of “privacy, family, home or correspondence”? If data collection and data mining remain secret and produce no known impact on a person, some might conclude that the person has not been subjected to an interference. However, others might conclude that even secret governmental awareness of information within the ambit of one’s privacy interest constitutes an interference. This is the approach of the European Court of Human Rights (ECHR), which has recognized that interception and subsequent storage of a telephone, facsimile, or email communication will constitute an “interference” with “private life” and “correspondence,” whether or not the communicator has been “inconvenienced.”³⁹ In such cases, societal expectations answer the

manifestly more stringent standard of “necessity” with respect to limitations of the right to privacy. See European Convention, *supra* note 30, art. 8(2).

³⁹ See, for example, Nyst, *supra* note 34, citing three cases set forth below with relevant quotations: *Malone v. United Kingdom*, 7 Eur. H.R. Rep. 14 (Judgment), ¶ 64 (1984), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57533> (“[T]he existence . . . of laws and practices which permit and establish a system for effectuating secret surveillance of communications amounted in itself to an ‘interference . . . with the exercise’ of the applicant’s rights . . . , apart from any measures actually taken against him”); *Weber and Saravia v. Germany*, 46 Eur. H.R. Rep. SE5 (Decision on Admissibility), ¶ 78 (2006), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76586> (“[A]pplicants . . . were unable to demonstrate that the impugned measures had actually been applied to them. . . . [H]owever, . . . the mere existence of legislation which allows a system for the secret monitoring of communications entails a threat of surveillance for all those to whom the legislation may be applied. This threat . . . amounts in itself to an interference”); accord *Kennedy v. United Kingdom*, 52 Eur. H.R. Rep. 4 (Judgment), ¶ 118 (2010), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98473>. That an interference with a recognized privacy interest occurs does not require a conclusion that the interference is arbitrary or otherwise impermissible. See discussion *infra* notes 101–102. Although using the rare and restrictive limitations on the right to privacy found in Article 8(2) of the European Convention, the Court in *Malone* found that domestic law did “not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking.” *Malone v. United Kingdom*, *supra*, ¶ 79. Moreover, “the resultant interference can only be regarded as ‘necessary in a democratic society’ if the particular system of secret surveillance adopted contains adequate guarantees against abuse.” *Id.* ¶ 81 (internal citation omitted). See also discussion and sources cited *infra* note 102.

question whether there is an interference as well as the first question (in other words, whether a privacy interest exists or is at stake). A third question remains—that is, whether an interference is permissible. As noted in Section IV.C, generally shared legal expectations regarding proper interpretation of relevant normative standards and limitations answer this question.

With respect to the first question posed—whether a person has a protectable privacy interest—a contextually-grounded choice will have to be made about whether privacy exists or is at stake in a given context. For example, under U.S. constitutional law (which is useful by analogy but not determinative), courts often inquire whether a person has a “reasonable expectation of privacy” in a given circumstance before concluding that “privacy” exists or is at stake.⁴⁰ If a person places garbage out near the street where others can access it, courts have ruled that privacy does not obtain.⁴¹ If a person mails a postcard with a clear written message on the back, courts usually find that the writer did not have a reasonable expectation of privacy and that the message was a public one.⁴² The opposite conclusion is predictable when a person places the message in a sealed non-see-through envelope for mailing. As the Human Rights Committee under the ICCPR has noted with respect to “the integrity and confidentiality of correspondence, . . . [c]orrespondence should be delivered to the addressee without interception and without being opened or otherwise read.”⁴³ Whether messages sent via email, texting, or otherwise through the internet are like those on the back of a postcard, those within a sealed envelope,

⁴⁰ See, for example, *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (“[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’ Thus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the ‘plain view’ of outsiders are not ‘protected’ because no intention to keep them to himself has been exhibited.”). Although the U.S. Constitution generally constrains government action abroad, the Fourth Amendment applies abroad merely to the people of the U.S. and does not confer protections from unreasonable searches on aliens. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 260 (1990).

⁴¹ See *California v. Greenwood*, 486 U.S. 35, 39–41 (1988) (regarding “garbage bags left at the curb outside” of a home, a warrantless search “would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable,” and where they “exposed their garbage to the public” with “the express purpose of conveying it to a third party, the trash collector,” there was no violation of a privacy interest, especially when “[i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible” by others).

⁴² See *U.S. v. Knotts*, 460 U.S. 276, 281–82 (1983); see also *United States v. Jones*, 132 S.Ct. 945, 951–52 (2012) (holding that a reasonable expectation of privacy does not exist when information has “been voluntarily conveyed to the public”). However, the Court’s use of the word “voluntarily” raises a question whether the claimant’s volition should control or is merely an aspect of the particular context to be addressed. See discussion *infra* note 45.

⁴³ U.N. H.R. Comm., General Comment No. 16, *supra* note 28, ¶ 8.

or those in some context in between can depend on ease of public access, general awareness of actual and potential access, and generally shared expectations about the reasonableness of a communicator's claimed expectation of privacy.

U.S. constitutional law since *Katz* tracks logic in prescribing two elements for determining whether a reasonable expectation of privacy exists: (1) whether there is an expectation of privacy, and (2) whether the expectation is reasonable. Presumably one should try to identify whether a relevant expectation is generally shared in society as opposed to whether merely the claimant has an expectation of privacy, although the claimant's expectation would not be irrelevant.⁴⁴ For example, if a claimant has no expectation of privacy when mailing a message on a postcard, it would be proper to conclude that the claimant's privacy is not at stake, especially when society in general would have no expectation of privacy in such a circumstance.⁴⁵ Conversely, if the claimant expects that a message on the back of a postcard is private, it would still be proper to conclude that the claimant's privacy is not at stake, either because of generally shared expectations or, perhaps ultimately, because the claimant's personal expectation is not reasonable. In either circumstance, the individual's expectation could be of some relevance but would not be determinative. With respect to the normative conclusion whether something is reasonable, it is clear that a given community's

⁴⁴ See, for example, Andrew D. Selbst, *Contextual Expectations of Privacy*, 35 CARDOZO L. REV. 643, 646, 649, 655 (2013) (addressing a preferred focus on "society's reasonable expectations of privacy," arguing that the "'reasonable expectation of privacy' test" under the Fourth Amendment to the U.S. Constitution should have "grounding" in contextual awareness of "how people in society actually experience privacy," and looking to "society's actual expectations of privacy"). Selbst rightly criticizes simplistic and "sweeping" use of the "third-party doctrine" in order to obviate privacy interests if information is disclosed merely to some persons but has purposely not been disclosed to "the world," because there should be fuller consideration of context and generally shared expectations about privacy. See *id.* at 656, 658 (regarding problems posed by use of the internet), 673 (adding that this danger is "more apparent today, as society relies on digital communications in which every action is transmitted to third-party Internet service providers, search engines, email servers, and others"), 707 ("If third-party doctrine continues as is, email, text messages, any documents stored online—basically any digital communication—will be outside the purview of the Fourth Amendment . . ."); see also *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting) ("Those who disclose certain facts to a bank or phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes."); but see discussion *infra* text accompanying note 92.

⁴⁵ See *Lustiger v. United States*, 386 F.2d 132, 139 (9th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968) ("[F]irst class mail cannot be seized and retained, nor opened and searched, without the authority of a search warrant. . . . However, the Fourth Amendment does not preclude postal inspectors from copying information contained on the outside of sealed envelopes in the mail, where no substantial delay in the delivery of the mail is involved.") (internal citations omitted); *Canaday v. United States*, 354 F.2d 849, 856 (8th Cir. 1966) (holding that "recording of information contained on the outside of first-class envelopes, such as the name and address of sender and addressee," did not violate the Fourth Amendment).

generally shared expectations are the proper standard,⁴⁶ although other international legal precepts and policies at stake might allow decision makers to conclude that a given intrusion is not “reasonable” despite general social acceptance of such a form of intrusion. Such might be the conclusion, for example, if the intrusion operated merely against a religious minority, but it might be intellectually more appropriate to conclude in such a circumstance that the intrusion was generally reasonable but impermissible because of unacceptable religious-based discrimination.

An interesting dynamic with respect to privacy on the internet and in other methods of communication involves the increasing public awareness of hacking, eavesdropping, data collection, and data storage by public and private actors. For example, the more the public learns about widespread U.S. and other governmental intrusions, the more compelling the conclusion that a given privacy interest is not at stake and that a communicator’s expectation of privacy is unreasonable. Yet it is theoretically possible that such a change in expectations about privacy could move serially such that, at one stage, public awareness of actual and potential invasions exists, but the public generally expects that the intrusions are unreasonable or that privacy is being violated. In such a circumstance, society would not expect that internet and phone communications are always private but would still have the normative expectation that widespread governmental hacking, eavesdropping, collection, and storage is an impermissible (because unreasonable) interference with a privacy interest.⁴⁷ This is undoubtedly the view of the European Parliament.⁴⁸ Governments may also

⁴⁶ See, for example, Selbst, *supra* note 44, at 650 (arguing that “the normative layer evaluates whether the new information flows being tested are preferable,” and “[a]ppropriateness” is tied to a type of “social norm” termed a “context-relative informational norm” regarding “how information is expected to flow among social actors within a given social context”), 701 (quoting Justice Kagan in *Florida v. Jardines*, 133 S.Ct. 1409, 1419 (2013) (Kagan, J., concurring), for the proposition that “our ‘shared social expectations’” should determine “what places should be free from governmental incursions” (internal citations omitted)). With respect to normative content of international law, patterns of shared expectations regarding content (or *opinio juris*) and objective, generally shared, or “ordinary” meaning also comprise the proper standard, and a core of generally shared meaning or *opinio juris* can expand or contract over time and exclude logically possible meanings from present legal protection. See Vienna Convention, *supra* note 11, art. 31(1); PAUST, VAN DYKE & MALONE, *supra* note 15, at 4–5, 29–30, 49, 69, 93–94, 105–07; Jordan J. Paust, *Basic Forms of International Law and Monist, Dualist, and Realist Perspectives*, in *BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW: MONISM & DUALISM* 244, 253–59 (Marko Novakovic ed., 2013).

⁴⁷ Some claim that there is still a reasonable expectation of privacy regarding use of the internet. See Susan W. Brenner, *Fourth Amendment Future: Remote Computer Searches and the Use of Virtual Force*, 81 MISS. L.J. 1229, 1239 (2012); Hosein & Palow, *supra* note 29, at 1093–95; see also La Rue Report, *supra* note 29, ¶ 21 (quoted *supra* in note 36); *infra* text accompanying note 91.

⁴⁸ See, for example, European Parliament, *Draft Report on the U.S. NSA Surveillance Programme, Surveillance Bodies in Various States and Their Impact on EU Citizen’s Fundamental Rights and on Transatlantic Cooperation in Justice and Home Affairs*, 2013/2188(INI) (Rapporteur Claude Moraes

be aware that their communications and data are increasingly subject to various forms of espionage but continue to expect that espionage is unlawful under domestic law. Therefore, mere awareness of the existence of invasions will not be determinative regarding whether a protectable interest exists or an interference is reasonable. Yet at a certain point, use of email, texting, and cell phones could be considered analogous to use of a postcard to send messages. A notable change in patterns of expectation has already occurred with respect to search of people and luggage on common carriers.⁴⁹

B. Relevant Limitations on Freedom of Communication

1. Under the ICCPR.

Finally, if a person has been subjected to an interference with a protectable interest in privacy or private correspondence, courts and institutions must ask whether there are applicable limitations to enjoyment of the right. For example, even when there is an interference with a recognized privacy interest, whether or not it is permissible under human rights law can depend on proper application of the word “arbitrary” or, as noted regarding the ICCPR, the word “unlawful.” The ostensibly permissive requirement that an interference not be “arbitrary” can result in a significant and potentially far-reaching limitation on one’s privacy and freedom of correspondence. Importantly, the word “unlawful” provides a separate protection because a non-arbitrary interference would still be proscribed under the ICCPR if unlawful within the meaning of Article 17—

MEP), Dec. 23, 2013, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML%2BCOMPARL%2BPE-526.085%2B02%2BDOC%2BPDF%2BV0//EN> [hereinafter Eur. Par. Draft]. President Obama has recognized that “all persons have legitimate privacy interests in the handling of their personal information,” and U.S. intelligence activities “must, therefore, include appropriate safeguards for [] personal information . . . regardless of . . . where [a monitored] individual resides.” Presidential Policy Directive, *supra* note 1, pmb1., § 4. Yet there is no elaboration of what privacy interests are “legitimate,” how interests must be taken “into account,” and what might not be “appropriate” as a safeguard. *See also* discussion *infra* note 82. It also states that “persons should be treated with dignity and respect” (Presidential Policy Directive, *supra* note 1, pmb1., § 4), but most persons abroad will not be “treated” because they will not be detainees.

⁴⁹ *See, for example*, *Electronic Privacy Information Center v. U.S. Dep’t of Homeland Security*, 653 F.3d 1 (D.C. Cir. 2011) (upholding TSA search with advanced imaging technology at an airport); *United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (upholding the same TSA search); *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006) (upholding random suspicionless subway baggage searches to prevent terrorism); *Torbet v. United Airlines, Inc.*, 298 F.3d 1087 (9th Cir. 2002) (finding implied consent to search when a bag is placed on x-ray conveyor belt at an airport); *American-Arab Anti-Discrimination Committee v. Massachusetts Bay Transp. Authority*, No. 04-11652-GAO, WL1682859 (D. Mass. July 28, 2004) (search at a train); *see also United States v. Edwards*, 498 F.2d 496, 499–500 (2d Cir. 1974) (showing how luggage and sealed envelopes were previously given the same treatment).

determination presumably depending on the content, reach, and proper consideration of relevant domestic, regional, and international law.⁵⁰ In fact, relevant international law is a necessary background for proper interpretation of any treaty.⁵¹ The Human Rights Committee under the ICCPR has added, “[t]he term ‘unlawful’ means that no interference can take place except in cases envisaged by the law . . . [and] on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.”⁵² More particularly, “[t]he gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law.”⁵³

Determining whether an intrusion is arbitrary under human rights law evokes the standard of reasonableness noted above because an intrusion would not be arbitrary if it is rational and reasonable in a given context.⁵⁴ Some prefer

⁵⁰ See, for example, *Weber and Saravia v. Germany*, *supra* note 39, ¶ 87 (“[T]he term ‘law’ within the meaning of . . . [Article 8 of the ECHR] refers back to national law, including rules of public international law applicable in the State concerned.”); NOWAK, *supra* note 33, at 382 (arguing that it “primarily refers to violations of . . . domestic laws, [but] it might also be interpreted to cover violations of international” law); Peters, *supra* note 33 (“[T]he word ‘unlawful’ should be interpreted expansively so as to include not only unlawfulness under domestic law but also unlawfulness under international law. The modern approach to expressions such as these is to construe them autonomously, that is, not as pure *renvois* to domestic law, in order to contribute to a universal understanding of the treaty provision.”). These laws might conflict in a given circumstance. For example, if surveillance is lawful under domestic law, it might be unlawful under regional or international law other than the human rights law contained in the ICCPR. Conversely, it might be unlawful under certain domestic law but permissible under international law. See *infra* Section IV.C.2.

⁵¹ See, for example, Vienna Convention, *supra* note 11, art. 31(3)(c) (“There shall be taken into account . . . any relevant rules of international law.”).

⁵² H.R. Comm., General Comment No. 16, *supra* note 28, at 191.

⁵³ *Id.* at 193. See discussion *infra* note 108 (focusing on domestic law of the state engaged in surveillance).

⁵⁴ See H.R. Comm. General Comment No. 16, *supra* note 28, at 191, ¶ 4 (interpreting Article 17 of the ICCPR “to guarantee that even interference provided for by law . . . should be[,] . . . in any event, *reasonable* in the particular circumstances”) (emphasis added); H.R. Comm., *Canepa v. Canada*, Comm. No. 558/1993, U.N. Doc. CCPR/C/59/D/558/1993, ¶ 11.4 (June 20, 1997) (“[A]rbitrariness . . . extends to the reasonableness of the interference with the person’s rights under Article 17 and its compatibility with the purposes, aims and objectives of the Covenant.”); *Gretel Artavia Murillo v. Costa Rica*, Case No. 12.361, Inter-Am. Comm’n H.R., Report No. 85/10, ¶ 88 (2011) (holding conduct abusive or arbitrary if it is unreasonable); NOWAK, *supra* note 33, at 383 (arguing that the term “arbitrary” is related to “elements of injustice, unpredictability and unreasonableness” and that, “[i]n evaluating whether interference with privacy by a State . . . represents a violation,” one must review “whether it was reasonable (proportional) in relation to the purpose to be achieved”). More generally, conduct can be arbitrary if it is irrational, without reason, capricious, or not reasonable—that is, “not flawed by arbitrariness or otherwise manifestly unreasonable.” *Anheuser-Busch, Inc. v. Portugal*, App. No. 73049/01, (Eur. Ct. H.R. Jan. 11, 2007) (Judgment), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001->

to add a requirement that an intrusion must be proportionate to a reasonable need.⁵⁵ This might be useful, but, when gauging whether a particular governmental intrusion is arbitrary, attending to the many features of actual context would seem to entail adequate consideration of proportionality.

In any event, what is or is not arbitrary, rational, or reasonable should be determined with reference to context as well as other relevant precepts, rights, and policies at stake. Among those identified in the UDHR are the human right of all persons to “dignity and worth”;⁵⁶ limitations of rights that are “determined by law” and are “solely for the purpose of” “securing due recognition and respect for the rights and freedoms of others”;⁵⁷ and limitations that are “determined by law” and are “solely for the purpose of” “meeting the just requirements of morality, public order and the general welfare in a democratic society.”⁵⁸ Clearly, concern for dignity of the person can pull one way while

78981; see *Murphy v. Ireland*, 2003-IX Eur. Ct. H.R., 1, 20–25 (addressing the “necessary in a democratic society” test of the European Convention regarding restrictions on speech, finding that the limitation at issue “reflects a reasonable distinction made by the State,” and holding “[i]n the circumstances, . . . that the State has demonstrated that there were ‘relevant and sufficient’ reasons justifying the interference”); Peters, *supra* note 33 (“[T]he proper, generally acknowledged test for determining the admissibility of a human rights restriction is the following: there must be a basis in law, the governmental measures must *pursue a legitimate aim*, and they must be *proportionate*. When these conditions are not satisfied, interference with privacy or correspondence is ‘unlawful or arbitrary.’”) (emphasis added). The standard is not a necessity standard, which only the European Convention employs. See European Convention, *supra* note 30, art. 8(2) (requiring limitations be “necessary in a democratic society”); *supra* text accompanying note 38; La Rue Report, *supra* note 29, ¶¶ 3, 28–29, 81, 83(b); *but see* Nyst, *supra* note 34 (“I would argue that mass or indiscriminate surveillance is arbitrary, as it doesn’t apply the principles of necessity and proportionality required under international law.”). Moreover, an intrusion that is not necessary can still be rational, reasonable, and non-arbitrary. Nonetheless, there are other limitations to other rights that have been phrased in terms of “requirements” and what is “necessary.” See *infra* text accompanying notes 61, 76; see also European Convention, *supra* note 30, art. 8(2) (proscribing interference with privacy “except such as is in accordance with the law and is necessary in a democratic society” for the serving of certain listed purposes, including “the protection of the rights and freedoms of others”); *supra* note 39.

⁵⁵ See, for example, Nyst, *supra* note 34; Peters, *supra* note 33; La Rue Report, *supra* note 29, ¶¶ 3, 28, 29(f), 83(c).

⁵⁶ UDHR, *supra* note 10, pmbi., art. 1.

⁵⁷ *Id.* art. 29 (“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”). Concerning accommodation of the rights of others, see African Charter on Human and Peoples’ Rights (“Banjul Charter”) art. 27(2), June 27, 1981, 1520 U.N.T.S. 217 (1982) (“The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”); European Convention, *supra* note 30, art. 8(2); *infra* text accompanying notes 59, 68; *infra* text accompanying notes 72, 79 (concerning Article 32(2) of the American Convention).

⁵⁸ UDHR, *supra* note 10, art. 1.

concern for the dignity and rights of others and for public order can pull the other way. Phrases such as “due recognition” and “just requirements” pose additional problems concerning interpretation and application in a given context. What is due or just should be decided with reference to generally shared expectations about the content of these concepts, their relation to various other rights and policies at stake, and their application in particular circumstances.⁵⁹

Article 19 of the ICCPR recognizes a relevant human right to freedom of expression and affirms that “this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”⁶⁰ Some forms of governmental surveillance, in addition to constituting an intrusion of privacy, can have an understandable chilling effect on freedom of expression and access to information. However, the subsequent paragraph of Article 19 states that exercise of the rights set forth is subject to “special duties and responsibilities” of the rights claimant and also recognizes forms of limitation that can apply if they are “provided by law and are necessary (a) [f]or respect of the rights or reputations of others; [or] (b) [f]or the protection of national security or of public order (*ordre public*), or of public health or morals.”⁶¹

2. Under the American Declaration.

Within the Americas, the United States is also bound to comply with the American Declaration of the Rights and Duties of Man (American Declaration),⁶² which provides authoritative content to the human rights

⁵⁹ See MCDUGAL, LASSWELL & CHEN, *supra* note 3, at 119, 459, 800, 805–07 (regarding the need for accommodation of different rights and interests); 2005 World Summit Outcome, *supra* note 10, ¶ 121 (“[A]ll human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing.”); *supra* text accompanying notes 46, 57 (regarding *opinio juris* and normative meaning); *infra* text accompanying notes 68–72, 79 (regarding proper accommodation of rights of others and correlative duties of states).

⁶⁰ ICCPR, *supra* note 9, art. 19(2). In a given circumstance, surveillance can be abused in an effort to deny the right to freedom of expression, especially in non-democratic societies. See, for example, La Rue Report, *supra* note 29, ¶¶ 24–27, 69; Eur. Par. Draft, *supra* note 48, ¶¶ 74–75.

⁶¹ ICCPR, *supra* note 9, art. 19(3). Relevant rights of others can include the right to “security of person” against terrorist harm. See *id.* art. 9(1) (“Everyone has the right to liberty and security of person.”); see also discussion *infra* notes 69, 70.

⁶² American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser.L/V/I.4Rev. (1965) [hereinafter American Declaration]. Unlike many human rights instruments, the American Declaration’s reach is not limited by phrases such as “persons subject to its jurisdiction.” See *Alejandro et al. v. Cuba*, Case No. 11.589, Annual Report of the Inter-Am. Comm. H.R. (Sept. 29, 1999) (applying the American Declaration to the Cuban downing of aircraft over the high seas); NILS MELZER, TARGETED KILLINGS IN INTERNATIONAL LAW 125–28 (2008) (asserting that the American Declaration “does not contain a jurisdiction clause” and has been applied abroad to more than just conduct occurring in occupied territory or the killing of individuals by state actors). In the absence of this limitation, the question becomes, what rights

guaranteed under the Charter of the Organization of American States.⁶³ Among relevant rights that are set forth in the American Declaration are the right of every person to “freedom . . . of the expression and dissemination of ideas, by any medium whatsoever”;⁶⁴ “the right to the inviolability of his home”;⁶⁵ “the right to the inviolability and transmission of his correspondence”;⁶⁶ and “the right to protection of the law against abusive attacks upon . . . his private and family life.”⁶⁷ Yet “[t]he rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the

are covered in the American Declaration and what limitations of rights pertain? Although the European Convention is also a regional human rights instrument, it has recognizably bound European parties and their nationals outside of Europe. *See, for example*, *Al-Skeini v. United Kingdom*, *supra* note 30. This supports the argument that the American Declaration will apply to conduct of American states and their nationals outside of the American region. However, the American Declaration only has ultimate legal force through the Charter of the Organization of American States, which is focused on the region. *See* discussion *infra* note 63.

⁶³ Charter of the Organization of American States, arts. 3(k)–(l), signed April 30, 1948, 119 U.N.T.S. 3, 2 U.S.T. 2394, T.I.A.S. No. 2631 (addressing common welfare for “the peoples of the continent,” and proclaiming “fundamental rights of the individual”) (citations to various subsequent Charter amendments omitted); *see also id.* arts. 17, 45 (mandating that “the State shall respect the rights of the individual”; addressing a “just social order” and a “right to material well-being . . . under circumstances of liberty, dignity, equality of opportunity, and economic security” in connection with principles related to “international social justice” and “integral development for their peoples” pledged in Article 30). Regarding authoritative use of the American Declaration through the O.A.S. Charter, *see* Advisory Opinion OC–10/89, I-A. Inter-Am. Court H.R., Ser. A, No. 10, ¶ 45 (1989); Inter-American Comm. on Human Rights, Report on the Situation of the Inhabitants of the Interior of Ecuador Affected by Development Activities, Chapter VII (1996), O.A.S. Doc. OEA/Ser.L/V/II.96, doc. 10, rev. 1 (April 24, 1997) (“The American Declaration . . . continues to serve as a source of international obligation for all member states . . .”); The “Baby Boy” Opinion, Case 2141, Inter-Am. Comm. H.R. 25, OEA/Ser.L/V/II.54, doc. 9 rev. 1 (1981), ¶ 16 (“As a consequence of Articles 3i, 16, 51e, 112 and 150 of [a prior version of the OAS Charter], the provisions of other instruments and resolutions of the OAS on human rights acquired binding force.”). Documents of the O.A.S. on human rights that have been approved by a vote in U.S. Congress include the American Declaration, which affirms several human rights now protected through the O.A.S. Charter, including the right to “resort to the courts to ensure respect for [one’s] legal rights.” American Declaration, art. XVIII; *see also* Roach Case, No. 9647, Inter-Am. Comm. H.R. 147, OEA/Ser.L/V/II.71, doc. 9 rev. 1 (1987), ¶ 48; BUERGENTHAL, SHELTON & STEWART, *supra* note 3, at 227–28; RICHARD B. LILICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS 802–04 (3d ed. 1995); MCDUGAL, LASSWELL & CHEN, *supra* note 3, at 198, 316; PAUST, VAN DYKE & MALONE, *supra* note 15, at 437–38; DAVID WEISSBRODT, JOAN FITZPATRICK & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS 598–600 (3d ed. 1996).

⁶⁴ American Declaration, *supra* note 62, art. IV.

⁶⁵ *Id.* art. IX.

⁶⁶ *Id.* art. X. Regardless of whether it can include phone conversations, the word correspondence clearly can include transmission of email and text messages. In any event, phone conversations can be part of private life if there is a protectable privacy interest at stake with respect to particular conversations.

⁶⁷ *Id.* art. V.

advancement of democracy.”⁶⁸

Although “freedom” and “inviolability” are potentially bedrocks of privacy in one’s home and private communication, the recognition that “private and family life” are protected from “abusive attacks” suggests that the phrase “abusive attacks” is a limitation and that non-abusive interferences with private and family life can be tolerated. In any event, broad limitations of documented rights can pertain regarding (1) “the rights of others” and (2) “the security of all,” and they provide two significant bases for justifying national security intrusions on privacy and private communications. With respect to proper accommodation of the rights of others, it is important to recognize that “the security of all” and the right of each person to “security of . . . person” contained in the American Declaration⁶⁹ and in several other human rights instruments,⁷⁰ can be served through permissible measures of national security protection.⁷¹ Indeed, a single-minded emphasis on the human rights of the privacy claimant could lead to inadequate consideration of potentially conflicting human rights of others, including the human rights of others to dignity and personal security and the correlative duties of states to seek to achieve personal security for all who are within their jurisdiction.⁷²

3. Under the American Convention.

The United States has not ratified the American Convention, but because President Carter signed the treaty on July 1, 1977 and the signature has

⁶⁸ *Id.* art. XXVIII.

⁶⁹ *Id.* art. I. Personal and national security can obviously be violated or threatened by state and non-state actor terrorism, armed attacks, and warfare. Such conduct would also threaten general welfare and the advancement of democracy, which are relevant to limitations under Article XXVIII.

⁷⁰ *See, for example*, ICCPR, *supra* note 9, art. 9(1); UDHR, *supra* note 10, art. 3; American Convention, *supra* note 30, art. 7(1); European Convention, *supra* note 30, art. 5(1).

⁷¹ *See supra* text accompanying note 57.

⁷² *See* Human Rights and Terrorism, U.N. G.A. Res. 59/195, pmbl., ¶ 13 (Dec. 20, 2004) (expressing serious concern “about the gross violations of human rights perpetrated by terrorist groups,” and stressing “that every person . . . has a right to protection from terrorism and terrorist acts,” respectively); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (Ser. A) (Judgment), ¶ 149 (1978), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57506> (stating in dictum that “terrorist activities . . . of individuals or of groups . . . are in clear disregard of human rights”). Aliens within a state’s jurisdiction are also entitled to personal security. *See* RESTATEMENT, *supra* note 3, § 711, cmts. a, b, c, e, RN 2 (regarding “denial of justice” to aliens through a failure to adequately protect aliens from violence). Many reports and court opinions pay no express attention to others’ individual human rights, especially the right to personal security. *See, for example*, La Rue Report, *supra* note 29 (noting the potentially interconnected right to freedom of speech but not mentioning the right to personal security); Eur. Par. Draft, *supra* note 48; H. R. Comm., *Concluding Observations on the Fourth Report of the United States of America*, *supra* note 33, ¶ 22.

not been withdrawn,⁷³ the United States is bound under international law to take no action inconsistent with the object and purpose of the treaty.⁷⁴ Clearly, the object and purpose of a human rights treaty are to assure the guarantee and effectuation of the rights set forth in the treaty.

Under the American Convention the right to privacy, including private life and correspondence, is merely protected against “arbitrary or abusive interference”;⁷⁵ and the right to freedom of expression is “subject to subsequent imposition of liability . . . expressly established by law to the extent necessary in order to ensure: (a) respect for the rights or reputations of others, or (b) the protection of national security, public order, or public health or morals.”⁷⁶ However, “[t]he right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls, . . . or by any other means tending to impede the communication and circulation of ideas and opinions.”⁷⁷ Moreover, the American Convention provides a set of limitations with respect to interpretation of any of its provisions and, therefore, a potential set of limitations of any of the limitations of right.⁷⁸ Importantly, the American Convention also recognizes that “[t]he rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”⁷⁹

⁷³ See BUERGENTHAL, SHELTON & STEWART, *supra* note 3 at 242, 358.

⁷⁴ See Vienna Convention, *supra* note 11, art. 18(a) (“A State is obligated to refrain from any acts which would defeat the object and purpose of a treaty when . . . (a) [i]t has signed the treaty . . . subject to ratification . . . until it shall have made its intention clear not to become a party to the treaty . . .”).

⁷⁵ American Convention, *supra* note 30, art. 11(2). *But see* Tristán Donoso v. Panamá, 2009 Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 56 (Jan. 27, 2009) (confusing different standards of “arbitrary or abusive” (which are the standards in Article 11(2) of the Convention) and necessary: “the right to privacy . . . may be restricted by the States provided that interference is not abusive or arbitrary; accordingly, such restriction must be statutorily enacted, serve a legitimate purpose, and meet the requirements of suitability, necessity, and proportionality which render it necessary in a democratic society”). The American Convention identifies an “intention to consolidate in this hemisphere . . . a system of personal liberty and social justice based on respect for the essential rights of man.” *Id.* pmb1.

⁷⁶ *Id.* art. 13(2).

⁷⁷ *Id.* art. 13(3).

⁷⁸ See *id.* art. 29 (b)(c)(d) (“No provision of this Convention shall be interpreted as . . . (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; (c) precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or (d) excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”). Subsections (b) and (d), then, make domestic and international law relevant to interpretation of the American Convention.

⁷⁹ *Id.* art. 32(2).

C. Application in Context

1. Arbitrary.

As noted, what is rational, reasonable, and non-arbitrary must be considered in context, and a choice must be made regarding accommodation of potentially competing interests and rights. Concerning widespread and systematic surveillance, Professor Anne Peters has suggested:

the impugned measure's objective must be legitimate and the restriction must be proportionate. The policy of combating terrorism and transnational crime is surely a legitimate objective. But the third condition [i.e., proportionality] does not seem to be fulfilled in the case of large-scale and systematic surveillance. It is of course difficult to assess the proportionality of a governmental measure in the absence of a thorough knowledge of the facts. However, dragnet searches and stock data retention of the entire population or large groups without concrete indications founding a suspicion that terrorist or criminal acts are being planned seems *prima facie* disproportionate and unnecessary.⁸⁰

Her points are generally apt, even if one disagrees with her conclusion about *prima facie* aspects of such forms of surveillance. In a given circumstance, widespread and systematic surveillance and data collection can be rational and reasonably needed in order to counter future terrorist threats and for purposes of national security more generally. Additionally, the test with respect to arbitrariness is not a necessity test or one that disallows interferences that are unnecessary, but one related to what is rational and reasonable in a given circumstance.⁸¹

⁸⁰ Peters, *supra* note 33. See Eur. Par. Draft, *supra* note 48, ¶¶ 9, 10 (condemning “in the strongest possible terms the vast, systematic, blanket collection of the personal data of innocent people,” which “constitute[s] a serious interference” with fundamental rights, and noting that the German Federal Constitutional Court prohibited “preventive dragnets . . . unless there is proof of a concrete danger,” respectively); Hosein & Palow, *supra* note 29, at 1103 (claiming that with respect to “mass surveillance . . . it is hard to see how it could [constitute a] reasonable [search],” and “courts should tread carefully when considering whether national security is a sufficient justification” under the U.S. Fourth Amendment); G. Alex Sinha, *NSA Surveillance Since 9/11 and the Human Right to Privacy*, 59 LOY. L. REV. 861, 861, 941 (2013) (“[T]here is good reason to think that the program violates the covenant”; “massive, deliberate collection . . . [is] strongly suggestive of arbitrariness.”).

⁸¹ See discussion *supra* note 54. But see La Rue Report, *supra* note 29, ¶¶ 28–29 (stating that Article 17 “enables necessary, legitimate and proportional restrictions” and recommending a change in Article 17’s test), 81 (claiming contrary to the text of Article 17 that “surveillance of communications must only occur under the most exceptional circumstances”), 83(b) (recommending a change in the relevant legal standard from arbitrary to “strictly and demonstrably necessary to achieve a legitimate aim”); H.R. Comm., *Concluding Observations on the Fourth Report of the United States of America*, *supra* note 33, ¶ 22(a) (claiming, contrary to the express language in Article 17 of the ICCPR and the Human Rights Committee’s General Comment No. 16, that obligations under the ICCPR require that “measures should be taken to ensure that any

For example, in the absence of known intelligence pointing to the existence of an actual plot, would it be arbitrary for the U.S. to engage in widespread collection and data mining of information on suspicion of a secret terrorist plot in Germany to kill President Obama on his next scheduled visit to the country? It seems that such data collection and mining can be rational and reasonable and at least would not be *prima facie* arbitrary within the meaning of the ICCPR. It would appear to be rational and reasonable in view of the significant national security interest at stake in protecting President Obama during his visit. Keeping in mind the right to personal security to which all persons within U.S. jurisdiction are entitled, nonspecific knowledge of a possible terrorist plot would make the same systematized collection of information even more rational, reasonable, and non-arbitrary.⁸²

There was clearly widespread Russian surveillance of communications coming into and emanating from Sochi during the 2014 Winter Olympics, and it was recognizably reasonable in view of a number of publicized terrorist threats and the need to protect the personal security of numerous athletes and spectators.⁸³ Perhaps Professor Peters would agree that general knowledge of a possible plot posed “concrete indications founding a suspicion that terrorist . . .

interference with the right to privacy complies with the principles of legality, proportionality and necessity”). It is unknown why the Committee chose to use a “necessity” test that only appears in the European Convention with respect to limitations of the right to privacy. No citations appear in support of its use of this manifestly incorrect test. A change to a necessity test would have to occur by amendment to the treaty or through a new Protocol to the ICCPR, which would only bind the parties thereto and their nationals. *See infra* Section V.

⁸² *See* Presidential Policy Directive, *supra* note 1, pmb. (“The collection of signals intelligence is necessary . . . [and our] capabilities must also be agile enough to enable us to focus on fleeting opportunities or emerging crises and to address . . . issues of tomorrow, which we may not be able to foresee.”), § 2 (“Locating new or emerging threats and other vital national security information is difficult, as such information is often hidden within the large and complex system of modern global communications. The United States must consequently collect signals intelligence in bulk [sic] in certain circumstances.”); Margulies, *supra* note 35, at 2152 (“NSA surveillance is not arbitrary under Article 17 [of the ICCPR], because it targets terrorists, national security threats, and espionage in a tailored fashion.”); *infra* text accompanying notes 85, 93.

⁸³ *See, for example*, Steven Lee Myers, *An Olympics in the Shadow of a War Zone*, N.Y. TIMES, Feb. 5, 2014, at A1; Thom Shanker, *U.S. and Russia Discuss Olympic Security*, N.Y. TIMES, Jan. 22, 2014, at A7 (discussing sophisticated electronic equipment to be “integrated into the communications networks”); Steven Lee Myers, *Intensive Security for Winter Olympics*, N.Y. TIMES, Jan. 19, 2014, at A6 (detailing efforts “to update the country’s eavesdropping system, known as SORM, to monitor virtually all communications in Sochi”). If the U.S. participated in surveillance of communications in Russia, it would have been with the consent of the Russian government. The security efforts engaged in during the Olympics met with little uproar, and the U.S. Department of State warned “that no one attending the Olympics should expect privacy, noting that Russian law ‘permits the monitoring, retention and analysis of all data that traverses Russian communication networks, including internet browsing, email messages, telephone calls and fax transmissions.’” *Id.* at A6 (internal quotation omitted).

acts . . . [were] being planned”⁸⁴ during the Olympics and, therefore, justified use of widespread and systematic searches and data collection.

With respect to suspicious calls to alleged terrorists, a Second Circuit opinion has held that search by U.S. intelligence operatives of a U.S. citizen’s home in Kenya and electronic surveillance of land-based and cellular phones met the Fourth Amendment’s requirement of reasonableness and that, under the circumstances, no U.S. warrant was needed for the extraterritorial search and surveillance.⁸⁵ The U.S. operatives had been working with Kenyan authorities and had unearthed evidence of calls to five phone numbers known to be used by suspected al-Qaeda associates. The opinion highlighted four compelling reasons why the search and surveillance at issue were reasonable:

First, complex, wide-ranging, and decentralized organizations, such as al Qaeda, warrant sustained and intense monitoring in order to understand their features and identify their members. . . . Second, foreign intelligence gathering of the sort considered here must delve into the superficially mundane because it is not always readily apparent what information is relevant. . . . Third, members of covert terrorist organizations, as with other sophisticated criminal enterprises, often communicate in code, or at least through ambiguous language. . . . Fourth, because the monitored conversations were conducted in foreign languages, the task of determining relevance and identifying coded language was further complicated. Because the surveillance of suspected al Qaeda operatives must be sustained and thorough in order to be effective, we cannot conclude that the scope of the government’s electronic surveillance was overbroad. While the intrusion on [the defendant’s] privacy was great, the need for the government to so intrude was even greater.⁸⁶

More recently, a federal court in the District of Columbia held that complainants’ case against the National Security Agency’s (NSA) wholesale collection and analysis of the phone record metadata of U.S. citizens “demonstrated a substantial likelihood of success on the merits of their Fourth Amendment claim,” and it granted a motion for preliminary injunctive relief.⁸⁷ The judge claimed that decades-old precedent “has been eclipsed by technological advances and a cell phone-centric lifestyle heretofore inconceivable,”⁸⁸ and, although the judge accepted the executive’s claim that “the

⁸⁴ Peters, *supra* note 33.

⁸⁵ See generally *In re Terrorist Bombings of U.S. Embassies in East Africa* (Fourth Amendment Challenges), *United States v. Odeh*, 552 F.3d 157 (2d Cir. 2008), *cert. denied*, 558 U.S. 1137 (2010).

⁸⁶ *Id.* at 176. See Presidential Policy Directive, *supra* note 1 (as quoted *supra* note 82).

⁸⁷ See generally *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.D.C. 2013).

⁸⁸ *Id.* at 43. See *id.* at 30, 33 (addressing *Smith v. Maryland*, 442 U.S. 735 (1979), which used the third party doctrine discussed in note 44, *supra*, and declaring that “the almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived in 1979,” respectively).

public's interest in combating terrorism is of paramount importance," he noted that it had not proven that removal of the complainants "from the database will 'degrade' the [NSA] program in any meaningful sense."⁸⁹ The judge noted that the NSA program involved an indiscriminate collection of metadata "without any particularized suspicion of wrongdoing"⁹⁰ and, for several reasons, decided that the program "almost certainly does violate a reasonable expectation of privacy."⁹¹ Addressing the point that widespread awareness of the NSA program might lead to acceptance of a diminution of privacy, the judge stated that it is more likely that such has "resulted in a greater expectation of privacy and a recognition that society views that expectation as reasonable."⁹²

Thereafter, a lower court in New York took note of the District of Columbia opinion but ruled quite differently. Relying on prior Supreme Court precedent "that an individual has no legitimate expectation of privacy in information provided to third parties,"⁹³ the court held that the NSA's metadata collection program did not violate the Fourth Amendment.⁹⁴ The court also noted that "[t]he effectiveness of bulk telephony metadata collection cannot be seriously disputed" and that the executive had disclosed some examples of

⁸⁹ *Id.* at 43 (internal quotation omitted).

⁹⁰ *Id.* at 30.

⁹¹ *Id.* at 32. The judge also stated that he "cannot imagine a more indiscriminate and arbitrary invasion than this systematic and high-tech collection and retention of personal data on virtually every single citizen," especially where "the Government does not cite a single instance in which analysis of the NSA's bulk metadata collection actually stopped an imminent attack." *Id.* at 40–42 (emphasis and quotation omitted).

⁹² *Id.* at 36 (emphasis omitted). See discussion *supra* notes 47–48.

⁹³ See *American Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724 (S.D.N.Y. 2013), citing *Smith v. Maryland*, 442 U.S. at 742. The opinion also cited *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (withholding third party doctrine protection from information on a home computer that is transmitted over the internet or by email). See *Clapper*, 959 F. Supp. 2d at 750 n.16.

⁹⁴ See *Clapper*, 959 F. Supp. 2d at 757. The opinion also noted that "[f]ifteen different FISC judges have found the metadata collection lawful a total of thirty-five times since May 2006." *Id.* at 756. One such opinion is that of Judge Claire V. Eagan in *In re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [Redacted]*, Docket No. BR 13-109 (U.S. Foreign Intelligence Surveillance Ct. Aug. 29, 2013), available at <http://www.uscourts.gov/uscourts/courts/fisc/br13-09-primary-order.pdf>. Judge Eagan found *Smith v. Maryland* controlling and held that government access to a telephone company's "metadata in bulk . . . without specifying the particular number of an individual" did not intrude on individuals' reasonable expectations of privacy. *Id.* at 6–8. Judge Eagan also noted that "known and unknown international terrorist operatives are using telephone communications, and . . . it is necessary to obtain the bulk collection of a telephone company's metadata to determine those connections between known and unknown international terrorist operatives as part of authorized investigations." *Id.* at 18. See David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. NAT'L SECURITY L. & POL'Y 209, 226 (2014).

successful use of collected data.⁹⁵ Appellate courts addressing the Fourth Amendment issue will likely add their gloss on contextually relevant reasonableness. Although not determinative with respect to the Constitution, other federal courts might note that some forms of surveillance are permissible under international law⁹⁶ and use international law to inform the meaning of the Fourth Amendment.⁹⁷

2. Unlawful.

What conduct is necessarily unlawful within the meaning of Article 17 of the ICCPR is partly ambiguous, especially with respect to what laws control. Theoretically, whether U.S. interferences with privacy in a foreign country are unlawful might simply depend on whether they are unlawful under foreign domestic law. For example, hacking and placement of worms, bugging devices, or other malware by U.S. agents operating in Germany could violate German

⁹⁵ Clapper, 959 F. Supp. 2d at 756–57 (“Technology allowed al-Qaeda to operate decentralized and plot international terrorist attacks remotely. The bulk telephony metadata collection program represents the Government’s counter-punch: connecting fragmented and fleeting communications to re-construct and eliminate al-Qaeda’s terror network. . . . There is no evidence that the Government has used any of the bulk telephony metadata it collected for any purpose other than investigating and disrupting terrorist attacks.”).

⁹⁶ See, for example, sources cited *infra* notes 98, 99, 109, 113, 119–120, and accompanying text.

⁹⁷ See, for example, *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974) (“[W]e must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct . . . [and h]aving unlawfully seized the defendant in violation of the Fourth Amendment . . . the government . . . should return him.”) (emphasis omitted); *Roper v. Simmons*, 543 U.S. 551 (2005) (using human rights precepts as an aid for interpreting the Eighth Amendment); *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring) (using the International Convention on the Elimination of All Forms of Racial Discrimination for guidance regarding affirmative action); *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 132–33 (1923) (Sutherland, J., dissenting) (looking to international law to interpret the Eighteenth Amendment); *Fong Yue Ting v. United States*, 149 U.S. 698, 705 *et seq.* (1893) (holding that international legal principles bear on assessing congressional power regarding exclusion and deportation of aliens); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 125 (1814) (holding that “a construction ought not lightly to be admitted which would” not be in conformity with or “fetter” discretion under customary international laws of war “which may enable the government to apply to the enemy the rule that he applies to us”); *United States v. Tinoco*, 304 F.3d 1088, 1110 n.21 (11th Cir. 2002) (finding due process requirements met when the U.S. has protective jurisdiction under international law); *United States v. Caicedo*, 47 F.3d 370, 372 (9th Cir. 1995) (“Principles of international law are ‘useful as a rough guide’ in determining whether application of the statute would violate due process. . . . The First, Second, Fourth, Fifth and Eleventh Circuits agree that the United States may exercise jurisdiction consistent with international law.”) (quoting *United States v. Davis*, 905 F.2d 245, 249 n.2 (9th Cir. 1990)); *Finzer v. Barry*, 798 F.2d 1450, 1458 (D.C. Cir. 1986) (classifying the international legal duty of the U.S. as a “compelling national interest” for First Amendment analysis); *United States v. Usama bin Laden*, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000) (“[I]f the extraterritorial application of a statute is justified by the protective principle [of customary international law regarding jurisdiction], such application accords with due process.”).

law. Even if such conduct occurs on a U.S. embassy compound in Berlin, it will occur in Germany because, under international law, the embassy compound is German territory (even though international law places far-reaching limits on Germany's ability to enforce its laws on embassy grounds).⁹⁸ Although there would still be questions about whether a person was within the actual power or effective control of the United States, an interference with the person's privacy interest occurred, and the interference was arbitrary, presumably an interference can also violate ICCPR human rights law if it is unlawful in this way (that is, under foreign domestic law).

On the other hand, if no relevant U.S. conduct takes place in Germany, and information is merely intercepted in the U.S. on a U.S. satellite orbiting in outer space or on a U.S. vessel on the high seas, German law might not apply. For example, it is generally accepted that mere receipt of information or remote sensing from a satellite, as opposed to purposely transmitting information from a satellite into a foreign state, is permissible.⁹⁹ Similarly, receipt of information on a U.S. vessel on the high seas would be permissible under international law.¹⁰⁰ Moreover, as noted in Section III, it is likely that claimants would not be within the actual power or effective control of the United States and, therefore, could not enjoy a relevant right under the ICCPR.

Also relevant is the prohibition under customary international law of the use of "police" or "law enforcement" powers or enforcement jurisdiction in a foreign state without consent from the highest level of that state or a prior

⁹⁸ See, for example, RESTATEMENT, *supra* note 3, § 466, cmnt. a; PAUST, VAN DYKE & MALONE, *supra* note 15, at 660.

⁹⁹ See, for example, CARL Q. CHRISTOL, SPACE LAW: PAST, PRESENT, AND FUTURE 76–77 (1991) (arguing that the "open skies" principle has prevailed over claims to absolute privacy regarding remote sensing activities from space); PETER P.C. HAANAPPEL, THE LAW AND POLICY OF AIR SPACE AND OUTER SPACE 159–60 (2003) ("[R]emote sensing activities from outer space, civil and military, are legal."); Major Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. REV. 1, 66 (2000) ("States are free to make full use of military reconnaissance satellites."), 94 (pointing out that spy satellite "acquisition of information" has "been recognized as lawful"). See also *infra* text accompanying notes 100, 102.

¹⁰⁰ See, for example, JOHN NORTON MOORE, FREDERICK S. TIPSON & ROBERT F. TURNER, NATIONAL SECURITY LAW 438 (1990) ("Ships have been traditional platforms for the gathering of intelligence. . . . Where this collection is carried out from international waters, it is accomplished in accordance with the customary right of freedom of navigation."); Jonathan G. Odom, *The True "Lies" of the Impeccable Incident: What Really Happened, Who Disregarded International Law, and Why Every Nation (Outside of China) Should Be Concerned*, 18 MICH. ST. J. INT'L L. 411, 440 (2010); *United States Protests Chinese Interference with U.S. Naval Vessel, Vows Continued Operations*, 103 AM. J. INT'L L. 349, 350–51 (2009). Nonetheless, such conduct must otherwise concern peaceful purposes. See, for example, United Nations Convention on the Law of the Sea art. 88, Dec. 10, 1982, 1833 U.N.T.S. 3 ("The high seas shall be reserved for peaceful purposes.").

international agreement.¹⁰¹ One commentator has noted that the ECHR, while finding relevant privacy claims inadmissible, recognizes that enforcement jurisdiction is not exercised in a foreign state if an eavesdropping state merely listens and gathers information via international wireless telecommunications from within its own territory:

[T]he ECHR [has] held [with respect to German eavesdropping] that as “[s]ignals emitted from foreign countries are monitored by interception sites situated on German soil and the data collected are used in Germany” the German authorities “have [not] acted in a manner which interfered with the territorial sovereignty of foreign States [“as protected in public international law”].” This applied to communication not transmitted by fixed/land lines but only to information transmitted by radio signals [sic] via satellites etc. . . . So by analogy, if the U.S. only intercepted signals emitted from Germany using interception sites situated within U.S. territory (and not on embassy premises) and if the data thus acquired was used only in the U.S. – [sic] then the U.S. has not acted “in a manner which interfered with the territorial sovereignty” of Germany.¹⁰²

One commentator has also rightly noted that important questions necessarily arise regarding how surveillance is carried out:

[T]he U.S. may have tapped mobile phones, but . . . my question is: how? Has it placed bugs inside such phones? Or has it eavesdropped such communication over airwaves? If so, from where is it listening in? Or again has it used recording available in hardware, such as servers or satellites? The means are important because not every action can be seen as an “extraterritorial” exercise of [enforcement] jurisdiction. If the U.S. simply mines the data available on servers present in U.S. territory or in U.S. controlled satellites, this will “merely” constitute an exercise of [U.S.]

¹⁰¹ See, for example, RESTATEMENT, *supra* note 3, §§ 432–433; IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 307 (4th ed. 1990); LASSA F. OPPENHEIM, INTERNATIONAL LAW 295 & n.1 (H. Lauterpacht ed., 8th ed. 1955); PAUST, VAN DYKE & MALONE, *supra* note 15, at 658–69; see also Eur. Par. Draft, *supra* note 48, ¶ J (suggesting a need to use Mutual Legal Assistance Treaties that are operative under a law enforcement paradigm). The person directly affected by impermissible law enforcement abroad has standing to complain in some instances. See RESTATEMENT, *supra* note 3, § 432, RN 1, § 433, cmt. c. However, such a person does not have standing regarding an alleged violation of the ICCPR unless the person is within the jurisdiction or actual power or effective control of the U.S. See *supra* Section III.

¹⁰² See Matthew, Response (Nov. 6, 2013), in Peters, *supra* note 33. In the case mentioned, the ECHR also found that under the circumstances “there existed adequate and effective guarantees against abuses of . . . [Germany’s] strategic monitoring powers [and that Germany was] entitled to consider the interferences with the secrecy of telecommunications . . . to have been necessary in a democratic society in the interests of national security and for the prevention of crime [under Article 8(2)].” Weber and Saravia, *supra* note 39, ¶¶ 107, 118, 137 (regarding the Court’s consideration of context and interests at stake).

territorial jurisdiction.¹⁰³

Yet if hacking of foreign computer systems or placement of worms, bugs, or other malware into foreign computer systems occurs through the internet or wireless telecommunication and emanates from the United States, some might claim that conduct starting in the U.S. continued, by fiction, into the foreign state—additionally, that there was an intent to produce effects in, as well as resulting effects within, the foreign state. The claim would be that the U.S. has engaged in police or law enforcement-type conduct in another state without its consent. Under customary international law, the foreign state would have a form of territorial jurisdictional competence known as objective territorial jurisdiction to prescribe domestic laws to reach such conduct abroad.¹⁰⁴ Three common factors regarding this form of prescriptive jurisdiction would be met: an intent to produce effects, actual effects, and, under both the innocent agency rationale and the continuing act rationale, acts occurring by fiction within the foreign state.¹⁰⁵ If the foreign state exercised such a competence by prescribing relevant extraterritorial law, the reach of its extraterritorial law would be legitimate—even though the foreign state could not exercise its enforcement jurisdiction until alleged perpetrators were physically present in its territory. The existence of foreign state law supported by such a prescriptive competence might arguably render a relevant invasion of privacy from abroad unlawful within the meaning of Article 17 of the ICCPR.

However, one response might argue that only an actual use of law enforcement powers or enforcement jurisdiction in the foreign state by governmental personnel or their agents operating therein should be covered under Article 17, especially if the state engaged in surveillance and data collection does not have actual power or effective control over a privacy claimant. This seems to be the ECHR's approach, which emphasizes that it is the physical exercise of enforcement powers within a foreign state that interferes with its territorial sovereignty.¹⁰⁶ An additional problem exists regarding conflicting laws. What if an intrusion is lawful under U.S. domestic law but unlawful under foreign domestic law? What domestic law should prevail with

¹⁰³ André de Hoogh, Response (Nov. 1, 2013), in Anne Peters, *Surveillance without Borders: The Unlawfulness of the NSA Panopticon, Part I*, EJIL TALK (Nov. 1, 2013), <http://www.ejiltalk.org/surveillance-without-borders-the-unlawfulness-of-the-nsa-panopticon> (last visited Nov. 18, 2014).

¹⁰⁴ See, for example, PAUST, VAN DYKE & MALONE, *supra* note 15, at 596–600, 621–27.

¹⁰⁵ See *id.* at 597–600.

¹⁰⁶ See, for example, *supra* text accompanying note 101; cf. *Al-Skeini v. United Kingdom*, *supra* note 30, ¶¶ 131–36; *supra* text accompanying notes 98–99. But see Eur. Par. Draft, *supra* note 48, ¶ 24 (alleging the existence of a “breach of their sovereignty . . . perpetrated through the mass surveillance programmes”). Certainly, remote sensing and surveillance do not physically or forcefully infringe the territorial integrity of another state.

respect to proper interpretation of Article 17 of the ICCPR? The answer is not evident,¹⁰⁷ even under the present guidance from the Human Rights Committee noted above.¹⁰⁸

What can complicate the inquiry further with respect to layered laws and conflicts of law is that some forms of relevant conduct can be permissible under international law. What if the United States does not claim to be acting under a law enforcement paradigm but under the law of self-defense or the laws of war? Human rights law would still be applicable,¹⁰⁹ but the salient question is whether conduct that is lawful under international law should be so considered within the meaning of Article 17 of the ICCPR even though it is unlawful under a foreign state's domestic law. Should a self-defense or law-of-war competence, which can recognizably make surveillance reasonable and not arbitrary within the meaning of Article 17 of the ICCPR,¹¹⁰ prevail for the purpose of interpreting the word "unlawful"? Giving primacy to international law in this inquiry would seem to be rational and policy-serving in view of (1) the importance of self-defense and law-of-war needs and competencies, and (2) the well-recognized canon of treaty law that relevant international law shall be used as an interpretive aid.¹¹¹ Nonetheless, treaty terms must also be interpreted in light of their ordinary meaning and the object and purpose of the treaty.¹¹² However, a core of ordinary or generally

¹⁰⁷ See Professor Stefan Talmon, *Tapping the German Chancellor's Cell Phone and Public International Law* (Nov. 6, 2013), <http://cjlcl.org.uk/2013/11/06/tapping-german-chancellors-cell-phone-public-international-law> (last visited Nov. 20, 2014) (concluding that U.S. law would be the relevant law, and not German law, if spying on Germans was only engaged in by agents operating within the U.S.).

¹⁰⁸ See *supra* text accompanying notes 52–53. When considering the propriety of NSA surveillance of communications, the Human Rights Committee merely addressed the need for the U.S. to assure that its domestic law will allow it to fulfill obligations under the Covenant. See H.R. Comm., *Concluding Observations on the Fourth Report of the United States of America*, *supra* note 33, ¶ 22(b) (recommending, *inter alia*, that it "[e]nsure that any interference . . . [be] authorized by laws that (i) are publicly accessible; [and] (ii) contain provisions that ensure . . . [U.S. surveillance activities] are tailored to specific legitimate aims").

¹⁰⁹ See discussion *supra* note 7.

¹¹⁰ With respect to another human right contained in the ICCPR and conditioned by the word "arbitrary," the ICJ declared that "whether a particular loss of life . . . is to be considered as arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict." *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8).

¹¹¹ See, for example, Vienna Convention, *supra* note 11, art. 31(3)(c). Relevant international law would include the right to receive information and sensing from satellites in space and vessels on the high seas (see discussion *supra* notes 99–100), the law of self-defense (see discussion *infra* note 119), and the laws of war (see discussion *infra* note 120).

¹¹² See Vienna Convention, *supra* note 11, art. 31(1). Some also regard surveillance programs as "changing the established paradigm of criminal law[,] . . . promoting instead a mix of law

shared meaning of the word “unlawful” can expand or contract over time, especially as expectations shift regarding the legal propriety of particular practices, and thereby leave logically possible aspects of meaning outside of normative protection.¹¹³

Also complicating rational and policy-serving choice is the widespread recognition that espionage engaged in by a state within a foreign state can violate the latter’s domestic law, but widely practiced espionage regarding foreign state secrets is not a violation of international law.¹¹⁴ Moreover, the widespread practice of espionage and transnational surveillance by governments from satellites in space and ships at sea¹¹⁵ compels recognition that customary international law based on general patterns of practice and *opinio juris* does not exist such as would preclude these specific practices.¹¹⁶

My preference is to interpret the word “unlawful” in Article 17 so as to give primacy to international law,¹¹⁷ and especially to competences under the law of self-defense and the laws of war when such laws are applicable. The international lawfulness of particular measures of self-defense, war, and state surveillance (from satellites and ships at sea) can buttress claims that particular forms of privacy intrusion are rational, reasonable, and not arbitrary under the circumstances,¹¹⁸ and should inform the legal meaning of the word “unlawful” in

enforcement and intelligence activities with blurred legal safeguards, often not in line with democratic checks and balances and fundamental rights.” Eur. Par. Draft, *supra* note 48, ¶ 10.

¹¹³ See generally Paust, *Basic Forms of International Law*, *supra* note 46.

¹¹⁴ See, for example, PAUST ET AL., *supra* note 7, at 740; Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT’L L. & POL’Y 321, 347 (1996); Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 218 (1999); Talmon, *supra* note 107; United States *ex rel.* Wessels v. McDonald, 265 F. 754, 762 (E.D.N.Y. 1920) (“[U]nder the international law, spying is not a crime.”). Cf. A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT’L L. 595, 620–21 (2007) (arguing that “[i]nternational law does affect one aspect of international espionage”—when those engaged in espionage are listed as diplomats “on the diplomatic roster,” their acts are not within “the Vienna Convention’s list of permitted diplomatic activities”).

¹¹⁵ See discussion *supra* notes 99–100 (concerning receipt of information and remote sensing from satellites in space and vessels on the high seas).

¹¹⁶ The 1995 Report of the ILA Human Rights Committee noted that the content and contours of the right to privacy vary considerably. See ILA H.R. Report, *supra* note 3 at 547. If so, some privacy interests might be supported by generally shared patterns of practice and *opinio juris* and, therefore, be part of customary international law. However, when there is a widespread practice opposing a particular privacy interest, that interest cannot be protected as customary international law.

¹¹⁷ At least with respect to the primacy of obligations under international law, it is well recognized that a failure to comply with an obligation cannot be justified by compliance with or the reach of domestic law. See, for example, Vienna Convention, *supra* note 11, art. 27; PAUST, VAN DYKE & MALONE, *supra* note 15, at 29–30, 770–71, 823–24.

¹¹⁸ See discussion *supra* note 111.

the ICCPR.¹¹⁹ For example, when acting in self-defense under Article 51 of the UN Charter against a private non-state actor (such as al-Qaeda) engaged in a process of continued armed attacks against a state's territory, its embassies abroad, its military personnel, and other nationals, a responding state lawfully uses self-defense by monitoring, inside a foreign state, cell phone and email communications of the non-state actor's known and suspected members, as well as those who directly facilitate armed attacks, in order to identify their plans and activities and learn their whereabouts.¹²⁰ Under the circumstances, monitoring would be markedly rational, reasonable, and lawful as self-defense and should be recognized as lawful within the meaning of Article 17 of the ICCPR. In the same way, monitoring the phone and email messages of enemy combatants and civilians directly participating in an international armed conflict is permissible under the laws of war¹²¹ and should also be lawful within the meaning of Article 17 of the ICCPR.

V. POLICY-SERVING REFORM

Despite widespread awareness of the NSA program and increasing awareness of other states' programs for extraterritorial data collection and

¹¹⁹ See discussion *supra* note 111 (establishing that international law is background for interpretation of treaties).

¹²⁰ With respect to the propriety of capture or targeting of such non-state actors under the law of self-defense—regardless of the consent of a foreign state—see generally Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010); Jordan J. Paust, *Permissible Self-Defense Targetings and the Death of bin Laden*, 39 DENV. J. INT'L L. & POL'Y 569 (2011).

¹²¹ See, for example, Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, Annex, art. 24, Oct. 18, 1907, 36 Stat. 2277, 15 U.N.T.S. 9 (“[T]he employment of measures necessary for obtaining information about the enemy and the country are considered permissible.”); U.K. MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004) § 4.9.3 (stating that the “obtaining of intelligence about the enemy . . . by satellites and drones” is among the types of permissible “measures necessary for the obtaining of intelligence in enemy-held territory” that the Hague Convention “formally sanctioned”), § 5.15.1 (“Information can lawfully be gleaned in many different ways, for example, by . . . the use of reconnaissance aircraft and satellites.”); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 208 (2004) (“Article 24 of the Hague Regulations . . . ensues [sic] that a belligerent may resort to any intelligence-gathering method, including (in the modern age) the use of electronic devices, wire tapping, code breaking and aerial or satellite photography.”); Margulies, *supra* note 35, at 2155–56 (“Reconnaissance and surveillance of another party to an armed conflict is an accepted incident of war . . . [and a] rigid application of the ICCPR that precludes such observation would fundamentally reshape the law of armed conflict.”) (internal citation omitted). See also Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (1863) (the Lieber Code), art. 15 (instructing that “[m]ilitary necessity . . . allows all . . . obstruction of the ways and channels of . . . communication” of the enemy).

mining, there seem to remain generally shared expectations that privacy with respect to internet and international telecommunications should still exist in some form. In light of this, I recommend creation of a Protocol to the ICCPR to reflect the more nuanced and restrictive form of limitation found in the European Convention: “necessary in a democratic society in the interests of national security.”¹²² If so, the present “arbitrary” or unreasonable standard would shift to one that will require any interference with privacy and private communication to be reasonably necessary under the circumstances.¹²³ This will not guarantee freedom from interference: no human rights standard presently does. Although a reasonably necessary standard might still allow use of a program for the widespread and systematic extraterritorial monitoring, data collection, and data mining that President Obama has stated is necessary,¹²⁴ it would better accommodate interests in privacy, personal security, and national security than would a less stringent standard tied to the word “arbitrary.”

One significant limitation regarding extraterritorial surveillance under

¹²² See European Convention, *supra* note 30, art. 8(2). The “necessary in a democratic society” standard will help to alleviate abusive interference with the human right to participate in democratic governmental processes and self-determination of peoples. See also Eur. Par. Draft, *supra* note 48, ¶ 111 (calling “on Member States . . . to advocate the adoption of an additional protocol to Article 17 . . . which should be based on the standards . . . endorsed by the . . . [35th International Conference of Data Protection and Privacy Commissioners] and the provisions in General Comment No 16 to the Covenant”). The phrase “necessary in a democratic society” already cabins those limitations to freedoms of assembly and association that are set forth in the ICCPR. See ICCPR, *supra* note 9, arts. 21, 22(2). However, the European Convention is the only treaty that presently uses a “necessary” standard with respect to limitations of privacy. See discussion *supra* note 38.

¹²³ I do not recommend that a new Protocol adopt the “strictly and demonstrably necessary” standard preferred by Special Rapporteur La Rue and more recently by the ECHR. See La Rue Report, *supra* note 29, ¶ 83(b); Digital Rights Ireland Ltd. v. Minister for Communications et al., Ireland, Eur. Ct. H.R. (Judgment, Grand Chamber) (Apr. 8, 2014), ¶ 52 (stating that “derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary”). Note that the ECHR fused two different tests applicable in different contexts for different purposes. Importantly, Article 8(2) of the Convention merely requires that an interference be “in accordance with the law and . . . necessary,” whereas a derogation under Article 15(1) must be “strictly required.” European Convention, *supra* note 30, arts. 8(2), 15(1); see discussion *supra* note 81. In my view, a strictly necessary standard would result in undue emphasis on admittedly non-absolute privacy interests and would not allow adequate accommodation of competing rights of others to dignity and personal security (regarding the need to consider human rights of other persons, see *supra* text accompanying notes 54, 57, 59, 68, 72, and 79) or the duty of states to seek to achieve personal security for all persons within their jurisdiction. See discussion *supra* note 72. If other courts misinterpret the word “necessary” to mean strictly necessary, in view of the danger posed to the rights of others, I would abandon my preference for a Protocol that creates a new threshold of necessity.

¹²⁴ See Presidential Policy Directive, *supra* note 1, pmb. (using “necessary”); *In re Application of the FBI*, *supra* note 94, at 18 (writing for the Foreign Intelligence Surveillance Court, Judge Eagan also used “necessary”).

programs like the NSA's would remain: the need for a claimant to be within the actual power or effective control of the United States. I doubt that the United States and other countries engaged in extraterritorial surveillance¹²⁵ will agree to change the actual power or effective control test that is applicable under the ICCPR, and I do not recommend that such a change appear in a new Protocol.

VI. CONCLUSION

This Article has demonstrated that at least four questions can arise under human rights law with respect to extraterritorial surveillance, collection of data, and data mining by a state: (1) is the claimant within the actual power or effective control of the state using such measures; (2) does the claimant have a protectable interest in privacy or private communication; (3) does use of the measures interfere with a protectable privacy interest of the claimant; and (4) is the interference permissible under the "arbitrary" and "unlawful" substantive legal standards and limitations, or in view of other types of limitation that are set forth in an applicable human rights instrument? With respect to extraterritorial surveillance and data collection, most claimants will not be within the actual power or effective control of the state using extraterritorial measures and, therefore, under the ICCPR and most human rights instruments, their human rights to privacy and private communication will not obtain.¹²⁶ However, if the rights to privacy and private communication or a particular aspect thereof are part of customary human rights law, the customary rights will be protected universally under the UN Charter without an exclusion of persons who are not within the jurisdiction, actual power, or effective control of a state,¹²⁷ and the inquiry will shift to the remaining three questions.

The requirement that an interference not be "arbitrary" actually grants wide latitude to monitoring states, because systematic surveillance and data collection is not *prima facie* irrational, unreasonable, and arbitrary. One must make choices with respect to various features of factual context, rights, and policies at stake when deciding whether a particular interference is arbitrary or unreasonable, and the permissibility of particular forms of surveillance under international law can inform any such policy-serving choice. A nuanced and considered choice would

¹²⁵ Concerning the push for extraterritorial surveillance by several countries, see, for example, La Rue Report, *supra* note 29, ¶ 64 (identifying South Africa, the Netherlands, and Pakistan); Nyst, *supra* note 34 ("The patchwork of secret spying programmes and intelligence-sharing agreements implemented by . . . the U.S., U.K., Canada, Australia and New Zealand[] constitutes an integrated global surveillance arrangement that covers the majority of the world's communications."). See also discussion *supra* note 83 (regarding Russian surveillance); *supra* text accompanying note 102 (regarding Germany).

¹²⁶ See *supra* Section III.

¹²⁷ See discussion *supra* notes 3, 6.

avoid focusing merely on the rights of privacy claimants and instead involve adequate attention to the rights of others, including human rights to dignity and personal security as well as the concomitant duties of states to seek to achieve personal security for all who are within their jurisdiction. If the international community prefers to achieve greater protection for privacy interests under global human rights law, a Protocol to the International Covenant on Civil and Political Rights could limit extraterritorial surveillance to those interventions “necessary in a democratic society.”