

# AN INTERNATIONAL RIGHT TO PRIVACY: ISRAELI INTELLIGENCE COLLECTION IN THE OCCUPIED PALESTINIAN TERRITORIES

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## ABSTRACT

*In 2014, a group of reservists in Israel's military signals intelligence (SIGINT) agency (Unit 8200) published a letter announcing their unwillingness to continue serving in the unit on missions relating to the West Bank, due to practices of mass surveillance against unwitting civilians not involved in hostilities. While this revelation led to weeks of media coverage in Israel, the anonymous reservists were maligned and threatened with prosecution, and seemingly no change was brought about. These allegations, however, provide a window into the rarely-seen secretive practices of the intelligence collection apparatus, inviting their evaluation under international law.*

*This Note addresses these alleged intelligence collection practices in light of two significant regimes of international law: international human rights law, namely the International Covenant on Civil and Political Rights (ICCPR) and International Humanitarian Law (IHL). First determining that, despite Israeli and U.S. contention to the contrary, the ICCPR is applicable extraterritorially, the Note goes on to discuss the substantive privacy right embodied in Article 17 and applies it to the facts alleged by the Unit 8200 refuseniks, as well as the unavailability of an ICCPR Article 4 National Security Exception in this context. Further, the Note discusses the implications of IHL in light of the Israeli occupation of the West Bank and Gaza, focusing on the Hague Regulations, Customary International Law, and the Geneva Convention IV.*

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I. INTRODUCTION

Since the revelations of Edward Snowden shocked the Western world in 2013, the tension between intelligence collection practices and individuals’ digital privacy has surged in the public’s awareness, in political dialogue, and in the headlines.<sup>1</sup> The aftermath of these leaks still reverberates in protest movements,<sup>2</sup> op-eds,<sup>3</sup> and the rising popularity of encrypted messaging programs like Signal and Telegram around the world.<sup>4</sup>

It is no coincidence that the so-called “refuseniks” from Unit 8200, Israel’s signals intelligence (SIGINT) unit roughly equivalent to the United States’ National Security Agency (NSA), decided to voice their concerns about collection policies in the West Bank and Gaza just over a year later.<sup>5</sup> In a public letter addressed to the highest echelons of the Israeli intelligence community, forty-three veterans from Unit 8200

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1. See, e.g., David D. Cole, *After Snowden: Regulating Technology-Aided Surveillance in the Digital Age*, 44 CAP. U. L. REV. 677 (2016).

2. See, e.g., Billy House & Steven T. Dennis, *Republicans Push to Extend NSA Surveillance Expiring This Month*, BLOOMBERG (Dec. 19, 2017, 12:47 PM), <https://www.bloomberg.com/news/articles/2017-12-19/republicans-push-to-extend-nsa-surveillance-expiring-this-month>.

3. See, e.g., Elias Atienza, *The Tech Generation Should Reject Mass Surveillance*, WASH. EXAMINER (Dec. 20, 2017, 6:54 PM), <http://www.washingtonexaminer.com/the-tech-generation-should-reject-mass-surveillance/article/2644095>.

4. See, e.g., Jeff John Roberts, *Here Are the Most Popular Apps for Secure Messages*, FORTUNE (Jan. 17, 2017), <http://fortune.com/2017/01/17/most-popular-secure-apps/>.

5. See, e.g., Peter Beaumont, *Israeli Intelligence Veterans Refuse to Serve in Palestinian Territories*, THE GUARDIAN (Sept. 12, 2014, 5:44 AM) [hereinafter Beaumont, *Intelligence Veterans*], <https://www.theguardian.com/world/2014/sep/12/israeli-intelligence-reservists-refuse-serve-palestinian-territories>.

made public some very troubling allegations regarding the unit's collection practices in the occupied Palestinian territories (OPT): (1) that many of the Palestinians under Israeli surveillance "are innocent people unconnected to any military activity"; (2) that potentially damaging details about adultery, sexual orientation, and other personal vulnerabilities were specific priorities for collection to be "used to extort/blackmail the person and turn them into a collaborator";<sup>6</sup> and that (3) oftentimes the person deciding whether or not to wiretap a Palestinian in the OPT is the lowest rung on the proverbial totem pole, without oversight or approvals required.<sup>7</sup> Despite several weeks of media coverage and public outrage in Israel, both in support and in fierce criticism of the letter and its authors, seemingly no change was effected. The Israel Defense Forces (IDF) Spokesman at the time, Brigadier General Moti Almoz, discredited the refuseniks as not "belonging to the cycle of production" in the unit, referring to them as "support staff."<sup>8</sup> He denied allegations of wrongdoing and threatened to punish them to the greatest extent possible.<sup>9</sup>

These claims, however, must not go without serious review. As this Note will show, the refuseniks allege violations of international conventions to which Israel is a party and customary international law (CIL). This Note will discuss each of these categories of law in turn and will propose changes to Israeli interpretation and application of international law in light of this analysis. After establishing that public international law espouses a right of privacy enjoyed by every individual (albeit qualified, as further discussed below) in Section II, Section III will turn to the unique implications of International Humanitarian Law (IHL) in light of the Israeli occupation of the West Bank and Gaza. Throughout this discussion, the Note will highlight proposed changes to current Israeli and U.S. interpretations of international law. With the

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6. As used here, and in common parlance in both Israeli and Palestinian communities, "collaborator" refers to a Palestinian or Israeli Arab who provides information to the Israeli security apparatus, often under threat of revoking work permits or in exchange for money, travel permits, or refugee status in Israel. See, e.g., Mohammed Omer, *Who Are Israel's Informants?*, AL JAZEERA (Sept. 6, 2014), <https://www.aljazeera.com/news/middleeast/2014/09/palestinian-collaborators-gaza-history-israel-201492113636242365.html>.

7. See Peter Beaumont, *Israel's Unit 8200 refuseniks: "You can't run from responsibility"*, THE GUARDIAN (Sept. 12, 2014, 5:01 AM), <https://www.theguardian.com/world/2014/sep/12/israel-unit-8200-refuseniks-transcript-interview>.

8. Shabtay Bendet, *Tzahal al Sarvanei 8200: Rak 'Asarah Shayachim L'ma'agal Ha'asiyah [IDF on the 8200 Refuseniks: Only Ten Belong to the Cycle of Production]*, WALLA NEWS (Sept. 14, 2014, 10:12 AM), <https://news.walla.co.il/item/2784988>.

9. *Id.*

adoption of these proposals, Israel's recognition of Palestinian privacy rights under international law could serve as a case study of proper self-regulation in a time of government overreach into the privacy of individuals.

## II. INTERNATIONAL HUMAN RIGHTS LAW: THE RIGHT TO PRIVACY IN THE ICCPR

While it has long been posited that international law does not, and perhaps cannot, regulate intelligence activities by state actors, states often frame their purported injury in terms of international law when intelligence activities conducted against them come to light.<sup>10</sup> Several states, in fact, have explicitly recognized the applicability of international law to their intelligence activities.<sup>11</sup> As nations have likely engaged in espionage for as long as there have been nations, it would seem unnatural to claim that affirmative international law should be construed to completely ignore this function of every military and defense apparatus in the world. This section will therefore not address the debate of whether intelligence collection is per se subject to the restraints of international law. Rather, this section will focus on the sources of international law recognizing an individual's right to privacy. The section will then turn to the corresponding national security exceptions to that right, in order to evaluate the balance that must be struck between these two competing interests. The section will go on to apply this equation to Israeli collection in the West Bank, as described in the Unit 8200 refuseniks' September 2014 letter discussed above. Specifically, this section will analyze the United Nations' International Covenant on Civil and Political Rights (ICCPR), its applicability to extraterritorial activity of a signatory state, its privacy protections and national security exceptions, as well as the case law of the European

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10. See, e.g., Ashley Deeks, *Confronting and Adapting Intelligence Agencies and International Law*, 102 VA. L. REV. 599, 606, 633 (2016) (citing Gary D. Brown & Andrew O. Metcalf, *Easier Said than Done: Legal Reviews of Cyber Weapons*, 7 J. NAT'L SEC. L. & POL'Y 115, 116-17 (2014) ("there is a long-standing (and cynically named) 'gentleman's agreement' between nations to ignore espionage in international law")); W. Hays Parks, *The International Law of Intelligence Collection*, in NATIONAL SECURITY LAW 433, 433-34 (John Norton Moore et al. eds., 1990) ("No serious proposal ever has been made within the international community to prohibit intelligence collection as a violation of international law because of the tacit acknowledgement by nations that it is important to all, and practiced by each.").

11. Deeks, *supra* note 11, at 651-52. See also, e.g., S. AFR. CONST., 1996 art. 199(5) ("The security services must act . . . in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.").

Court of Human Rights (ECtHR) interpreting the European Charter of Human Rights (ECHR) as an analog to the ICCPR provisions.

In determining whether the surveillance allegations against Israel violate the ICCPR, three critical questions must be answered: (1) whether the ICCPR, which Israel signed in 1966 and ratified in 1991,<sup>12</sup> is applicable to the OPT under its Article 2 jurisdictional provision; (2) if applicable, whether the ICCPR Article 17 right to privacy is violated by the practices alleged; and (3) if the national security exception standard provided by Article 4 is met. This section will address these questions in turn, concluding that the ICCPR should be interpreted to apply extraterritorially in this situation, that the practices alleged violate the privacy rights guaranteed by Article 17, and that the Article 4 exception is not triggered. As shown below, under these considerations, Israel should recognize the applicability of the ICCPR to its own activities in the OPT and alter its practices to ensure the privacy rights guaranteed therein.

#### A. *The Extraterritorial Applicability of the ICCPR*

The ICCPR must be construed to apply to Israeli action in the OPT under the controlling provisions of the Vienna Convention on the Law of Treaties (VCLT). Israel has consistently claimed, however, that the ICCPR does not apply extraterritorially, and therefore is inapplicable to the OPT.<sup>13</sup> In so doing, the Israeli government relies on a narrow construction of ICCPR Article 2(1).<sup>14</sup> While this interpretation is not entirely without support, it becomes untenable when construed within the broader context of the ICCPR. Under the rules of interpretation set forth in VCLT Articles 31-33, Article 2 of the ICCPR should be interpreted to apply, at a minimum, to Israeli activity within the OPT.<sup>15</sup>

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12. Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 102 (July 9) [hereinafter *The Wall Case*].

13. See, e.g., Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Second Periodic Report, U.N. Doc. CCPR/C/ISR/2001/2, add., Isr. (2001) [hereinafter *Second Periodic Report*].

14. International Covenant on Civil and Political Rights, art. 2(1), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter *ICCPR*] (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant. . .”).

15. This analysis is based in part on the assessment of the United States’ analogous position regarding the extraterritorial applicability of the ICCPR by Ilina Georgieva, *The Right to Privacy Under Fire: Foreign Surveillance Under the NSA and the GCHQ and Its Compatibility With Art. 17 ICCPR and Art. 8 ECHR*, 31 *UTRECHT J. INT’L & EUR. L.* 104, 108-10 (2015).

1. The Israeli Interpretation

The official Israeli interpretation of Article 2(1) contends that the ICCPR's protections extend only to individuals that are both physically "within its territory" and legally "subject to its jurisdiction"—meaning that the "and" in Article 2(1) is conjunctive (both aspects are required) rather than disjunctive (either aspect would be sufficient).<sup>16</sup> The United States similarly interprets the clause conjunctively, drawing additional support from the drafting history of the ICCPR.<sup>17</sup>

This reading, espoused by both the Israeli and U.S. governments, has been largely refuted by the U.N. Human Rights Committee (HRC), the International Court of Justice (ICJ), and most academic commentary.<sup>18</sup> In assessing the viability of this interpretation, Professor Marko Milanovic proposes what he terms the "Auschwitz Rule of Interpretation": "in case there are two plausible interpretations of the text of a human rights treaty, one should favor that interpretation under which Auschwitz would be considered a human rights violation."<sup>19</sup> As he points out, if the ICCPR is never applicable extraterritorially, then the Nazis would only have been bound to its provisions within the territory of Germany proper; death camps in Nazi-occupied Poland would not have been precluded under the ICCPR.<sup>20</sup> While this *reductio ad absurdum* approach may be intentionally provocative, it quite accurately identifies the gaping hole in this interpretation's logic: Israel's position flies directly in the face of the very purpose of the ICCPR.

When applied to the realm of intelligence collection, this interpretation remains similarly illogical. This reading would preclude arbitrary surveillance by a state on its own citizens, but not by a foreign nation on those citizens. A U.S. citizen would have a presumptive right to privacy from U.S. government intrusion, but not from any other government. Surely, however, this interpretation would challenge the fundamental concept of human rights—that humans have basic rights regardless of their nationality, citizenship, or any other distinguishing

16. See Second Periodic Report, *supra* note 14, ¶ 8; Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Fourth Periodic Report of States Parties Due in 2013, Isr., U.N. Doc. CCPR/C/ISR/4 ¶¶ 45-49 (2013) [hereinafter Fourth Periodic Report].

17. See Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARV. INT'L L.J. 81, 104 (2015), citing Human Rights Comm., Summary Record of the 1405th Meeting, U.N. Doc. CCPR/C/SR ¶ 20 (1995).

18. *Id.* at 105-06.

19. *Id.* at 110.

20. *Id.*

characteristic.<sup>21</sup> As discussed below, the purpose of the ICCPR is to ensure to all humanity a common standard of human rights; therefore, it seems contrary to that goal that humans be protected by this instrument only from their own governments.

It could be, and has been, argued that violations by foreign governments should be governed not by human rights law such as the ICCPR, but rather by IHL. In fact, Israel has consistently highlighted the differentiation between IHL and human rights law in supporting its interpretation, claiming that human rights law applies only domestically while IHL applies internationally.<sup>22</sup> Since IHL applies only in the context of armed conflict, however, this approach is inherently flawed.<sup>23</sup> Were it the case that foreign governments were only (or predominantly) capable of infringing on human rights through armed conflict, as it may have been at the time of drafting, this distinction might be logical. Conversely, today, with technology available to developed nations' governments to geolocate a cellphone on the other side of the planet,<sup>24</sup> to hack a webcam using remote administration tools (known as "rattling"),<sup>25</sup> and more, we cannot depend solely on the law of armed conflict to protect individuals from foreign governments. Steady-state intelligence collection (taking place in peacetime and therefore not triggering many IHL protections)<sup>26</sup> should not be so cavalierly and categorically excluded from any international legal restriction. To preserve the intent of the ICCPR, the Israeli interpretation of Article 2 must be rejected, making way for a construction that would support the ICCPR applying extraterritorially, at least as to a state's own extraterritorial activities.

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21. See, e.g., Georgieva, *supra* note 16, at 110.

22. See Second Periodic Report, *supra* note 14, ¶ 8; Fourth Periodic Report, *supra* note 17, ¶ 45.

23. See, e.g., ICRC, *International Humanitarian Law and the Challenges of Contemporary Conflicts*, 89 INT'L R. RED CROSS 719 (2007), <https://www.icrc.org/eng/assets/files/other/irrc-867-ihl-challenges.pdf>.

24. See, e.g., Barton Gellman & Ashkan Soltani, *NSA Tracking Cellphone Locations Worldwide, Snowden Documents Show*, WASH. POST (Dec. 4, 2013), [https://www.washingtonpost.com/world/national-security/nsa-tracking-cellphone-locations-worldwide-snowden-documents-show/2013/12/04/5492873a-5cf2-11e3-bc56-c6ca94801fac\\_story.html?utm\\_term=.bf4d6858857e](https://www.washingtonpost.com/world/national-security/nsa-tracking-cellphone-locations-worldwide-snowden-documents-show/2013/12/04/5492873a-5cf2-11e3-bc56-c6ca94801fac_story.html?utm_term=.bf4d6858857e).

25. See, e.g., Sara Malm, *FBI Can Spy on You Through Your Webcam Without Triggering the Indicator Light . . . And Has Had the Technology for Several Years*, DAILY MAIL (Dec. 9, 2013, 7:25 AM), <http://www.dailymail.co.uk/news/article-2520707/FBI-spy-webcam-triggering-indicator-light.html>.

26. See ICRC, *supra* note 24. The implications of IHL for Israeli intelligence activities in the OPT will be discussed further *infra*, Section III.

2. Reading the ICCPR per the VCLT

The VCLT supports a disjunctive reading of Article 2(1), making the ICCPR applicable extraterritorially insofar as the offending nation exercises jurisdiction over the injured party. In the case of a material conflict between interpretations of an international treaty, as between the interpretation advanced by the United States and Israel of ICCPR Article 2(1) and that supported by the Human Rights Commission,<sup>27</sup> the text must be analyzed under the appropriate international rules of interpretation to resolve this conflict. Under VCLT Articles 31–33, there are three interpretive approaches to address<sup>28</sup>: (1) a formalist approach focuses on the ordinary meaning of the text of the treaty in context;<sup>29</sup> (2) due weight is then to be given to the treaty’s object and purpose;<sup>30</sup> and (3) if the first two methods are insufficient, the intention of the drafting parties should be taken into account.<sup>31</sup> Applying each of these approaches to the ICCPR in turn, Article 2(1) must be understood to apply extraterritorially in this case as described below.

*a. Ordinary Meaning*

Following the ordinary meaning interpretation that VCLT Article 31 (1) first articulates, the U.S. and Israeli approach would at first seem to be quite reasonable. The most common usage of “and” is conjunctive, meaning that an ordinary reading of Article 2(1) would presumably require both “within its territory” and “subject to its jurisdiction.”<sup>32</sup> However, this reading is unsustainable in the broader context of the ICCPR. If the ICCPR does not apply, at least to some degree, to individuals outside of a state’s territory, several of its substantive provisions would be rendered moot.<sup>33</sup> As examples, scholars have pointed to the right of the nationals of a state to return there,<sup>34</sup> as well as the right not to be tried for criminal changes *in absentia*.<sup>35</sup> Following this ordinary

27. See, e.g., Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Comm., Isr., U.N. Doc. CCPR/C/79/Add.93 ¶ 10 (1998).

28. Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

29. *Id.* art. 31.

30. *Id.*

31. *Id.* art. 32.

32. See Georgieva, *supra* note 16, at 109.

33. See, e.g., Peter Margulies, *The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism*, 82 FORDHAM L. REV. 2137, 2144 (2014).

34. ICCPR, *supra* note 15, art. 12.

35. *Id.* art. 14(3) (d); see also Margulies, *supra* note 34, at 2144.



meaning, a state could only violate the right of a national to return when that national is abroad; similarly, the criminal tried *in absentia* maintains his ICCPR protections while outside the territory of the state trying him. Furthermore, as Georgieva indicates, a conjunctive understanding of Article 2(1) would exclude from protection individuals within a state's territory but outside of its jurisdiction, such as ambassadors or foreign military personnel stationed there.<sup>36</sup> The U.S. and Israeli interpretation, therefore, would find no violation of ICCPR Article 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment")<sup>37</sup> if a signatory state were to round up and torture the U.S. sailors docked in their ports, or if a member state were to imprison and humiliate foreign ambassadors in their territory. A more coherent reading of Article 2(1) would rightly find these acts to be violations of the ICCPR. While the initial understanding of the ordinary meaning of this provision would seem to conform with the U.S. and Israeli interpretation, it is incompatible with the substantive provisions of the ICCPR and therefore unreasonable.

*b. Goals and Purpose*

The goals and purpose of the ICCPR would further support reading Article 2(1) disjunctively. The second interpretive approach in VCLT 31(1) calls for the consideration of the treaty's object and purpose.<sup>38</sup> The preamble to the ICCPR repeatedly asserts the purpose of the ICCPR: "recognition of the inherent dignity and of the equal and inalienable rights of *all members of the human family*," "[r]ecognizing that these rights derive from *the inherent dignity of the human person*," and "promot[ing] *universal* respect for, and observance of, human rights and freedoms."<sup>39</sup> Further, the U.N. HRC has reduced these principles to a simple purpose: as paraphrased by Professor Margulies, "to extend human rights as comprehensively as possible around the globe and leave as few gaps as possible in human rights protection."<sup>40</sup> A conjunctive reading of Article 2(1), as espoused by Israel and the United States, however, leaves significant gaps in the human rights protection granted by the ICCPR. On its face, the ICCPR purports to recognize the rights

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36. Georgieva, *supra* note 16, at 109.

37. ICCPR, *supra* note 15, art. 7.

38. VCLT, *supra* note 29, at 340.

39. ICCPR, *supra* note 15, pmb. (emphasis added).

40. Margulies, *supra* note 34, at 2147 (citing CCPR General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Human Rights Comm., 80th Sess., Mar. 29, 2004 ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004)).

therein granted as extending from the very humanity of the benefactors of those rights, every human. Indeed, the ICCPR frames human rights as universal, emanating from “the inherent dignity” of all people, whether occupied or occupying, citizen or alien, at home or abroad.<sup>41</sup> It would seem, therefore, that the object and purpose of the ICCPR weigh strongly in favor of finding it applicable extraterritorially to a state’s own actions.

*c. Intent of the Drafting Parties*

Lastly, the intent of the drafting parties similarly weighs in favor of finding the ICCPR to apply extraterritorially. When an interpretation “[l]eads to a result which is manifestly absurd or unreasonable,” VCLT Article 32 provides for the intention of the drafting parties, as evidenced in “the preparatory work of a treaty and the circumstances of its conclusion” to provide additional clarification.<sup>42</sup> According to the drafting history of ICCPR Article 2, the addition of the word “territory” was originally intended to avoid imposing an affirmative commitment to ensure the human rights of civilians in the then-U.S.-occupied territories of Germany, Austria, and Japan.<sup>43</sup> The United States wanted to avoid the massive undertaking of introducing human rights in populations where “commitment to democratic institutions was nascent and highly uncertain.”<sup>44</sup> There was also concern that enacting new legislation on behalf of these occupied territories, even in furtherance of the local population’s rights, would violate the law of occupation, which requires an occupying force to respect the laws in place at the time of occupation.<sup>45</sup> However, as conceded by Eleanor Roosevelt, the chief U.S. delegate to the U.N. during the drafting of the ICCPR, it was never the intention of the United States to avoid liability for its own affirmative action, but rather only to avoid liability for the failure to “ensure” as required by Article 2.<sup>46</sup> Roosevelt specifically recognized the applicability of the ICCPR to U.S. military personnel stationed abroad, acknowledging the extraterritorial applicability of the treaty at least as pertained to U.S. action abroad that might infringe on the rights guaranteed by the ICCPR, if not to the failure to act in ensuring these

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41. ICCPR, *supra* note 15, at pmb1.

42. VCLT, *supra* note 29, at 340.

43. Margulies, *supra* note 34, at 2144-45.

44. *Id.*

45. *Id.* The implications of the law of occupation for this analysis are further discussed *infra* Section III.

46. *Id.*

rights.<sup>47</sup> This history weighs in strong favor of holding Israel accountable under the ICCPR for its activity in the OPT.

The ICJ, in considering its advisory opinion on the “security fence” constructed by Israel in *The Wall Case*, agreed with that sentiment. In that case, the ICJ found that:

The *travaux préparatoires* of the Covenant confirm the [U.N. Human Rights] Committee’s interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence.<sup>48</sup>

Specifically, the annotations on the draft of the ICCPR make very clear that the insertion of the phrase “within its territory” was in order to protect states from being held responsible for protecting “the rights of persons subject to its jurisdiction when they were outside its territory.”<sup>49</sup> With that in mind, the intent of the drafters appears at least to support, if not require, a disjunctive reading. There is nothing in the record, however, to indicate that the insertion of “within its territory” was meant to restrict a state’s responsibility only to its domestic actions. The intent of the drafters, therefore, would seem to prefer the HRC’s interpretation of Article 2(1) over the position taken by the United States and Israel.

Interestingly, the Israeli Supreme Court, sitting as the High Court of Justice (HCJ), has repeatedly assumed, without formally deciding, that the ICCPR applies to the OPT, both before and after the ICJ *Wall Case*.<sup>50</sup> While the HCJ has analyzed questions of rights violations in the OPT in the framework of the ICCPR, it has quite intentionally fallen short of affirming the ICCPR’s applicability. Whether or not this juridical punt is grounded in political considerations or pressures, this

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47. *Id.*

48. Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 179 (July 9).

49. U.N. GAOR, 10th Sess., Agenda Item 28 (Part II) at 17, U.N. Doc. A/2929 (July 1, 1955).

50. See HCJ 7957/04 Mara’abe v. The Prime Minister of Israel ¶ 27 (2005) (Isr.), [https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\04\570\079\A14&fileName=04079570\\_A14.txt&type=4](https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts\04\570\079\A14&fileName=04079570_A14.txt&type=4); HCJ 13/86 Shahin v. The Commander of IDF Forces in the Judea and Samaria Area, 41(1) P.D. 197, 210-11 (1988) (Isr.).

continued avoidance is propagating the ongoing violation of Palestinian rights. The HCJ must affirmatively hold the ICCPR applicable in the OPT, in line with its previous rulings under that logic and the international jurisprudence to that end.

As discussed above, the interpretation of Article 2(1) espoused by the United States and Israel is untenable under the VCLT rules for treaty interpretation. While the ordinary meaning of Article 2(1) might allow for this narrow interpretation, applying this understanding of the provision to the remainder of the ICCPR raises significant problems. The object of the ICCPR, to ensure the basic human rights of all people, would be materially abridged by applying this interpretation, and what is known of the drafters of the ICCPR tends to indicate that their intent was otherwise. The stance held by the United States and Israel on this issue has been rejected by the HRC, the ICJ, and extensive academic commentary.<sup>51</sup> The ICJ has explicitly found that "... the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory,"<sup>52</sup> and the Israeli HCJ has tacitly agreed.<sup>53</sup> The ICCPR must be understood to restrict a state's action, whether within its borders or beyond them.

### B. ICCPR Article 17 and the Right to Privacy

The claim that intelligence activities fall under the purview of the ICCPR is relatively new.<sup>54</sup> In the past decade, however, the ICCPR has become a commonly cited source of the right to privacy.<sup>55</sup> Notably, in 2014, the HRC issued a report on the right to privacy in the digital age in response to the U.N. General Assembly's request in Resolution 68/167.<sup>56</sup> But even well before that, in 1988, the HRC clarified the extent to which the right to privacy is guaranteed by Article 17 in its General Comment No. 16.<sup>57</sup> Most recently, in 2016, the U.N. General Assembly adopted a revised right to privacy in the digital age, explicitly and directly framing mass and indiscriminate surveillance practices as

51. See, e.g., Milanovic, *supra* note 18, at 105-06.

52. The Wall Case, 2004 I.C.J. Rep. ¶ 180.

53. See HCJ 7957/04 *Mara'abe* ¶ 27; HCJ 13/86 *Shahin* at 210-11.

54. See Deeks, *supra* note 11, at 639 n.132.

55. See *id.* at 639-40.

56. U.N. High Comm'r for Human Rights, *The Right to Privacy in the Digital Age*, U.N. Doc. A/HRC/27/37 (June 30, 2014).

57. Human Rights Comm. (32nd session), General Comment No. 16: Article 17 (Right to Privacy) (April 8, 1988) [hereinafter General Comment No. 16].

violations of ICCPR Article 17 and the Universal Declaration of Human Rights (UDHR) Article 12.<sup>58</sup> These sources, and the academic commentary surrounding them, show that the practices alleged by the Unit 8200 refuseniks are in violation of ICCPR Article 17.

ICCPR Article 17 grants a right to privacy that the alleged Israeli surveillance practices in the West Bank and Gaza violate. Article 17 provides that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”<sup>59</sup> On the face of this provision, in order to be considered a violation of Article 17, a state’s actions must be shown to be: (1) an interference with privacy, (2) that is either arbitrary or unlawful, and (3) not covered by the Article 4 national security exception. This section will discuss the contours of that privacy right, its limitations in the national security context in conjunction with ICCPR Article 4, and its applicability to electronic surveillance practices such as those alleged by the Unit 8200 refuseniks. As the privacy interferences alleged against Israeli intelligence specifically claim that collection targets are selected despite a complete lack of military or terrorist involvement, these practices would violate the prohibition of “arbitrary or unlawful interference” and would not fall under the ICCPR’s national security exception.

### 1. Interference with Privacy

For Article 17 privacy rights to be implicated, a state’s action must first be shown to qualify as an “interference with privacy.” However, since the ICCPR and General Comment No. 16 were drafted well before the internet age, they do not explicitly envisage the kinds of privacy interferences that are most intrusive and prevalent today.<sup>60</sup> Indeed, the allegations made by the Unit 8200 refuseniks are of a nature and type quite similar to other allegations of mass surveillance of late; and while these practices are not explicitly covered by the definitions of General Comment No. 16, the jurisprudence of the HRC and academic commentary indicate that they should be considered infringements on the Article 17 privacy right.

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58. G.A. Res. 71/199, U.N. Doc. A/C.3/71/L.39/Rev.1, at 2 (Nov. 16, 2016).

59. ICCPR, *supra* note 15, art. 17.

60. *See, e.g.*, AMERICAN CIVIL LIBERTIES UNION, PRIVACY RIGHTS IN THE DIGITAL AGE: A PROPOSAL FOR A NEW GENERAL COMMENT ON THE RIGHT TO PRIVACY UNDER ARTICLE 17 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 9-10 (2014) [hereinafter ACLU PROPOSAL].

The HRC has relied on a broad definition of “interference” in the context of Article 17, but a precise definition has yet to be laid out.<sup>61</sup> In *Toonen v. Australia*, for example, the HRC found an interference with privacy in the mere continued existence of legislation criminalizing sexual contact between men, despite never having been enforced.<sup>62</sup> The ECtHR, in analyzing the ECHR Article 8 (analogous to ICCPR Article 17), has found explicitly that electronic intelligence surveillance constitutes an impermissible interference.<sup>63</sup> If, as in *Toonen*, the technical criminalization of a private act, absent any prosecution or tangible intrusion on an individual’s private life, can be found to be an impermissible “interference” under Article 17, then surely the actual intrusion into an individual’s personal communications and private life as purportedly committed by Israeli intelligence would, *a fortiori*, constitute an “interference” as well. ICCPR Article 17 should be, as ECHR Article 8 has been, interpreted to find an interference with privacy when a state conducts electronic surveillance.

## 2. “Unlawful” Interference

ICCPR Article 17 prohibits two forms of interference with privacy: “unlawful” interference and “arbitrary” interference.<sup>64</sup> As defined by General Comment No. 16, “unlawful” does not mean simply in conflict with existing law, but rather that “no interference can take place except in cases envisaged by the law.”<sup>65</sup> Absent affirmative authorization by a state’s legislation, which in turn must comport with the ICCPR, interference with an individual’s right to privacy is therefore prohibited.<sup>66</sup> Additionally, as illustrated by HRC practice and comparable application of the ECHR, the domestic law authorizing such interference must be both reasonably foreseeable to the person concerned as well as precise and clearly defined.<sup>67</sup>

61. *Id.* at 19.

62. *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, ¶ 8.2 (1994); see also ACLU PROPOSAL, *supra* note 61, at 19.

63. See, e.g., *Weber v. Germany*, App. No. 54934/00, Decision as to Admissibility, Eur. Ct. H.R., ¶ 78 (2006), <http://hudoc.echr.coe.int/eng?i=001-76586> (“[T]he secret monitoring of communications . . . amounts in itself to an interference with the exercise of the applicants’ rights under Article 8[.]”).

64. ICCPR, *supra* note 15, art 17.

65. General Comment No. 16, *supra* note 58, ¶ 3.

66. *Id.* See also ACLU PROPOSAL, *supra* note 61, at 21.

67. ACLU PROPOSAL, *supra* note 61, at 21. See also General Comment No. 16, *supra* note 58, ¶ 3.

Regardless of any Israeli legislation which might be argued to authorize such collection practice,<sup>68</sup> and whether it is sufficiently precise and specific, the practices alleged by the refuseniks fail the foreseeability requirement on their face. The ECtHR has laid out the requirements of such a lawfulness test: “the standard of ‘lawfulness’ set by the Convention . . . requires that all law be sufficiently precise to allow the person—if need be, with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”<sup>69</sup> In *Weber*, the ECtHR further clarified and required six specific criteria to be met by the enacting legislation, which the court most recently applied when finding the U.K.’s bulk surveillance scheme to be an impermissible violation of Article 8 rights.<sup>70</sup> While the ECtHR has continued to contend that a mass surveillance scheme is not a per se violation of ECHR Article 8, it has repeatedly insisted that such schemes are permissible *only* with justifying legislation that meets the criteria set forth in *Weber*.<sup>71</sup> Under this standard, members of armed terrorist groups, or opposing military factions, could likely foresee that their actions in belonging and participating in those activities might give rise to state action. But as the refuseniks stated in their allegations, a “significant portion of the unit’s Palestinian objectives are innocent people unconnected to any military activity.”<sup>72</sup> Civilians without military or terrorist involvement do not (and should not) expect this type of intrusion. That these collection targets had no reasonable expectation to foresee the invasion of their privacy by Israeli intelligence, and the complete absence of specific justifying legislation, is sufficient to show the unlawfulness of the practice.

### 3. “Arbitrary” Interference

Not only are these collection practices “unlawful” under Article 17, they also constitute “arbitrary interferences.” General Comment No. 16 expresses the HRC’s stance that “‘arbitrary interference’ can also

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68. See generally Wiretapping Law, 5777–2017, SH No. 2653, pp. 1060-62 (Isr.); Privacy Protection Law, 5760–2000, SH No. 1735, p. 160 (Isr.); Basic Law: Human Dignity and Liberty, 5752–1992, SH No. 1391, p. 150 (Isr.). While a thorough analysis of these laws is beyond the scope of this Note, the author notes that these laws all recognize a right to privacy in *Israeli citizens*; they are not, however, applicable to Palestinian residents of the occupied territories under Israeli law.

69. *Jecius v. Lithuania*, App. No. 34578/97, Eur. Ct. H.R. ¶ 56 (2000).

70. See *Big Brother Watch v. United Kingdom*, App. No. 58170/13, Judgment, Eur. Ct. H. R. (2018) (pending review by the Grand Chamber), <http://hudoc.echr.coe.int/eng?i=001-186048>.

71. *Id.* ¶ 307; *Weber*, App. No. 54934/00, ¶ 95.

72. Beaumont, *Intelligence Veterans*, *supra* note 5 (internal quotations omitted).

extend to interference provided for under the law.”<sup>73</sup> Even if Israeli legislation provided for such surveillance practices, the application of such legislation should be permissible only insofar as it comports with the “aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.”<sup>74</sup> The HRC has interpreted this reasonableness requirement to include an aspect of proportionality to the end sought by the infringing state.<sup>75</sup>

Intelligence surveillance of civilians who are not participating in hostilities, as the refuseniks describe, is neither reasonable nor proportional and should therefore be deemed arbitrary, in violation of Article 17. HRC jurisprudence has found that unwarranted and unrestricted wiretaps run awry of Article 17,<sup>76</sup> and the ECtHR has similarly found that legislation regarding electronic surveillance, as well as other invasions of privacy, must provide adequate safeguards against arbitrariness by being sufficiently circumscribed and subject to limitation.<sup>77</sup> The surveillance practices giving rise to the refuseniks’ protest meet none of these requirements; low-level personnel approving wiretaps on civilians would certainly fail any assessment of reasonableness, and the lack of military or terrorist involvement makes a proportionality finding impossible. The practices described seemingly lack any safeguards and are not circumscribed in any manner. The practices alleged against Unit 8200 are therefore arbitrary under Article 17.

Given that the alleged Israeli interference with Palestinians’ privacy is both arbitrary and unlawful, as discussed above, it is presumptively impermissible under the ICCPR unless excused under the national security exception in Article 4.

### C. ICCPR Article 4: The National Security Exception

Under ICCPR Article 4, States Parties to the ICCPR may be excused from their obligations “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially

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73. General Comment No. 16, *supra* note 58, ¶ 4.

74. *Id.*

75. See *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, ¶ 8.2 (1994).

76. See U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations, Russia*, ¶ 20 U.N. Doc. CCPR/CO/79/RUS (2003); U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations, Jamaica*, ¶ 20 U.N. Doc. CCPR/C/79/Add.83 (1997).

77. See *Zakharov v. Russia*, App. No. 47143/06, Eur. Ct. H.R. (Dec. 4, 2015).



proclaimed.<sup>78</sup> It is worth noting that Israel has been in a declared state of public emergency since its founding.<sup>79</sup> This Note will not address the validity of that state of emergency, but rather will focus on the qualification provided by Article 4 to that excuse: derogations from the ICCPR can only be taken “to the extent strictly required by the exigencies of the situation.”<sup>80</sup> Article 4 goes on to disallow any measures that involve “discrimination solely on the ground of race, color, sex, language, religion or social origin.”<sup>81</sup> Unit 8200’s purported collection practices fail to meet these two qualifications, as discussed below; therefore, the Article 4 exception is not triggered, and the violation of Article 17 remains.

The practices described by the refuseniks amount, in colloquial terms, to a “fishing expedition.” Collection targets being identified and approved by the lowest ranks of the unit, specifically prioritizing private information without military implications, cannot possibly be “strictly required” under Article 4.<sup>82</sup> The ICJ, in its Advisory Opinion on Nuclear Weapons, quite clearly established the applicability of the ICCPR in a national emergency: “[T]he protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”<sup>83</sup> Assuming, *arguendo*, the viability of the declared state of public emergency in Israel, these practices would remain violations. While intelligence collection and the infringement of privacy in certain cases may well be protected under Article 4, even by its own terms, permissible infringement is limited to what is “strictly required.”<sup>84</sup> As Israel maintains numerous other sources of defense and, presumably, many other collection targets, at least some of which are more closely tailored to the threats it faces, these specific interferences with the privacy rights of Palestinians not involved in hostilities are not strictly required. Article 4 cannot be invoked as a *carte blanche* to justify all intrusive state action; rather, it quite explicitly restricts itself to permitting state action under

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78. ICCPR, *supra* note 15, art. 4.

79. The state of emergency, declared seven days after the establishment of the State of Israel, is of contested legitimacy and often cited as a tool of discrimination against Palestinian residents of the OPT. See Yoav Mehozay, *The Fluid Jurisprudence of Israel’s Emergency Powers: Legal Patchwork as a Governing Norm*, 46 L. SOC. REV. 137, 137 (2012); see also ICCPR, *supra* note 15, art. 4(1).

80. ICCPR, *supra* note 15, art. 4.

81. *Id.*

82. See *id.*

83. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

84. See ICCPR, *supra* note 15, art. 4.

a theory of necessity. The facts presented by the refuseniks do not comport with this requirement.

Furthermore, targeting Palestinian residents of the OPT not engaged in hostilities would likely fall under the prohibited discrimination “solely on the ground of race . . . or social origin.”<sup>85</sup> These civilians are being targeted by Unit 8200 simply because they are Palestinians residing in the OPT, without any cause to believe that they are involved in military or terrorist activity.<sup>86</sup> This activity would surely qualify as discrimination on the basis of either race or social origin, and is therefore prohibited even under the Article 4 exception for national security.

As discussed above, the ICCPR should be found to apply extraterritorially at least insofar as it restricts Israeli action in the OPT. The practices described by the refuseniks’ letter violate Article 17, as they are both unlawful and arbitrary. Since they are not strictly required for the supposed exigencies of Israel’s state of emergency, these practices are not subject to an Article 4 exception; they are also likely to qualify as discrimination on the ground of race and/or social origin. In order to conform with the ICCPR, to which it is a signatory, Israel must cease these practices and regulate its intelligence community to ensure Palestinians the right to privacy to which they are entitled.

### III. INTERNATIONAL HUMANITARIAN LAW: IMPLICATIONS OF THE OCCUPATION

A common response from the Israeli government to criticisms of supposed violations of international law is that the situation in which Israel finds itself as regards the OPT is *sui generis*.<sup>87</sup> Applying international human rights law or IHL to Israeli action in the OPT is inherently distinct from the majority of the cases in which those bodies of law are cited, precisely because of the continued occupation of these territories.<sup>88</sup> This Section will briefly survey the legal framework through which this occupation should be viewed and discuss the implications of that framework on the enforcement of the ICCPR as discussed above.

“Belligerent occupation,” or “military occupation,” is generally characterized by “first, a formal system of external control by a force whose presence is not sanctioned by international agreement; and second, a

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85. *Id.*

86. Beaumont, *Intelligence Veterans*, *supra* note 5.

87. *See, e.g.*, Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. INT’L L. 44, 72 (1990) (citing Office of the Legal Adviser, *Memorandum (Sept. 12, 1984)*, in A. ROBERTS ET AL., *ACADEMIC FREEDOM UNDER ISRAELI MILITARY OCCUPATION* 80-81 (1984)).

88. *See generally id.*

conflict of nationality and interest between the inhabitants, on the one hand, and those exercising power over them, on the other.”<sup>89</sup> This quite aptly describes the Israeli occupation of the OPT, and the term is broadly used in that context.<sup>90</sup> Belligerent occupation is subject to several bodies of international law, including the Hague Regulations, Geneva Convention IV, and CIL.<sup>91</sup> These sources will be discussed in turn as they relate to these Israeli intelligence practices.

A. *The Hague Regulations and Customary International Law*

The Hague Regulations require Israel to recognize a privacy right in Palestinians, which the practices alleged by the refuseniks would violate. Article 43 of the Hague Regulations lays out perhaps the most fundamental tenet of the law of occupation:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety,<sup>92</sup> while respecting, unless absolutely prevented, the laws in force in the country.<sup>93</sup>

This basic rule of occupation has been consistently upheld by international tribunals and the ICJ.<sup>94</sup> While Israel is not a signatory to the Hague Regulations, it has conceded before the ICJ,<sup>95</sup> and the Israeli

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89. *Id.* at 44.

90. See generally *id.*; EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* (2d ed., 2012); YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* (2009).

91. See DINSTEIN, *supra* note 91, at 4-8. While the Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (Protocol I) is also an applicable source of law for belligerent occupation, it is not included in the analysis here as its applicability to the Israeli occupation is questionable and does not add much in the way of relevant protections for this case.

92. While not particularly germane to the analysis here, the author notes that the authoritative French version of the text refers to “l’ordre et la vie publics,” which would be more aptly translated as “public order and civil life.” See, e.g., BENVENISTI, *supra* note 91, at 68 n.1; Edmund Schwenk, *Legislative Power of the Military Occupant Under Article 43, Hague Regulations*, 54 *YALE L. J.* 393, 393 n.1 (1945). The semi-official English language version of the text will be used here, as the distinction is immaterial to the analysis.

93. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Regulations].

94. See DINSTEIN, *supra* note 91, at 5 (surveying the International Military Tribunals of Nuremberg and Tokyo, as well as the ICJ opinions on The Wall Case and the Congo).

95. See *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 172 (July 9).

HCJ as expressly affirmed,<sup>96</sup> that they are binding CIL. Indeed, the Israeli government relies on the applicability of the Hague Regulations to engage in some of its most contested activities in the OPT, including the punitive demolition of the homes of Palestinians who have engaged in hostilities against the state.<sup>97</sup> The HCJ has also consistently applied the Hague Regulations when assessing IDF activity in the West Bank and Gaza.<sup>98</sup> Since Article 43 requires the occupant to respect the laws in force at the time of occupation, however, the question arises as to which laws were in force in the OPT at the time of occupation. The following sections address the West Bank and Gaza in turn, and the corresponding constitutional rights under Jordanian and Egyptian law in 1967, respectively.

### 1. West Bank: Jordanian Law of 1967

The applicability and validity of Jordanian law in the West Bank has been recognized by Israel since its occupation began on June 7, 1967.<sup>99</sup> Upon declaring authority over the West Bank, the Military Commander of the IDF for that region, in Military Proclamation No. 2, affirmed Israel's obligation as the occupant to maintain Jordanian law insofar as it did not pose a threat to Israel's security and did not prevent the application of the Hague Regulations.<sup>100</sup> Consequently, this section addresses the privacy protections in Jordanian law as of 1967.

The Jordanian Constitution in effect at that time, enacted in 1952, includes a right to privacy.<sup>101</sup> Article 18 of that instrument provides that “[a]ll postal, telegraphic and telephonic communications shall be treated as secret, and as such shall not be subjected to censorship or

96. See HCJ 606/78, *Ayub v. Minister of Def.* 33(2) PD 113, 120 (1979) (Isr.).

97. See Michael T. Samuel, *Punitive House Demolitions in the West Bank: The Hague Regulations, Geneva Convention IV, and a Jus Cogens Bypass*, 6 BERK. J. MIDDLE E. & ISLAMIC L. 1, 9-10 (2014).

98. DINSTEIN, *supra* note 91, at 91 (citing HCJ 393/82 *Jama'it Askan v. Commander of the IDF in Judea and Samaria* 37(4) PD 785, 792 (1983) (Isr.)).

99. The Israeli occupation of the West Bank and Gaza began as a result of the 1967 War, prior to which the West Bank had been annexed by Jordan without recognition from the international community, and Gaza was under Egyptian occupation. See Samuel, *supra* note 98, at 2, 7; see also Sharon Weill, *The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories*, 89 INT'L REV. RED CROSS 395, 401 (2007) (citing Military Proclamation No. 2 Concerning Regulation of Authority and the Judiciary (West Bank) (1967)).

100. Weill, *supra* note 100. Since approximately 1971, however, the Israeli government has exercised a broad interpretation of this necessity, making vast alterations to Jordanian law by way of the Military Commander in the West Bank. See RAJA SHEHADEH & JONATHAN KUTTAB, *WEST BANK AND THE RULE OF LAW: A STUDY* (1980).

101. THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, Jan. 1, 1952, art. 18.

suspension except in the circumstances prescribed by law.”<sup>102</sup> While this limited privacy right may not be regularly honored by Jordanian authorities today,<sup>103</sup> Article 43 of the Hague Regulations would hold Israel, as the belligerent occupant of the OPT, responsible for upholding it. Electronic intelligence surveillance as described by the refuse-niks would certainly constitute a breach of the secrecy guaranteed by Article 18, and the qualification “except in the circumstances prescribed by law,”<sup>104</sup> would seemingly trigger analogous requirements of domestic legislation as did the ICCPR’s “unlawful” analysis, shown to fail above.<sup>105</sup> This constitutional right to privacy under Jordanian law in 1967, therefore, should be upheld by Israel under Article 43 of the Hague Regulations.

## 2. Gaza: Egyptian Law of 1967

As Gaza was under Egyptian control until the Israeli occupation, the Hague Regulations require Egyptian law to remain in force there.<sup>106</sup> Under Egyptian law as of 1967, a right to privacy was recognized in both the Constitution of 1956 and the Civil Code promulgated in 1949.<sup>107</sup> Articles 41 and 42 of the 1956 Constitution recognize the inviolability of private residences and the “sanctity of correspondence” respectively, both of which permit intrusion only as provided by affirmative legislation.<sup>108</sup> The Civil Code, in turn, provides for compensatory and injunctive relief for an individual whose “personality rights” have been violated;<sup>109</sup> the right to privacy and the sanctity of private life were understood to be included in those personality rights.<sup>110</sup> The previous

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102. *Id.* The constitution was amended in 1954, 1955, 1956, 1958, 1960 and 1965 without alteration to the cited article. See THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, *as amended* Apr. 1, 1965; see also Mohamed Mattar, *Article 43 of the Arab Charter on Human Rights: Reconciling National, Regional, and International Standards*, 26 HARV. HUM. RTS. J. 91, 117–18 (2013).

103. See, e.g., U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR: JORDAN (Mar. 6, 2007), <https://www.state.gov/j/drl/rls/hrrpt/2006/78855.htm>; EPIC, PRIVACY AND HUMAN RIGHTS REPORT, JORDAN (2006), <http://www.worldlii.org/int/journals/EPICPrivHR/2006/PHR2006-The-4.html#fnB3190>.

104. THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, *as amended* Apr. 1, 1965, art. 18.

105. See *supra*, Part II(B)(2).

106. See Hague Regulations, *supra* note 94, at art. 43.

107. See CONSTITUTION OF THE REPUBLIC OF EGYPT, Jan. 16, 1956, arts. 41-42; Civil Code art. 50 (1949) (Egypt).

108. Civil Code art. 50 (1949) (Egypt).

109. *Id.*

110. See, e.g., MARIAM M. EL-AWA, CONFIDENTIALITY IN ARBITRATION: THE CASE OF EGYPT 159-60 (2016). Al-Awa draws support from the preparatory works of the Civil Code, which reference a list

1930 Constitution included a similar provision recognizing the sanctity of one's domicile.<sup>111</sup> While these Egyptian sources of law did not clearly envision the kind of electronic surveillance allegedly conducted by Unit 8200, they recognize and enshrine the individual's right to privacy in his home. The surveillance practices purportedly espoused by Unit 8200 would violate this right: they are not authorized by any affirmative legislation, they are not strictly necessary for the defense of Israel, and they do not otherwise impede the implementation of the Regulations. The Hague Regulations would therefore require Israel, as occupant, to cease them.

### 3. UDHR as Customary International Law

International custom, as defined by the ICJ Statute, is cemented when there is "evidence of a general practice accepted as law."<sup>112</sup> While both Jordan and Egypt signed and ratified the ICCPR, neither did so before the Israeli occupation began. Jordan became a signatory to the ICCPR only in 1972 and ratified it in 1975,<sup>113</sup> while Egypt signed it in August of 1967 (just two months after the beginning of the Israeli occupation of Gaza) and ratified it in 1982.<sup>114</sup> The UDHR, including its Article 12 (nearly identical in wording to ICCPR Article 17), however, constitutes CIL applicable to and binding upon all nations, and was so considered since before 1967.<sup>115</sup> The ICJ has also referred to the UDHR as CIL, as early as 1962.<sup>116</sup>

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of examples on personality rights which included "assault on the person's freedom . . . reputation or the sanctity of his domicile." *Id.*

111. *See* CONSTITUTION OF THE KINGDOM OF EGYPT, Oct. 22, 1930, art. 8.

112. *E.g.*, Statute of the International Court of Justice art. 38(1)(b) (San Francisco, June 26, 1945), 59 Stat. 1055, T.S. No. 993, *entered into force* Oct. 24, 1945.

113. U.N. Human Rights Office of the High Comm'r, Ratification Status for Jordan, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=88&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=88&Lang=EN) (last visited Dec. 28, 2017).

114. U.N. Human Rights Office of the High Comm'r, Ratification Status for Egypt, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=54&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=54&Lang=EN) (last visited Dec. 28, 2017).

115. *See, e.g.*, Montreal Statement of the [Nongovernmental] Assembly for Human Rights (1968), *reprinted in* 9 J. INT'L COMM'N JURISTS 94 (1968) (The UDHR "has over the years become part of customary international law."); Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, 11 Supp. Pub. 1 INT'L & COMP. L.Q. 1, 15 (1965).

116. *See* South West Africa Cases, Preliminary Objections, Judgment 1962 I.C.J. 319, 323, (Dec. 1962) (finding the U.N. Charter and the UDHR to be "currently accepted international standards").

## AN INTERNATIONAL RIGHT TO PRIVACY

Accepting UDHR Article 12 as CIL,<sup>117</sup> the Unit 8200 privacy intrusions would violate Article 12 under the same reasoning as they do the analogous ICCPR Article 17 provision discussed above.<sup>118</sup> Under the Hague Regulations, Israel is responsible for enforcing and respecting the law of the land at the time of its occupation of the territories in 1967.<sup>119</sup> The CIL at the time, coupled with Jordanian and Egyptian constitutional rights, indicate that at least a limited right to privacy should be recognized in the OPT and honored by Israel. The warrantless and unchecked intrusion upon this right, as claimed by the Unit 8200 refuseniks, would violate this right and therefore contradict the obligations of a belligerent occupant under the Hague Regulations.

### B. Geneva Convention IV

The Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, drafted in 1949, also addresses the legal obligations of a belligerent occupant.<sup>120</sup> Indeed, as Article 154 of Geneva Convention IV provides, the Convention is “supplementary” to the Hague Regulations, providing additional protection to the occupied civilian populace, and at times explicitly overrides the Hague Regulations.<sup>121</sup> In this instrument, for the first time, an international legal doctrine addressed the victims of armed conflict outside the strict context of warfare between sovereigns.<sup>122</sup> Most remarkably, the Convention has 166 States Parties, which in and of itself is nearly dispositive as to its being CIL.<sup>123</sup> Israel ratified the Convention in 1951 and recognizes the its binding nature.<sup>124</sup> More contentiously, however, the Israeli government has iterated an interpretation of the applicability of Article 2 of the

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117. “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.” Universal Declaration of Human Rights, G. A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 12 (Dec. 10, 1948) [hereinafter UDHR].

118. *See supra*, Section II(A).

119. *See* Hague Regulations, *supra* note 94, art. 43.

120. Convention Relative to the Protection of Civilian Persons in Time of War art. 31, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

121. *Id.* art. 154; DINSTEIN, *supra* note 91, at 6-7. *See also* ICRC, COMMENTARY, IV GENEVA CONVENTION 618 (O.M. Uhler & H. Coursier eds., 1958).

122. Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT’L L. J. 365, 407 (2009).

123. *See* Roberts, *supra* note 88, at 53 (“This remarkably high number is one of several factors that have strengthened arguments that the Conventions are, in whole or in substantial part, declaratory of customary international law.”); *see also* Theodore Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT’L L. 348 (1987).

124. DINSTEIN, *supra* note 91, at 20.

Convention that excludes the OPT, citing the fact that these territories were not parts of Contracting States, but rather were under unrecognized occupations by Jordan and Egypt, respectively, and are therefore supposedly unprotected by the Convention.<sup>125</sup> This interpretation has been summarily rejected by the ICJ and most scholars.<sup>126</sup>

Technically, Geneva Convention IV may not constitute binding law by Israeli standards. Having inherited a dualist system from the British, Israel requires treaties to be incorporated in domestic law by specific legislation in order to be invoked in Israeli courts.<sup>127</sup> While no such legislation has been enacted, Israeli governmental entities have repeatedly given express consent for the HCJ to apply the Convention to their actions, and the HCJ references it more and more frequently, if only as dicta.<sup>128</sup> This concession, together with decades of precedent in the prolonged occupation, weighs toward viewing the Convention as both binding on Israel in the OPT and subject to HCJ judicial review.<sup>129</sup> In that vein, the intelligence surveillance practices charged by the Unit 8200 refuseniks can be subjected to the Geneva Convention IV regulations.

The Convention affirms the requirement of the Hague Regulations to maintain the laws in force at the time of occupation in Article 64.<sup>130</sup> It allows, however, for three categories of legislative change, beyond the Hague Regulation stipulation of absolute necessity: (1) the repeal of laws that pose a security threat to the occupant, (2) the repeal of laws inconsistent with the Geneva Convention, and (3) the enactment of legislation geared towards the needs of the occupied civilian population.<sup>131</sup> All of these permissive provisions, however, address only acts of affirmative, published legislation; it is not permissible for the occupant simply to disregard the law in effect in the occupied territories.<sup>132</sup> In

125. For a full discussion of the untenable Israeli position which has since been essentially rendered moot by government concession, at least in practice, see Roberts, *supra* note 88, at 62-66.

126. DINSTEIN, *supra* note 91, at 23-24. Notably, Attorney General Meir Shamgar (who was the IDF Advocate General in 1967 and went on to be President of the Supreme Court) announced in 1971 that the Israeli government would "act de facto in accordance with the humanitarian provisions of the Convention." *Id.* at 24. As Dinstein points out, this statement essentially commits the government to the entirety of the Geneva Convention, as its regulations make up a significant part of international humanitarian law. *Id.*

127. *Id.* at 28.

128. *Id.* at 29-30.

129. *Id.* at 30.

130. Geneva Convention IV, *supra* note 122, art. 64.

131. DINSTEIN, *supra* note 91, at 111.

132. *Id.*



light of the absence of such legislation, Israel is bound to uphold the Jordanian, Egyptian, and international law applicable at the time of occupation. Geneva Convention IV, therefore, requires Israel to recognize the Palestinian right to privacy.

Sources of IHL, including the Hague Regulations, Geneva Convention IV, and CIL, uniformly require Israel to recognize a right to privacy in the residents of the OPT. Absent authorizing legislation illustrating a necessity to override that presumptive right, these collection practices violate IHL.

#### IV. CONCLUSION

The Israeli intelligence apparatus has been accused of violating international human rights and humanitarian law to deepen its control over the civilian population of the OPT. The targeting of Palestinian civilians with no military or terrorist affiliation for electronic surveillance, and using the information thereby acquired to coerce collusion with the occupant, has served to further Israel's entrenchment in an occupation that has lasted for over fifty years. In order to properly observe international human rights law, Israel must recognize the applicability of the ICCPR to the OPT and uphold the privacy right granted by that instrument. IHL, including relevant CIL norms and the Hague Regulations, similarly requires Israel to cease these surveillance practices, whether by applying the UDHR, Jordanian law, or Egyptian law, as all find such surveillance to be a violation of Palestinians' universally recognized rights.

Electronic surveillance of unwitting and innocent civilians without cause or constraint is a violation of the privacy rights guaranteed to all humans by ICCPR Article 17. This violation is not mitigated by the emergency powers recognized by ICCPR Article 4, notwithstanding Israel's de facto permanent state of emergency, as the intrusion on these civilians' privacy is not strictly necessary for Israel's security. Further, IHL, in the form of both the Hague Regulations and Geneva Protocol IV, requires Israel to recognize and uphold the law of the land in effect at the time of occupation in 1967—namely, the UDHR as well as Egyptian and Jordanian law, which also deem these surveillance activities illegal, absent specific legislation repealing the privacy right embodied in those laws, which legislation would have to show that the civilian population's right to privacy either threatens the security of Israel or hinders the application of the Hague Regulations. Since no such legislation exists, nor could any reasonable legislation be conceived, these intelligence collection practices would violate Israel's obligations as occupant of the West Bank and Gaza. Under international law, both human rights and humanitarian, Israel must curtail these practices.