THE 2016 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

CASE CONCERNING THE FROST FILES

STATE OF AMESTONIA

(APPLICANT)

V.

FEDERAL REPUBLIC OF RIESLAND

(RESPONDENT)

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE, THE HAGUE, THE NETHERLANDS

ON 13 JANUARY 2016

MEMORIAL FOR THE RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015	
IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, INTERNATIONAL BAR ASSOCIATION (2010)	5
James Lewis, *The Internet and Terrorism*, 99 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 112 (2005)	14
Alexander Kees, *Responsibility of States for Private Actors*, MPEPIL 2015, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1092?rskey=k2d33m&result=5&prd=EPIL	47
Microsoft TechNet, *Master Boot Record*, https://technet.microsoft.com/en-us/library/cc976786.aspx?f=255&MSPPError=-2147217396	53
Nakashima, *Confidential Report Lists US Weapons System Designs Compromised by Chinese Cyberspies,* WASHINGTON POST, 2013 https://www.washingtonpost.com/world/national-security/confidential-report-lists-us-weapons-system-designs-compromised-by-chinese-cyberspies/2013/05/27/a42c3e1c-c2dd-11e2-8c3b-0b5e9247e8ca_story.html	7
"The National Security Agency: Missions, Authorities, Oversight and Partnerships," 9 August 2013, 6, https://www.nsa.gov/public_info/_files/speeches_testimonies/2013_08_09_the_nsa_story.pdf	15
MICHAEL SCHMITT, THE TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (2013)	8, 9, 46, 48, 51
Harriet Sherwood, *Günter Grass barred from Israel over poem*, THE GUARDIAN (Apr. 2012), http://www.theguardian.com/world/2012/apr/08/gunter-grass-barred-from-israel	21
Atilla Tanzi, *Liability for Lawful Acts*, MPEPIL 2015, opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1065?rskey=ZX7Ylj&result=1&prd=EPIL	50
Troianovsky, *Germany Requests Meeting with US Ambassador over New Spying Leaks* WALL STREET JOURNAL, 2015, http://www.wsj.com/articles/germany-requests-meeting-with-u-s-ambassador-over-new-spying-leaks-1435850048	7

STATEMENT OF JURISDICTION

The State of Amestonia ("Amestonia") and the Federal Republic of Riesland ("Riesland") hereby submit the present dispute to the International Court of Justice ("ICJ"), pursuant to Article 40(1) of the Court's Statute, in accordance with the Compromis for submission to the ICJ on the differences concerning the Frost Files, signed in The Hague, The Netherlands, on the first day of September in the year two thousand fifteen. Both States accepted the jurisdiction of this Court pursuant to Article 36(1) of its Statute.

QUESTIONS PRESENTED

I. Whether the *Ames Post* documents are admissible as evidence before the Court.

II. Whether the *Ames Post* documents evidence a breach of an international obligation of Riesland to Amestonia.

III. Whether the arrests of VoR employees and confiscation of VoR property violated the Broadcasting Treaty.

IV. Whether these arrests and confiscation violated international law.

V. Whether Amestonia may exercise diplomatic protection over Joseph Kafker.

VI. Whether Joseph Kafker's detention was lawful and non-arbitrary.

VII. Whether evidence concerning Kafker's detention should be revealed.

VIII. Whether the cyber attacks against the *Ames Post* and Chester & Walsingham are attributable to Riesland.

IX. Whether the cyber attacks constitute an internationally wrongful act.

STATEMENT OF FACTS

BACKGROUND

Riesland is a developed, democratic State with a population of approximately 100 million and a world-renowned IT and communications sector. Its relations with Amestonia, its agrarian neighbor to the south, have long been positive: notably, since 1970, the States have cooperated closely through bilateral agreements in fields such as tourism, trade, extradition, and intelligence sharing. In 1992, the States established an agricultural free-trade area, and Riesland has since become the top importer of Amestonian agricultural produce, leading to exceptional GDP growth of 6.8-7.4% in Amestonia. Many Amestonian farmers utilize Rieslandic-produced neonics to significantly boost yields. While some environmental groups raised concern about neonics' effects, no definitive evidence of causation was shown between the use of neonics and the decline in regional honeybee populations.

In 1992, the States signed the "Treaty on the Establishment of Broadcasting Facilities" ("the Broadcasting Treaty") as a continued expression of the close ties between them. Pursuant to the Broadcasting Treaty, each State established and operated a television station in the other's territory subject to immunities for the facility, assets, documents, archives and employees of both stations. As such, the state-owned Voice of Riesland (VoR) began its programming on 22 December 1992 and aired many award-winning programs and interviews with Amestonian dignitaries.

ECO-TERRORISM ATTACKS AND THE HIVE

Following reports of the potentially detrimental effects of neonics, an escalating wave of eco-terrorism grievously affected both States. The first attack came on 2

February 2014, when seven Amestonian warehouses were set on fire, killing five, including two Rieslandic nationals; many were injured and some €75 million of damage was caused, including long-term adverse health consequences for the local population. A month later, on 7 March 2014, 263 envelopes containing white powder were sent to Amestonian and Rieslandic government ministers, farmers and corporation board members, followed by a threat that the next attack would be more dangerous. Both attacks were marked by the image of a bee: spray-painted at the arson scene and stamped on the envelopes. A website established in 2013, www.longlivethehive.com, became a hub of incitement promoting violent actions and endorsing them after they occurred – most notably the envelopes affair.

Riesland offered to assist Amestonia in combating the wave of eco-terrorism attacks and began to work against that threat through the Rieslandic Secret Surveillance Bureau ("the Bureau"), a function established pursuant to the Rieslandic Secret Service Bureau Act 1967 (SSBA), which includes stringent authorization mechanisms, minimization procedures, and safeguards, such as external oversight and limitations on operation. Intelligence sharing between Riesland and Amestonia succeeded in identifying a ring of activists who had been plotting to contaminate a large shipment of honey meant for Riesland with toxic neonicotinoids. These activists were apprehended by Amestonian police and revealed the existence of "The Hive", a group of eco-terrorism suspects who admitted to have been planning the attack.

In response to the deteriorating situation, Riesland declared a Terrorism Alert on 17 October 2014 pursuant to the 2003 Terrorism Act, which was reissued in April and

October 2015 and followed by a notification to the Secretary General of the United Nations.

THE "FROST FILES"

On 16 December 2014, Frederico Frost, a former Bureau analyst, defected to Amestonia with a USB drive containing nearly 100,000 top-secret documents downloaded from Bureau computers. He passed this drive on to Chester & Walsingham, an Amestonian law firm, and to two reporters from *The Ames Post*, Amestonia's most widely circulated newspaper. In January and February 2015, *The Ames Post* published thousands of unedited documents from Frost's USB on its website.

These documents revealed two Rieslandic surveillance programs. The first, *Verismo*, involved a recording pod placed on a section of an undersea fiber optic cable located in Riesland's exclusive economic zone. The program, which allowed the retention of information for a limited timeframe, has been repeatedly and extensively reviewed in accordance with the SSBA. *Verismo* had provided material benefit to the national security of both States – most recently in the eco-terrorism affair – and the intelligence gained was frequently shared with Amestonia. The second, *Carmen*, operated from the VoR and allowed Rieslandic officials to gain intelligence on a number of high-ranking Amestonian nationals via their cell-phones and laptops.

On 2 February 2015, Riesland requested the immediate extradition of Frost in accordance with the 1970 Extradition Treaty, and the recovery of the aforementioned "Frost Files". Despite Riesland's emphasis of the damage that the publication of the materials would have on the cooperation between the nations in their joint fight against

terror, both requests were refused by Amestonia. Amestonia continues to provide sanctuary to Frost.

THE SEARCH OF THE VOR AND THE ARREST OF ITS EMPLOYEES

Following the publication concerning the *Carmen* program on 16 February 2015, Amestonian police was granted a warrant to seize all VoR assets and property for criminal investigation. Amestonian police forces entered the station, which was unattended and broadcasting reruns, and removed and catalogued broadcasting equipment and various other documents and devices. Amestonia later granted researchers unfettered access to the seized devices.

The following morning, three Rieslandic VoR employees were arrested, detained, and denied bail on suspicion of espionage. That day, Amestonia recalled its ambassador to Riesland and closed its television station in Riesland.

On 22 April 2015, the Amestonian Ministry of Justice announced that a number of the items taken from the VoR had been used for surveillance. A forfeiture order was issued against the VoR premises and property, which the Ministry then announced its intention to sell. All challenges and appeals to the proceedings were rejected, and the auction has been stayed until the conclusion of the current legal proceedings.

THE ARREST OF JOSEPH KAFKER

Joseph Kafker, a retired Amestonian politician who actively opposed neonics and attempted to outlaw them, was arrested pursuant to the Terrorism Act 2003 on 7 March 2015, under suspicion of involvement with senior echelons of The Hive. On 10 March 2015, Kafker's case was brought before the National Security Tribunal authorized by the Terrorism Act to review the detention; the evidence and testimonies in his case were

classified as "closed material" as defined in the Terrorism Act. As such, requests by Amestonia's Foreign Minister to reveal it were denied. A lawyer Kafker had selected from a list was present at the proceedings, and Kafker was granted consular assistance, medical treatment, and visits from his family. Since then, Kafker's detention at a maximum-security facility has been reviewed and extended every 21 days for reasons of national security.

THE CYBER ATTACKS AGAINST THE AMES POST AND CHESTER & WALSINGHAM

On 22 March 2015, *The Ames Post* and Chester & Walsingham fell victim to cyber attacks, which disabled their networks and communication switches via a program that disrupted the operation of their computer systems and master boot records, cutting off access to data. Experts from the Amestonian Institute of Technology traced the attacks to Rieslandic government IP addresses, noting that the code involved was not known to be used outside the Bureau. Several proceedings before Amestonian courts were delayed, and *The Ames Post* was forced to shut down temporarily. On 1 April 2015, Amestonia publicly accused Riesland of having committed the cyber attacks, and the States agreed to settle their differences before the International Court of Justice.

SUMMARY OF PLEADINGS

I. THE ADMISSIBILITY OF THE FROST FILES, AND THE LEGALITY OF THE *CARMEN* AND *VERISMO* PROGRAMS

Amestonia's use of the illegally obtained Frost Files violates sovereign equality. The illegality is attributable to Amestonia due to its maintenance and endorsement of the situation begun by Frost, and according to the principle *ex injuria non jus oritur* - "law does not arise from injustice"- this violation cannot be the source of a right, such as to use the files as evidence. Furthermore, admission of the documents would be an infringement of Rieslandic national security.

In any case, the *Carmen* and *Verismo* programs did not violate any international obligation owed by Riesland to Amestonia. Regarding *Carmen,* espionage is not precluded by any international rule, and the program was not an illegal intervention or a violation of Amestonia's territorial integrity. *Verismo*, too, did not violate territorial integrity, and is not subject to the ICCPR. Even if the ICCPR applied, there was no violation of the right to privacy as protected therein, because *Verismo* was neither unlawful nor arbitrary.

II. THE ARREST OF VOR EMPLOYEES AND CONFISCATION OF ITS FACILITY AND PROPERTY

The Broadcasting Treaty, which includes essential immunity and inviolability rights for the VoR station and personnel, was not materially breached by Riesland. In any case, because Amestonia did not comply with procedural requirements for its termination, the Broadcasting Treaty was in force during Amestonia's arrest of the VoR

employees and confiscation of its facility and property; thus, these acts violated the aforementioned immunities and inviolabilities. Any covert activities at the station were neither unlawful nor sufficient for a claim of necessity, and Amestonia was therefore not entitled to breach the treaty.

Even if the Broadcasting Treaty was not in force, the VoR station's assets and personnel enjoyed State immunity and functional immunity, respectively – both of which were violated by Amestonia's actions. Furthermore, allowing Amestonia to retain and sell the confiscated property would allow the State unjust enrichment at Riesland's expense.

III. The Detention of Joseph Kafker and Classification of Relevant Evidence as Closed Material

Riesland experiences an imminent threat to the life of its nation, justifying a declaration of emergency and derogations from the rights to liberty and fair trial through the Terrorism Act 2003. Riesland acted proportionally and without discrimination in issuing and renewing the declaration of emergency, considering that the terrorism threat to Rieslandic nationals remains potent.

Considering the lack of undue delay in Joseph Kafker's local remedies, Amestonia is not entitled to exercise diplomatic protection over him. However, assuming *arguendo* that such protection is permissible, Kafker's detention was pursuant to the aforementioned lawful derogations and resulted from concrete suspicions linking him to a terrorist organization. Evidence concerning his case is classified for national security reasons, but any derogation from his fair trial rights is balanced by advantageous

safeguards, including an advocate and pending review proceedings. Kafker should therefore remain in custody, based on Riesland's substantial interest and suspicions. Furthermore, Riesland should not be ordered to reveal the aforementioned classified evidence, in order to avoid harm to Rieslandic national security.

IV. THE ATTRIBUTION OF THE CYBER ATTACKS TO RIESLAND, AND THEIR LEGALITY

Due to its reliance on circumstantial evidence and the fact that the matter is one of State responsibility, Amestonia faces a high standard of proof in claiming Riesland's responsibility for the cyber attacks against *The Ames Post* and Chester & Walsingham. The Amestonia Institute of Technology report does not meet this standard, nor does it show that the attacks necessarily emanated from a Rieslandic State agent or were conducted under Rieslandic direction or control. Not only did Riesland not violate a due diligence operation to prevent the attacks, such an obligation is not a path for attribution in this case.

Even if the attacks were attributable to Riesland, they would not be in violation of international law. Besides the due diligence obligation which was not violated, the attacks were not of sufficient severity to violate the prohibition on the use of force as enshrined in Article 2(4) of the United Nations Charter. Furthermore, the attacks did not give access to data, and therefore could not have violated attorney-client privilege between Chester & Walsingham and its clients.

PLEADINGS

I. THE ILLICITLY-OBTAINED DOCUMENTS PUBLISHED ON THE AMES POST WEBSITE ARE INADMISSIBLE BEFORE THE COURT, BUT IN THE EVENT THAT THE COURT FINDS THEM ADMISSIBLE, THEY DO NOT EVIDENCE ANY BREACH BY RIESLAND OF AN INTERNATIONAL OBLIGATION OWED TO AMESTONIA

The documents are inadmissible as evidence [A] because this would violate sovereign equality [1]; their illicit acquisition is attributable to Amestonia, and the principle *ex injuria non jus oritur* applies [2]; and admission is prejudicial to Riesland's national security [3]. Alternatively, the Documents do not evidence any international law violation [B] via *Carmen*, a targeted espionage program[1] [1], or *Verismo*, a mass surveillance program[2] [2].

A. THE DOCUMENTS ARE INADMISSIBLE

1. ADMITTING THE DOCUMENTS VIOLATES SOVEREIGN EQUALITY

Sovereign equality is enshrined in the United Nations [UN] Charter and is fundamental to the Court's jurisprudence,[3] as evidenced by the exclusion of stolen

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[1] *Compromis*, ¶25.

[2] Ibid, ¶22.

[3] Charter of the United Nations, 1 U.N.T.S. XVI (1945), art.2(1) [UN Charter]; *Military and Paramilitary Activities in and against Nicaragua* (*Nicar. v. USA*), [1986] I.C.J. 14,

evidence twice on this basis.[4] Difficulty in obtaining evidence is given consideration by the Court, but does not allow recourse to use any and all evidence in violation of sovereign equality.[5] The Court's jurisdiction is rooted in consent, which includes allowing States leeway in choosing which evidence to submit.[6] Accordingly, the Court

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¶31 [*Nicaragua*]; Statute of the International Court of Justice, 1 U.N.T.S. 993 (1945), art.53(2) [ICJ Statute].

[4] *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)* [1980] I.C.J. 3, ¶62, 95 [*Tehran*]; *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Aust.),* Provisional Measures, [2014] I.C.J. 147, ¶27, 51 [*Certain Documents*].

[5] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*), [2007] I.C.J. 43, ¶205 [*Genocide*]; *Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. Intervening),* [1992] I.C.J. 351, 16; *Avena and Other Mexican Nationals* (*Mex. v. U.S.)*, [2004] I.C.J. 12, ¶57 [*Avena*].

[6] ICJ Statute (n.3) art.43, 49; *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, UK, USA),* Preliminary Questions, [1954] I.C.J. 19, 31; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Cro. v. Serb.*), [2015] I.C.J. ¶198 [*Genocide (2015)*]; ANNA RIDDELL AND BRENDAN PLANT, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE 20 (2009).

deemed illegal and discourages self-help strategies in gathering evidence located within other States.[7]

Amestonia's use of the stolen documents[8] would violate sovereign equality, a violation not mitigated by the fact that the original documents are located in Riesland.[9] These documents were exposed without Riesland's consent, and thus their submission by Amestonia- without Riesland's approval- undermines one of this Court's basic principles and should not be allowed.

2. THE DOCUMENTS' ACQUISITION IS ATTRIBUTABLE TO AMESTONIA, AND *EX INJURIA NON JUS ORITUR* APPLIES

State responsibility entails the commission of an internationally wrongful act and its attribution to a State.[10] A wrongful act by a non-State actor is attributable to a State, *inter alia*, to the extent that the State adopts it as its own.[11] This can be inferred from conduct,

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[7] *Corfu Channel* (*U.K. v. Albania*), [1949] I.C.J. 4, 34; Dissenting Opinion of Judge Azevedo, 111-12 [*Corfu*]; Hugh Thirlway, *Dilemma or Chimera? Admissibility of Illegally Obtained Evidence in International Adjudication* 78 AM. J. INT'L L. 633, 641 (1984).

[8] *Compromis,* ¶20.

[9] Ibid.

[10] Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, U.N. Doc.A/RES/56/83 (2001), art.2 [ARSIWA].

[11] Ibid, art.11; *Tehran* (n.4) ¶74.

and the Court recognizes States' maintaining and endorsing an illegal situation as sufficient for attribution.[12] Wrongful conduct, once attributed to the State, is subject to the principle *ex injuria jus non oritur* - law cannot arise from injustice: the State cannot benefit from its violation of international law.[13]

By refusing to return the Files to Riesland or extradite Frost, declining to stop their publication, and submitting them as evidence,[14] Amestonia actively maintains and endorses the situation of illegality. This situation thus becomes attributable to it, and should not be the source of a "right" to use the Files as evidence.

3. ADMITTING THE DOCUMENTS WOULD HARM RIESLAND'S NATIONAL SECURITY

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[12] YILC, Vol.II (pt.2) (2001) 54 [ARSIWA Commentary]; *Tehran* (n.4) ¶73-4; S.C. Res. 138 (1960).

[13] *Gabčíkovo-Nagymaros Project (Hung. v. Slov.),* [1997] I.C.J. 7, ¶133 [*Gabčíkovo-Nagymaros*]; *Factory at Chorzów (Ger. v. Pol.)*, Jurisdiction, [1925] P.C.I.J. (Ser.A) No.9, 31*; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276,* Advisory Opinion,[1970] I.C.J. 16, 46-47; ARSIWA (n.10) art.41(2).

[14] *Compromis*, ¶24, 31, 35.

This Court and others have accepted national security and State secrets as grounds for declining requests to include evidence.[15] The Court also restricted foreign access to confidential documents whose contents were already revealed in part.[16] Here, the Court would prevent further damage from being caused[17] by declining to set a dangerous precedent of accepting leaked confidential documents, thus encouraging the continuation of leaks, and of self-help strategies in collecting evidence.[18] Riesland's intelligence activities are essential for national and regional security.[19] Compromising confidentiality and encouraging further leaks reduces the efficacy of the programs, and with it the security of Riesland and Amestonia.

For these reasons, Riesland asks the Court to adjudge and declare that the *Ames Post* documents should not be admitted as evidence.

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[15] *Corfu* (n.7) 32; *Genocide* (n.5) ¶206; *Sargsyan v. Azerbaijan*, E.Ct.H.R. 40167/06 (2015), ¶10; IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION, INTERNATIONAL BAR ASSOCIATION (2010), art.9(2)(f).

[16] *Certain Documents* (n.4) ¶33.

[17] Ibid., Separate Opinion of Judge Cançado Trinidade, ¶52.

[18] *Corfu* (n.7) 35; W. Michael Reisman and Eric Freedman, *The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication,* 76 AM. J. INT'L L. 737, 752 (1982); Thirlway (n.7) 641.

[19] *Compromis*, ¶4-5, 17-18, 24, 36.

B. ALTERNATIVELY, THE DOCUMENTS DO NOT EVIDENCE THE BREACH OF ANY INTERNATIONAL OBLIGATION

1. CARMEN

Carmen does not breach any international rule prohibiting espionage [a], is not an illegal intervention [b], and does not violate Amestonia's territorial integrity [c].

a. There is no international rule prohibiting espionage

Espionage has long been, and continues to be, a fact of international relations.[20] There exists no general international rule against espionage,[21] and therefore it is not prohibited.[22] Accordingly, in cases of State espionage, the rhetoric is of violation of *domestic*, not international law.[23] *Carmen* is thus not illegal *per se*.

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[20] *Certain Documents* (n.4) Dissenting Opinion of Judge ad hoc Callinan, ¶33; Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VIRG. J. INT'L L. 291, 302 (2014).

[21] Christopher Baker, *Tolerance of International Espionage: A Functional Approach,* 19 AM. U. INT'L L. REV. 1091, 1095 (2004); A. John Radsen, *The Unresolved Equation of Espionage and International Law,* 28 MICH. J. INT'L. L. 597, 603 (2007); Deeks (n.20) 313; Dieter Fleck, *Individual and State Responsibility for Intelligence Gathering,* 28 MICH. J. INT'L. L. 687, 688 (2006-2007).

[22] *S.S. "Lotus" (Merits) (Fr. v. Turk.)*, [1927] P.C.I.J. (Ser.A), No.10, 18; *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, [1996] I.C.J. 226, ¶52,

b. In any case, *Carmen* is not an illegal intervention

Illegal intervention involves coercion, and employs it on matters regarding which the State is free to decide, such as its political or economic system.[24] Not all trans-border involvement constitutes illegal intervention; manipulation of elections,[25] intervention in

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¶105(2)(A)-(B); *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] I.C.J. 403, ¶79 [*Kosovo*].

[23] Troianovsky, *Germany Requests Meeting with US Ambassador over New Spying Leaks* WALL STREET JOURNAL, 2015, http://www.wsj.com/articles/germany-requests-meeting-with-u-s-ambassador-over-new-spying-leaks-1435850048; *Germany spies among friends; controversy grows over espionage activities* DEUTSCHE WELLE, 2015 http://www.dw.com/en/germany-spies-among-friends-controversy-grows-over-espionage-activities/a-18844401; Nakashima, *Confidential Report Lists US Weapons System Designs Compromised by Chinese Cyberspies,* WASHINGTON POST, 2013 https://www.washingtonpost.com/world/national-security/confidential-report-lists-us-weapons-system-designs-compromised-by-chinese-cyberspies/2013/05/27/a42c3e1c-c2dd-11e2-8c3b-0b5e9247e8ca_story.html; Baker and Rudoren, *Jonathan Pollard, American Who Spied for Israel, Released After 30 Years*, NEW YORK TIMES, 2015 http://www.nytimes.com/2015/11/21/world/jonathan-pollard-released.html.

[24] *Nicaragua* (n.3) ¶205; MALCOLM SHAW, INTERNATIONAL LAW 832 (7th ed., 2014).

[25] MICHAEL SCHMITT, THE TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 47(2013) [TALLINN].

civil war directly or by proxy,[26] or attempts to change public opinion[27] were recognized as examples thereof. Interference without a coercive element, such as that undertaken by Riesland, does not violate the prohibition.[28] *Carmen* made no attempt to force Amestonian policy, or effect change in a field under solely Amestonian control.[29] It is not, therefore, illegal intervention.

c. Additionally, Amestonia's territorial integrity was not implicated

A State's territorial integrity is its right to exclusively exercise State powers within its borders,[30] such as relating to physical cyber infrastructure and activities.[31] Nevertheless, wireless surveillance, and software not causing physical damage, do not implicate

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[26] *Nicaragua* (n.3) ¶242; *Armed Activities on the Territory of the Congo (DRC v. Uganda),* [2005] I.C.J. 168, ¶280 [*Armed Activities*].

[27] Terry Gill, *Non-Intervention in the Cyber Context*, *in* PEACETIME REGIME FOR STATE ACTIVITIES IN CYBERSPACE (Katharina Ziolkowski, ed.) 234 (2013) [PEACETIME REGIME].

[28] *Armed Activities* (n.27) ¶165; *Nicaragua* (n.3) Dissenting Opinion of Judge Schwebel, ¶98; Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforceful Influence over State Affairs*, 83 AM. J. INT'L L. 1, 5 (1989).

[29] TALLINN (n.25) 47; Gill (n.27) 223.

[30] SHAW (n.24) 377; 838; *Kosovo* (n.22) ¶80; *Island of Palmas Case (Neth. v. USA)* 1928, Reports of International Arbitral Awards, Vol. II 829-871.

[31] TALLINN (n.25) 25.

physical infrastructure, and are not violations of territorial integrity,[32] since *virtual* presence cannot be equated with *physical* presence.[33] *Carmen* copied, but did not alter, the relevant information,[34] and thus did not violate Amestonia's territorial integrity.

2. VERISMO

Verismo did not violate Amestonian territorial integrity [a]. The International Covenant on Civil and Political Rights [ICCPR] does not apply to it [b] or, alternatively, was not violated [c].

a. Amestonia's territorial integrity was not implicated

The customary legal regime governing exclusive economic zones [EEZ][35] does not grant States jurisdiction over submarine cables outside their territorial waters.[36] The fiber-

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[32] *Weber and Saravia v. Germany*, E.Ct.H.R., 54934/00 (2006), ¶88 [*Weber*]; TALLINN (n.25) 25; Benedikt Pirker, *Territorial Sovereignty and Integrity and the Challenges of Cyberspace*, in PEACETIME REGIME (n.27) 203.

[33] Katharina Ziolkowski, *General Principles of International Law as Applicable in Cyber Space, in* PEACETIME REGIME (n.27) 45; Craig Forcese, *Spies Without Borders: International Law and Intelligence Collection,* 5 J. INT'L L. & SEC. POL. 179, 208 (2011).

[34] *Compromis*, ¶26.

[35] *Canada v. France,* 82 ILR 590, 642 (Arbitration Tribunal, 1985).

[36] United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 3 (1982) art.56 [UNCLOS]; Wolff Heintschell von Heineg, *Protecting Critical Submarine*

optic cable involved in the *Verismo* program, which is not Amestonian property,[37] lies outside of Amestonia's territory,[38] excluding it from Amestonian jurisdiction.

b. The ICCPR does not apply

Extraterritorial application of the ICCPR[39] requires either effective physical control over territory,[40] which a State does not exercise in its EEZ,[41] or control of a foreign national by a State agent,[42] such as in cases of State custody[43] and kidnapping.[44] Either way, control over data is insufficient to create jurisdiction.[45]

Infrastructure: Legal Status and Protection of Submarine Communication Cables under International Law, in PEACETIME REGIME (n.27) 309.

[37] Clarifications, ¶2.

[38] *Compromis*, ¶22.

[39] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1968), art.2(1) [ICCPR].

[40] UN Human Rights Committee [UNHRC] General Comment 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) ¶10 [GC 31]; *Armed Activities* (n.27) ¶178; MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY 127 (2011) [EXTRATERRITORIAL APPLICATION].

[41] UNCLOS (n.36) art.56.

[42] GC 31 (n.40) ¶10.

[43] *Issa v. Turkey*, 41 E.Ct.H.R 567 (2004) ¶71; *Öcalan v. Turkey*, 37 E.Ct.H.R. 10 (2003), ¶93; *Medvedyev v. France*, E.Ct.H.R. 3394/03 (2010), ¶67.

Due to Riesland's lack of effective control in the EEZ, and the fact that *Verismo* gave control over data, not Amestonian citizens,[46] the ICCPR does not apply.

c. Alternatively, the ICCPR was not violated

Even if the ICCPR applies, *arguendo*, there was no violation of the right to privacy as protected therein, as *Verismo* was legal and non-arbitrary.[47] *Verismo* was [*i*] authorized

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[44] *Lopez Burgos v. Uruguay*, Communication [Comm.] No. 52/1979, U.N. Doc. CCPR/C/13/D/52/1979 (1981); *Lilian Celiberti de Casariego v. Uruguay*, Comm. No. 56/1979, U.N. Doc. CCPR/C/OP/1 (1984) 92.

[45] Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age,* 56 HARVARD INT'L. L. J. 81, 124 (2015); *Banković v. Belg.,* E.Ct.H.R., 52207/99 (2001), ¶75; EXTRATERRITORIAL APPLICATION (N.40) 62-63; Deeks (n.20) 311.

[46] *Compromis,* ¶22.

[47] ICCPR (n.39) art.17.

under national law,[48] [*ii*] pursued for legitimate aims[49] and [*iii*] necessary and proportionate.[50]

i. Authorization

A privacy interference must be based on law that is accessible, specific and foreseeable,[51] includes authorization and oversight,[52] and provides binding remedies.[53] Legislation must be publicly accessible, and detail the conditions under which interference may be authorized, though national security concerns may preclude

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[48] UNHRC, General Comment 16, U.N. Doc. HRI/GEN/1/Rev.1 (1994) ¶3.

[49] Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson*, U.N. Doc. A/69/397 (2014) [43] ¶30 [Emmerson].

[50] Report of the Office of the UN High Commissioner for Human Rights, *The Right to Privacy in the Digital Age,* U.N. Doc. A/HRC/27/37 (June 30, 2014), ¶22 [Privacy Report].

[51] Ibid., ¶8; Emmerson (n.49) ¶35.

[52] UNHRC, *Concluding Observations on the Fourth Periodic Rep. of the United States*, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), ¶22; G.A. Res. 68/167 A/RES/68/167 (2014).

[53] Privacy Report (n.50) ¶39; Emmerson (n.49) ¶6.

notification that surveillance has taken place.[54] While executive and judicial oversight are required,[55] judicial authorization is not.[56] The SSBA is detailed and published,[57] and allows the public to ascertain when it might be subject to surveillance measures.[58] It includes sufficient oversight and authorization,[59] and mandates compliance with the Attorney General on legal matters, thus granting him power to provide binding remedies.[60] Thus, the lawfulness requirement is met.

ii. Legitimate aim

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[54] *Weber* (n.32) ¶135; *Zakharov v. Russia,* E.Ct.H.R. 47143/06 (2015), ¶229-230, 242; Peter Marguiles, *The NSA in Global Perspective: Surveillance, Human Rights and International Counterterrorism,* 82 FORDHAM L. REV. 2137, 2158 (2014).

[55] *Weber* (n.32) ¶4.

[56] Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, U.N. Doc. A/HRC/23/40 (2013), ¶54; 50 U.S.C. §1802 (2000); *Kennedy v. U.K.,* E.Ct.H.R. 26839/05 (2010), ¶152.

[57] *Compromis*, ¶4, 5.

[58] Ibid., ¶17, 22.

[59] Ibid., ¶5, 23.

[60] Ibid., ¶5.

Legitimate aims include counterterrorism[61] and national security.[62] Accordingly, *Verismo* was employed chiefly to protect Riesland's security, and the lives of Rieslandic and Amestonian citizens, including by sharing the information collected.[63]

iii. Necessary and proportionate

Considering the role of the internet in funding and enabling terrorism, remaining apprised of communications is an inalienable part of addressing terror threats.[64] *Verismo* has thwarted at least one attack, saving untold Amestonian and Rieslandic lives,[65] and was thus necessary to achieve the above aims.[66]

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[61] Emmerson (n.49) ¶33-34.

[62] ICCPR (n.39) art.19(3)(b); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (1950) art.8(2) [ECHR]; Privacy Report (n.50) ¶24.

[63] *Compromis*, ¶17, 22-23.

[64] James Lewis, *The Internet and Terrorism*, 99 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 112 (2005); UNODC, THE USE OF THE INTERNET FOR TERRORIST PURPOSES 3 (2012); Emmerson (n.49) ¶34.

[65] *Compromis*, ¶18.

[66] UNHRC, General Comment 27, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), ¶11 [GC 27]; ECHR (n.62) art.8(2); *Klass v. Germany,* E.Ct.H.R. 5029/71 (1978), ¶42.

Proportionality requires appropriateness to function, that the method be the least intrusive instrument, and proportionality to the protected interest.[67] Considering the extensive online activity at the base of the wave of eco-terrorism, and its trans-border nature, monitoring communications was appropriate.[68] This was the least intrusive instrument. The most stringent surveillance was based on "catch-terms"- a method both recognized by Courts and widely practiced[69] - which ensures that those who constitute no threat experience minimal interference. Moreover, placing a pod on the cable, as opposed to bending it - another method of collecting information[70] - ensured the integrity of communications and availability of information.[71]

Verismo was proportionate to the interest at stake: Rieslandic and Amestonian lives. The quantity of data collected was minimal compared to similar programs: The National Security Agency collects almost twenty times more per day, and the Government Communication Headquarters is alleged to collect even more.[72] The greatest privacy

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[67] GC 27 (n.66) ¶14.

[68] *Compromis,* ¶16, 23, 31.

[69] *Weber* (n.32) ¶116; Marguiles (n.54) 2138.

[70] Heintschell von Heineg (n.36) 429.

[71] Ibid; Emmerson (n.49) ¶51.

[72] "The National Security Agency: Missions, Authorities, Oversight and Partnerships," 9 August 2013, 6, https://www.nsa.gov/public_info/_files/speeches_testimonies/2013_08_09_the_nsa_story

invasion was towards those whom Riesland had reason to believe were involved in the Hive, and thus had a legitimate security interest to monitor.[73] For the average Amestonian, the intrusion caused by *Verismo* was minor, and proportionate.

II. THE ARREST OF MARGARET MAYER AND THE OTHER VOR EMPLOYEES, AND THE EXPROPRIATION OF THE VOR FACILITY AND ITS EQUIPMENT, VIOLATED THE BROADCASTING TREATY AND INTERNATIONAL LAW GENERALLY, AND RIESLAND IS THEREFORE ENTITLED TO THE IMMEDIATE RELEASE OF ITS NATIONALS AND COMPENSATION FOR THE VALUE OF THE CONFISCATED PROPERTY

Amestonia's arrest of the VoR employees and confiscation of its property violated the Treaty on the Establishment of Broadcasting Facilities (BT) [A] and international law [B].

A. THE CONFISCATION AND ARRESTS VIOLATED THE BT

The BT was in force during relevant events [1], and the arrest of the employees and confiscation of the equipment violated it [2].

1. THE BT WAS IN FORCE

The Vienna Convention on the Law of Treaties (VCLT) allows terminating or suspending treaties following material breach – violation of a provision essential to the

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.pdf; Ira Rubinstein et al, *Systematic Government Access to Personal Data: A Comparative Analysis*, 4 INT'L DATA PRIVACY L. 96, 102 (2014).

[73] *Compromis*, ¶22.

treaty's "object or purpose", regardless of severity.[74] The object and purpose may be derived from treaties' preambles or titles,[75] while friendship treaties regulate only fields they concern – e.g. financial relations.[76] States' agents may operate under different goals – e.g. commercial purposes – if their actions are reasonable vis-à-vis the stated objective.[77]

The BT regulates "television channels", was signed by the States' telecommunications ministers, and its title indicates "broadcasting".[78] Therefore, the treaty's object and purpose is communications and its obligations concern this field alone.

The station operated consistently until the arrests and confiscation, featuring interviews with Amestonian dignitaries.[79] Thus, the object and purpose subsisted

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[74] Vienna Convention on the Law of Treaties art.60(3)(b), 1155 U.N.T.S. 331 (1969) [VCLT]; 2 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 1359 (Olivier Corten & Pierre Klein eds., 2011) [CORTEN 2].

[75] *Territorial Dispute (Libya v. Chad)*, [1994] I.C.J. 6, 25; *Certain Norwegian Loans (Fr. v. Nor.)*, [1957] I.C.J. 9, 24.

[76] *Oil Platforms (Iran v. U.S.),* Preliminary Objections, [1996] I.C.J. 803, 813-814; *Nicaragua* (n.3) 137.

[77] *Whaling in the Antarctic (Austl. v. Jap.: N.Z. intervening)*, [2014] I.C.J. 226, 260.

[78] Treaty on the Establishment of Broadcasting Facilities between the State of Amestonia and the Federal Republic of Riesland, pmbl. *et seq* (1992) [BT].

[79] *Compromis,* ¶8-9, 27.

regardless of breaches of Amestonian laws.[80] Any other activities in the station were not incompatible with the VoR's functions[81] and did not materially breach the BT, and Amestonia was therefore not entitled to breach the treaty.

2. THE ARRESTS AND CONFISCATION VIOLATED THE BT

Amestonia's actions violated the BT's immunity and inviolability rights [a] and procedural requirements for terminating or suspending treaties [b]. Furthermore, necessity cannot justify Amestonia's actions [c].

a. Amestonia Violated Immunity and Inviolability

i. Property

The VCLT requires interpretation of treaties in good faith, in light of terms' ordinary meaning, and the treaty's object and purpose.[82] If uncertainty persists, other rules of international law applicable between the Parties – including other treaties and different fields – apply through systemic integration.[83]

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[80] BT (n.78) art.23(1).

[81] Ibid., art.23(2).

[82] VCLT (n.74) art.31.

[83] Ibid., art.31(3)(c); Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the I.L.C., U.N. Doc. A/CN.4/L.682 (2006), ¶413, 420, 422; Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, 54

The BT's privileges and immunities end upon cessation of the station's functions.[84] Given that the station's function is communications[85] and that the station had continued broadcasting – albeit through reruns[86] – its functions had not ceased. The inviolability of property[87] is therefore valid and Riesland is entitled to compensation as reparations[88] for its violation.

ii. Personnel

BT articles concerning immunities are almost identical to relevant articles in the Vienna Convention of Diplomatic Relations [VCDR], to which both States are parties.[89] Pursuant to the aforementioned principle of systemic integration, these BT provisions should be interpreted in line with jurisprudence concerning diplomatic immunity.

INT'L & COMP. L.Q. 279, 280-281, 290 (2005); *Oil Platforms (Iran v. U.S.),* [2003] I.C.J. 161, 182.

[84] BT (n.78) arts.15(1)(c), 36.

[85] *Supra*, II.A.1.

[86] *Compromis*, ¶27.

[87] BT (n.78) art.14(4).

[88] ARSIWA (n.10) art.31; ARSIWA Commentary (n.12) 91.

[89] *Compromis*, ¶43; BT (n.78) arts.14, 15(1)(a, b, c); Vienna Convention on Diplomatic Relations arts.22, 29, 31(1, 2), 39(2), 500 U.N.T.S. 95 (1961) [VCDR].

Diplomatic immunity and inviolability from law enforcement[90] must be upheld even during emergencies[91] – as reflected in the BT.[92] Diplomats may be detained only in order to stop an ongoing offence.[93] Alternatively, offenders may be declared *persona non grata*: a customary, longstanding procedure[94] applied to diplomats and non-diplomats alike – even entertainers.[95]

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[90] Jonathan Brown, *Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations*, 37 INT'L & COMP. L.Q. 53, 73 (1988).

[91] Mark Summers, *Diplomatic Immunity Ratione Personae: Did the International Court of Justice Create a New Customary Law Rule in Congo v Belgium?*, 16 MICH. ST. J. INT'L L. 459, 461 (2007); *Tehran* (n.4) 40.

[92] BT (n.78) arts.14(1, 3), 15.

[93] *Tehran* (n.4) 40; 1 OPPENHEIM'S INTERNATIONAL LAW §493 (Robert Jennings & Arthur Watts eds., 9th ed., 1992).

[94] VCDR (n.89) art.9; EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 61, 64 (4th ed., 2016); YILC, Vol.I, 50 (1957); Marcel Hendrapati, *Legal Regime of Persona Non Grata and the Namru-2 Case*, 32 J. L. POL'Y & GLOBALIZATION 161, 162, 165 (2014).

[95] Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT'L L. 53, 58-59 (1984); Miriam Elder, *US 'spy' Ryan Fogle expelled after CIA refused to stop recruiting, say Russians*, THE GUARDIAN (May 2013), http://www.theguardian.com/world/2013/may/15/russia-american-expelled-cia-

The arrest and confiscation occurred while the station was unmanned[96] and no offense was occurring. Covert intelligence collection is not prohibited in international law[97] and did not materially breach the BT.[98] Given that States may react to internationally lawful actions only with other lawful actions,[99] the arrests were impermissible considering the alternative of *persona non grata*.

b. Additionally, Amestonia Violated Procedural Requirements for Treaty Termination

Except for urgency situations requiring self-protection,[100] the VCLT requires States to notify other Parties, in writing, three months prior to terminating treaties.[101] Thus, treaties are safeguarded and actions are not unilaterally imposed on sovereign States.[102]

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espionage; *Manila Is Mad At Claire Danes*, CBS NEWS (Oct. 1998), http://www.cbsnews.com/news/manila-is-mad-at-claire-danes/; Harriet Sherwood, *Günter Grass barred from Israel over poem*, THE GUARDIAN (Apr. 2012), http://www.theguardian.com/world/2012/apr/08/gunter-grass-barred-from-israel.

[96] *Compromis*, ¶27, 28.

[97] *Supra*, I.B.1.a.

[98] *Supra*, II.A.1.

[99] ARSIWA Commentary (n.12) 128.

[100] VCLT (n.74) art.65(2); 1 THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 1496 (Olivier Corten & Pierre Klein eds., 2011).

[101] VCLT (n.74) arts.65(1, 2), 67(1).

Amestonia provided no notification prior to breaching the BT, and its actions were not needed for protection.[103] Amestonia's actions were therefore unlawful.

c. Necessity Does Not Apply

Necessity is a narrow exception precluding wrongfulness;[104] it applies if the act is the only way of protecting an essential interest – e.g. the survival of State functions[105] – from grave, imminent, and objective peril.[106] When circumstances of necessity pass, treaty obligations resume.[107]

Given that covert operations at the VoR station had ceased, any perceived threat ended prior to Amestonia's actions;[108] thus, treaty obligations resumed. Amestonia's actions were therefore not necessary for prevention but, at most, for investigation. This interest should not be considered essential, lest States be allowed to breach obligations before ascertaining threats. Nevertheless, this interest could be pursued through correspondence

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[102] CORTEN 2 (n.74) 1487-1488; YILC, Vol.II, 263-264 (1966).

[103] *Infra*, II.A.2.c.

[104] ARSIWA (n.10) art.25, ARSIWA Commentary (n.12) 80, 83; Roman Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct,* 3 YALE HUM. RTS. & DEV. L.J. 1, 17-18 (2000).

[105] YILC, Vol.II (pt.1), 14 (1980).

[106] *Gabčíkovo-Nagymaros* (n.13) 40.

[107] Ibid., 63; ARSIWA Commentary (n.12) 80.

[108] *Compromis*, ¶27.

and extradition.[109] Therefore, necessity does not apply; Amestonia has no justification for its actions, and Riesland is entitled to compensation and the release of the employees.

B. ALTERNATIVELY, THE ARRESTS AND CONFISCATION VIOLATED INTERNATIONAL LAW

Even if the BT was not applicable, Riesland is entitled to compensation following Amestonia's violation of Riesland's State immunity [1], or following Amestonia's unjust enrichment [2]. The employees are to be released following violation of their functional immunity [3].

1. THE CONFISCATION VIOLATED STATE IMMUNITY

Customary State immunity protects States' property from enforcement by other States regarding official acts;[110] it persists even if the prosecuting State believes no other remedies are available.[111] A salient exception allows post-judgment measures of constraint against property used for commercial purposes;[112] however, this does not apply

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[109] Ibid., ¶6.

[110] U.N. Convention on Jurisdictional Immunities of States and Their Property pmbl., arts.5, 18-19, adopted in G.A. Res. 59/38 (2004) [UNCSI]; Andrew Dickinson, *State Immunity and State-Owned Enterprises*, 10 BUS. L. INT'L 97, 100-101 (2009); HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 89 (3rd ed., 2013).

[111] *Jurisdictional Immunities of the State (Ger. v. It.)*, [2012] I.C.J. 99, 143-144.

[112] Ibid., 148; UNCSI (n.110) art.19(c); XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 343, 362 (2012).

to pre-judgment measures,[113] and the general commercial activity exception is inapplicable to agreements between States.[114]

The initiation of proceedings against Riesland violated State immunity.[115] Additional violation occurred through the pre-judgment confiscation and motion to sell the property.[116] Even if the commercial exception applied, the operation of the VoR – following an agreement between States[117] – is non-commercial, as private people cannot undertake it.[118] Therefore, the confiscation of VoR property violated Riesland's State immunity.

2. ALTERNATIVELY, AMESTONIA UNJUSTLY ENRICHED ITSELF

The general principle[119] of unjust enrichment, based on good faith[120] arises when a State enriches itself to the detriment of another State without legal justification,[121] while

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[113] UNCSI (n.110) art.18.

[114] Ibid., art.10(2)(a); YILC, Vol.II (pt.2), 33-34 (1991).

[115] *Arrest Warrant of 11 April 2000 (DRC v. Bel.)*, [2002] I.C.J. 3, 29 [*Arrest Warrant*].

[116] *Compromis*, ¶40.

[117] Ibid., ¶7-8.

[118] YANG (n.112) 76-77.

[119] YILC, Vol.II, 243-244 (1963); Charles Manga Fombad, *The Principle of Unjust Enrichment in International Law*, 30 COMP. & INT'L L.J. S. AFR. 120, 123 (1997); *Saluka Investments B.V. v. The Czech Republic*, Partial Award, UNCITRAL, ¶449 (2006).

the injured State has no other available remedy.[122] It entitles the claimant to the property's value as compensation.[123]

Even if Amestonia's actions were not wrongful, Riesland is entitled to compensation for the confiscated property, which unjustly enriched Amestonia with €20 million.[124]

3. ADDITIONALLY, AMESTONIA VIOLATED THE EMPLOYEES' FUNCTIONAL IMMUNITY

Customary international law,[125] reflected in international and domestic rulings,[126] entitles State officials to functional immunity from criminal proceedings of other

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[120] D. P. O'Connell, *Unjust Enrichment*, 5 AM. J. COMP. L. 2, 4 (1956); Memorial of Lichtenstein, *Certain Property (Liechtenstein v. Ger.),* 141 (2002), http://www.icj-cij.org/docket/files/123/13333.pdf.

[121] Ibid., 141, 151; *Sea-Land Services, Inc. v. Iran*, 6 Iran-U.S. Cl. Trib. Rep. 149, 169 (1984).

[122] ARSIWA (n.10) art.27(b); *Gabčíkovo-Nagymaros* (n.13) 39; R.B. Grantham and C.E.F. Rickett, *Disgorgement for Unjust Enrichment?,* 62 CAMBRIDGE L.J. 159, 159 (2003).

[123] YILC, Vol.II, 244 (1963); *Factory at Chorzów (Ger. v. Pol.)*, Merits, [1928] P.C.I.J. (Ser.A) No.17, 5, 47.

[124] *Compromis*, ¶40.

[125] Reports of the International Law Commission to the General Assembly, 58th Sess., U.N. Doc. A/61/10 (2006) ¶13, 16 [ILC 58 Sess.]; Huang Huikang, *On Immunity of State*

States.[127] The official must be the State's organ or authorized to exercise governmental authority,[128] even in lower ranks;[129] the criminal act must be attributable to the State[130]

Officials from Foreign Criminal Jurisdiction, 13 CHINESE J. INT'L L. 1, 7 (2014) [Huikang *Immunity*]; *Jones v. U.K.*, E.Ct.H.R., 34356/06 & 40528/06 (2014), ¶202.

[126] Ibid., ¶205; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. Fr.)*, [2008] I.C.J. 177, 185, 189, 243; *Prosecutor v. Blaškić*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, I.C.T.Y Case no. IT-95-14, ¶38 (Oct. 1997); *Belhas v. Ya'alon*, 515 F.3d 1279, 1290, 1294 (D.C. Cir. 2008).

[127] Huikang *Immunity* (n.125) 5-6.

[128] Concepción Escobar Hernández (Special Rapporteur), Fourth report on the immunity of State officials from foreign criminal jurisdiction, U.N. Doc. A/CN.4/686 (2015), ¶22, 111-112, 114; ARSIWA (n.10) arts.4-5.

[129] Concepción Escobar Hernández (Special Rapporteur), Third report on the immunity of State officials from foreign criminal jurisdiction, U.N. Doc. A/CN.4/673 (2014), ¶32, 36-37, 108; *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3)* [2000] 1 A.C. 147, 269 (U.K.H.L. 1999).

[130] Chimène Keitner, *Symposium on the Immunity of State Officials: Horizontal Enforcement and the ILC's Proposed Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction*, 109 AJIL UNBOUND 161, 164 (2015), https://www.asil.org/blogs/symposium-immunity-state-officials-horizontal-enforcement-

and implement State policy.[131] This immunity balances sovereign equality with territorial sovereignty and human rights.[132]

Amestonia arrested the VoR employees, who operated as Riesland's agents, while declaring their alleged criminal espionage attributable to Riesland.[133] Intelligence collection is a sovereign implementation of official policy;[134] therefore, the employees are entitled to immunity, which Amestonia violated.

III. RIESLAND'S DETENTION OF JOSEPH KAFKER UNDER THE TERRORISM ACT IS CONSISTENT WITH ITS OBLIGATIONS UNDER INTERNATIONAL LAW, AND THE COURT HAS NO AUTHORITY TO ORDER EITHER KAFKER'S RELEASE OR THE DISCLOSURE OF THE INFORMATION RELATING TO HIS APPREHENSION

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and-ilc%E2%80%99s-proposed-draft-articles; ROGER O'KEEFE, INTERNATIONAL CRIMINAL LAW 433 (2015).

[131] Ibid., 434, 436.

[132] *Arrest Warrant* (n.115) 109 (Separate opinion of Judge ad hoc Bula-Bula); ILC 58 Sess. (n.125) ¶1, 8.

[133] *Compromis*, ¶9, 29-30.

[134] Glenn Sulmasy & John Yoo, *Counterintuitive: Intelligence Operations and International Law*, 28 MICH. J. INT'L L. 625, 628 (2007).

Amestonia was not entitled to exercise diplomatic protection over Kafker [A]. Nevertheless, his detention is consistent with Riesland's international law obligations [B], and Riesland should not be required to release him or reveal relevant evidence [C].

A. AMESTONIA MAY NOT EXERCISE DIPLOMATIC PROTECTION

Customary international law allows States to exercise diplomatic protection over injured nationals who exhausted local remedies.[135] The injured person must have pursued all available remedies, except for exceptional circumstances:[136] lack of effective remedies, lack of connection to the responsible State or waiver by it, undue delay, or manifest preclusion.[137] Furthermore, Administrative remedies must not be discretionary, i.e. meant to obtain a favor.[138]

The local remedies requirement was not waived; Kafker had available effective remedies which he enjoyed;[139] the threat to Riesland constitutes a connection; and his

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[135] Draft Articles on Diplomatic Protection with Commentaries arts.3(1), 14, 2(2) YILC (2006) [ADP Commentaries]; *Ahmadou Sadio Diallo* (*Guinea v. DRC*), Preliminary Objections, [2007] I.C.J. 582, 599 [*Diallo* Preliminary].

[136] Ibid., 599-600; ADP Commentaries (n.135) 71.

[137] Ibid., 76–77.

[138] Report of the International Law Commission to the General Assembly, 55th Sess., U.N. Doc. A/58/10, 88 (2003); *Diallo* Preliminary (n.135) 601.

[139] *Infra*, III.B.2.c-d; *Compromis,* ¶33.

reviews are non-discretionary and based on security needs.[140] The remaining exception is undue delay.

The timeframe for this requirement is contextual,[141] though it includes pending proceedings.[142] Complexities such as terrorism suspicions[143] justify longer delays,[144] but delays of over four years were disapproved.[145]

During his year-long detention, Kafker's case was examined after three days and is reviewed every twenty-one days.[146] The clandestine suspicions and potent threat constitute a complexity justifying lengthier proceedings. There was therefore no undue delay, and Kafker must exhaust proceedings before the Tribunal.

B. IN ANY CASE, KAFKER'S DETENTION IS CONSISTENT WITH RIESLAND'S INTERNATIONAL LAW OBLIGATIONS

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[140] Rieslandic Terrorism Act art.3(d, g) [RTA].

[141] ADP Commentaries (n.135) 80.

[142] *Interhandel (Switz. v. U.S.),* [1959] I.C.J. 6, 27.

[143] *Brogan v. U.K.*, E.Ct.H.R., 11209/84; 11234/84; 11266/84; 11386/85 (1988), ¶61 [*Brogan*].

[144] *Taylor v. Jamaica*, Comm. No. 705/1996, U.N. Doc. CCPR/C/62/D/705/1996 (1998), ¶7.1.

[145] *Weinberger Weisz v. Uruguay*, Comm. No. 28/1978, U.N. Doc. CCPR/C/OP/1 (1984), ¶11.

[146] *Compromis*, ¶32-33.

Kafker's detention followed a lawful derogation from the ICCPR [1] and was not arbitrary [2].

1. RIESLAND'S DEROGATION FROM ICCPR RIGHTS WAS LAWFUL

States may exercise their sovereign duty to protect their citizens by derogating from ICCPR rights in emergencies,[147] if they experience and officially proclaim an emergency [a] and apply proportionality and non-discrimination in the declaration and its implementation [b].[148]

a. Riesland Experienced an Emergency

Emergencies must threaten the "life of the nation"[149] – the population's organized life[150] or physical integrity,[151] even based on terrorism abroad.[152] The threat must be

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[147] ICCPR (n.39) art.4(1); Richard Burchill, *When does an Emergency Threaten the Life of the Nation? Derogations from Human Rights Obligations and the War on International Terrorism*, 8 Y.B. N.Z. JURIS. 99, 112 (2005).

[148] UNHRC General Comment 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, ¶5 (2001) [GC 29].

[149] ICCPR (n.39) art.4(1).

[150] *Lawless v. Ireland*, E.Ct.H.R., 332/57 (1961), ¶28; Richard Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 AM. J. INT'L L. 1072, 1073 (1985).

actual, clear, and imminent,[153] and routine criminal law enforcement must be insufficient to handle it.[154] Due to States' knowledge of needs of the moment, the assessment of emergencies is left to them[155] if they carefully consider the situation and substantiate their claim with facts, e.g. specific attacks.[156]

Riesland's emergency stems from the deaths of two nationals and the potential for many more: poisoned honey almost reached Rieslandic population, and Rieslandic

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[151] UNHRC, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN. Doc. E/CN.4/1985/4 (1984), ¶39 [Siracusa Principles].

[152] Sarah Joseph, *Human Rights Committee: General Comment 29*, 2 HUM. RTS. L. REV. 81, 84 (2002); *A v. U.K.*, E.Ct.H.R., 3455/05 (2009), ¶179-181 [*A v. U.K.*].

[153] Siracusa Principles (n.151) ¶54.

[154] U.N. Economic and Social Council, Study of the Implications for Human Rights of Recent Developments Concerning Situations Known as States of Siege or Emergency, U.N. Doc. E/CN.4/Sub.2/1982/15 (1982), 15 [Study on Emergency].

[155] *Ireland v. U.K.*, E.Ct.H.R., 5310/71 (1978), ¶207.

[156] GC 29 (n.148) ¶3; *Montejo v. Colombia*, Comm. No. 64/1979, U.N. Doc. CCPR/C/OP/1 (1985), ¶10.3; John Quigley, *Israel's Forty-Five Year Emergency: Are there Time Limits to Derogations from Human Rights Obligations?,* 15 MICH. J. INT'L L. 491, 507, 518 (1994).

nationals were threatened with toxic envelopes.[157] The seven simultaneous arsons – indicating widespread operation – reflect a particularly potent terrorism strategy.[158] Riesland therefore experienced an actual, clear, and imminent threat.

Ex post facto criminal law procedures are difficult to use for investigating future attacks.[159] Ideological terrorism is especially challenging, as it may escalate after beginning with support.[160] Riesland must protect its citizens by preventing such escalation; normal measures are insufficient, and the state of emergency, which met all procedural requirements,[161] is therefore justified.

b. Riesland's Derogations Were Proportionate

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[157] *Compromis*, ¶14, 16, 18-19; Clarifications, ¶1.

[158] *Compromis*, ¶14; Kathleen Deloughery, *Simultaneous Attacks by Terrorist Organisations*, 7(6) PERSPECTIVES ON TERRORISM 79, 81 (2013).

[159] Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369, 385 (2008) [Hakimi *Standards*].

[160] *Compromis*, ¶13, 19; C. Raj Kumar, *Global Responses to Terrorism and National Insecurity: Ensuring Security, Development and Human Rights*, 12 ILSA J. INT'L & COMP. L. 99, 122 (2005).

[161] Clarifications, ¶7.

The cumulative criteria for proportionality are duration, geographical coverage, and scope.[162] While legal certainty of legislation is a constituent of its proportionality,[163] the international community has not agreed on a definition of "terrorism" due to the term's controversial nature.[164]

Notwithstanding, the definition of terrorism in the Rieslandic Terrorism Act (RTA) originates in the International Convention for the Suppression of the Financing of Terrorism,[165] to which Amestonia and Riesland are Parties.[166] This definition received domestic and international accord;[167] therefore, the RTA is sufficiently clear.

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[162] GC 29 (n.148) ¶4; Study on Emergency (n.154) 10.

[163] Patricia Popelier, *Five Paradoxes on Legal Certainty and the Lawmaker*, 2 LEGISPRUDENCE 47, 54 (2008).

[164] Geoffrey Levitt, *Is "Terrorism" Worth Defining?* 13 OHIO N.U. L. REV. 97, 114 (1986); U.N. General Assembly [UNGA], *Measures to Eliminate International Terrorism: Report of the Secretary-General*, U.N. Doc. A/60/228 (2005), ¶142.

[165] International Convention for the Suppression of the Financing of Terrorism, 2178 U.N.T.S. 197 (1999).

[166] *Compromis*, ¶33; RTA (n.140) art.1.

[167] Martin Scheinin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, U.N. Doc. E/CN.4/2006/98 (2005), ¶32; 18 U.S.C. §2339C(a)(1)(B) (2006); *Fuentes v. Canada*, 4

Emergency measures often affect the entire population;[168] however, the RTA affects only terrorism suspects.[169] Thus, the derogations' scope was proportionate. The extensive geographical coverage of potential derogations is balanced by their scope and is nevertheless proportionate, due to the threat to all of Riesland or undetermined groups of its nationals.

States must review declarations expeditiously[170] and withdraw them upon significant diminution of violence.[171] Nevertheless, some states of emergency lasted years or decades.[172]

Riesland's declarations are limited to six months.[173] Considering that most of the perpetrators are at large and that the existence of an organized terrorism group was

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CAN. F.C. 249, ¶6 (2003); Gambia Anti-Terrorism Act, 2002 (as amended by the Anti-Terrorism Amendment Act, 2008), art.11(1)(b).

[168] Darren Davis & Brian Silver, *Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America*, 48 AM. J. POL. SCI. 28, 28-29 (2004).

[169] RTA (n.140) art.3.

[170] UNHRC, *Concluding Observations: Israel,* U.N. Doc. CCPR/C/ISR/CO/3 (2010), ¶7.

[171] UNHRC, *Concluding Observations: U.K.*, U.N. Doc. CCPR/C/79/Add.55 (1995), ¶23.

[172] ROUTLEDGE HANDBOOK OF CONSTITUTIONAL LAW 91 (Mark Tushnet, Thomas Fleiner, and Cheryl Saunders eds., 2013); *Emergency Regulations Lifted in Sri Lanka*, ASIAN TRIBUNE (Aug. 2011), http://www.asiantribune.com/news/2011/08/25/emergency-regulations-lifted-sri-lanka.

revealed,[174] the threat requires the same measures as were needed in 2014. The derogations are therefore proportionate.

2. ADDITIONALLY, KAFKER'S DETENTION IS NOT ARBITRARY

There are no predetermined conditions for arbitrary detention,[175] due to difficulties in foreseeing specific manifestations.[176] In practice, tribunals often focus on procedural steps rather than analyzing the term itself.[177] Notwithstanding, relevant criteria are lack of legal basis or reasonable suspicion, duration, necessity, and proportionality; also relevant are severe violations of fair trial.[178]

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[173] RTA (n.140) art.2; *Compromis*, ¶18.

[174] Ibid., ¶19.

[175] ICCPR (n.39) art.9(1).

[176] Laurent Marcoux, Jr., *Protection from Arbitrary Arrest and Detention Under International Law*, 5 B. C. INT'L COMP. & L. REV. 345, 360-361 (1982).

[177] Hakimi *Standards* (n.159) 393, 395.

[178] U.N. O.H.C.H.R., *Fact Sheet No. 26, The Working Group on Arbitrary Detention* (2000), section IV(B); *Ahmadou Sadio Diallo* (*Guinea v. DRC*), [2010] I.C.J. 639, 667, 669; *A v. U.K.* (n.152) ¶204; GC 29 (n.148) ¶4; *Van Alphen v. The Netherlands*, Comm. No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), ¶5.8; UNHRC General Comment 35, U.N. Doc. CCPR/C/GC/35 (2014), ¶12, 15, 65 [GC 35].

The legal basis for Kafker's detention is sufficient;[179] the remaining criteria are necessity: reasonable duration and suspicion [a]; proportionality [b]; and fair trial.[180] Of relevance are prompt trial, which Kafker received;[181] a competent court [c]; and public trial or justified derogations therefrom [d].

a. Necessity: Reasonable Suspicion and Duration

Arrests must be based on reasonable suspicion and facts – such as the alleged act – to be conveyed to detainees.[182] The ICCPR does not include a predetermined list of reasons;[183] States are required only to provide information to justify continued detention,[184] and may withhold information from terrorism suspects for security concerns.[185] The duration of detention must also be reasonable considering complexities of the case, such as terrorism suspicions.[186]

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[179] *Supra*, III.B.1.b.

[180] ICCPR (n.39) art.14.

[181] Ibid., art.9(3-4); *Supra*, III.A.

[182] ICCPR (n.39) arts.9(2), 14(3)(a); GC 35 (n.178) ¶14, 25.

[183] UNGA, *Annotations on the text of the Draft International Covenants on Human Rights*, U.N. Doc. A/2929 (1955), chapter VI, ¶28.

[184] GC 35 (n.178) ¶30; *Brogan* (n.143) ¶53.

[185] Brice Dickson, *Article 5 of the ECHR and 28-Day Pre-Charge Detention of Terrorist Suspects*, 60 N. IR. LEGAL Q. 231, 236 (2009); *A v. U.K.* (n.152) ¶216.

[186] *Valderrama c. France*, E.Ct.H.R. 29101/09 (2012), ¶32, 34.

In arresting Kafker under suspicion for "terrorism" as defined in the RTA,[187] Riesland provided sufficient reasoning. Kafker's links to the Hive, whose members are at large,[188] justify the detention's necessity and reasonableness. Kafker's detention is not overly long considering the imminent threat and compared to State practice, which includes years of administrative detention.[189]

b. Proportionality Was Applied

Proportionality includes three cumulative requirements: legitimate aim, e.g. national security; necessity, i.e. pursuing it by the least intrusive way; and a balance between interests.[190] States must also apply emergency laws without discrimination.[191] However,

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[187] *Compromis*, ¶32.

[188] Ibid., ¶19, 36.

[189] Carlos Carcach and Anna Grant, *Imprisonment in Australia: The Remand Population*, at 5, AUSTRALIAN INSTITUTE OF CRIMINOLOGY (Oct. 2000), http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi172.pdf; U.S. Department of State, *Country Reports on Human Rights Practices for 2011: Argentina*, 7 (2011), http://www.state.gov/documents/organization/186697.pdf; Jennifer Gonnerman, *Kalief Browder, 1993–2015*, THE NEW YORKER (June 2015), http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015.

[190] MICHAEL NEWTON & LARRY MAY, PROPORTIONALITY IN INTERNATIONAL LAW 156 (2014); Julian Rivers, *Proportionality and Variable Intensity of Review,* 65 CAMBRIDGE

reasonable and objective differentiation from regular cases is not discriminatory,[192] and nationality is not on the ICCPR's list of discriminatory criteria.[193]

The RTA allows extension of detentions based on terrorism suspicions or substantial interest.[194] Given Riesland's concrete suspicions and the likelihood of Kafker's returning to Amestonia if released, Riesland has a substantial interest justifying the detention.

Riesland balanced Kafker's rights with the legitimate aim of national security – through frequent review of the state of emergency and the detention,[195] which was necessary to protect this aim. Kafker's detention following a warrant[196] is based on

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L.J. 174, 195-196, 198, 200 (2006); Mads Andenas and Stefan Zleptnig, *Proportionality: WTO Law: in Comparative Perspective*, 42 TEX. INT'L L.J. 371, 388 (2007).

[191] ICCPR (n.39) art.4(1).

[192] UNGA, *Report of the Working Group on Arbitrary Detention: United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, U.N. Doc. A/HRC/30/37 (2015), ¶54(b) [U.N. Proceedings].

[193] ICCPR (n.39) art.4(1); SARAH JOSEPH AND MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 915 (3rd ed., 2013).

[194] RTA (n.140) art.3(d)(i-ii, v-vi).

[195] *Compromis*, ¶5, 33; RTA (n.140) art.2; Corrections, ¶2.

[196] Ibid.

terrorism threats rather than on Kafker's nationality.[197] Considering this reasonable application, Kafker's detention is the least intrusive measure affording the same level of protection to Riesland. Therefore, Kafker's detention is proportionate.

c. The Tribunal is an Acceptable Court

Considering that fundamental fair trial requirements must be upheld during emergency,[198] the ICCPR requires access to a "competent, independent and impartial tribunal"[199] and recognizes special tribunals as such – irrespective of emergencies.[200] These tribunals may be used following exceptional, reasonable, and objective circumstances, such as legal condition.[201] Specialized tribunals for terrorism are endorsed for allowing judges to specialize in the field.[202]

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[197] RTA (n.140) art.3(a).

[198] GC 29 (n.148) ¶6.

[199] ICCPR (n.39) art.14(1).

[200] UNHRC, General Comment 32, U.N. Doc. CCPR/C/GC/32 (2007), ¶22 [GC 32].

[201] Ibid.; U.N. Proceedings (n.192) ¶54(b).

[202] STEPHANIE COOPER BLUM, THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR: A PLAN FOR A MORE MODERATE AND SUSTAINABLE SOLUTION 217-218 (2008); Matthew Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SEC. L. & POL'Y 1, 9 (2009) [Waxman *Detention*].

The Tribunal was created as "safeguards" for the Bureau,[203] ensuring independence. Its expertise in terrorism facilitates handling closed material, which might harm the impartiality of regular courts. The Rieslandic Supreme Court may review the Tribunal's decisions as an additional safeguard.[204] The Tribunal is therefore competent, independent, and impartial.

d. The Limitations on Evidence and Communication Were Justified

The ICCPR entitles detainees to choose or to be assigned an advocate and to communicate with them.[205] States may hold closed trials, e.g. due to national security.[206] A special advocate with access to specific allegations may balance the withholding of evidence,[207] as their expertise in terrorism benefits detainees.[208]

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[203] *Compromis*, ¶5.

[204] Ibid., ¶33; Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 ME. L. REV. 131, 161 (2010).

[205] ICCPR (n.39) art.14(3)(b, d).

[206] GC 32 (n.200) ¶29.

[207] *Jasper v. U.K.*, E.Ct.H.R., 27052/95 (2000), ¶52.

[208] Waxman Detention (n.202) 9; *A v. U.K.* (n.152) ¶219; Megan Caristo, *Secretary of State for the Home Department v AF: a lesson for Australia*, 32 SYDNEY L. REV. 693, 709 (2010).

Kafker chose his advocate from a list[209] – a beneficial procedure compared to States that afford no advocates.[210] Security concerns led to the classification of closed material, but Kafker's advocate could view it.[211] Riesland's derogations from fair trial were therefore justified.

C. THE COURT SHOULD NOT ORDER KAFKER'S RELEASE OR THE DISCLOSURE OF EVIDENCE CONCERNING HIM

Secrecy is essential when combating terrorism;[212] moreover, this Court has refrained from making inferences against States that decline to present evidence.[213]

Kafker's detention is lawful, necessary, and proportionate; the shortage of unclassified evidence results from national security concerns and should not be held

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[209] RTA (n.140) art.3(i); *Compromis*, ¶33.

[210] Ben Saul, *The Kafka-esque Case of Sheikh Mansour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia*, 33 U.N.S.W. L.J. 629, 648 (2010).

[211] *Compromis*, ¶33.

[212] *Fox, Campbell, and Hartley v. U.K.*, E.Ct.H.R. 12244/86; 12245/86; 12383/86 (1990), ¶32; William Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1220 (2007).

[213] CHITTHARANJAN F. AMERASINGHE, EVIDENCE IN INTERNATIONAL LITIGATION 132 (2005); *Corfu* (n.7) 32.

against Riesland. Even if procedural requirements were breached, the Court should require that they be redressed,[214] not that Kafker be released.

IV. THE CYBER ATTACKS AGAINST THE COMPUTER SYSTEMS OF THE AMES POST AND CHESTER & WALSINGHAM CANNOT BE ATTRIBUTED TO RIESLAND, AND IN ANY EVENT DID NOT CONSTITUTE AN INTERNATIONALLY WRONGFUL ACT

The cyber attacks against *The Ames Post* and Chester & Walsingham computer systems cannot be attributed to Riesland [A]. In any case, they would not constitute an internationally wrongful act [B].

A. THE CYBER ATTACKS CANNOT BE ATTRIBUTED TO RIESLAND

Amestonia has not proven attribution to Riesland [1]. Alternatively, due diligence – which was not violated - is not a path of attribution in this case [2].

1. AMESTONIA HAS NOT PROVEN ATTRIBUTION

To attribute the attacks to Riesland, Amestonia must show that a Rieslandic State organ was responsible,[215] or that they were conducted under Riesland's effective control or direction.[216] Hence, both the identity of the attacker, and their connection to Riesland,

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[214] *Avena* (n.5) 73; *Caldas v. Uruguay*, Comm. No. 43/1979, U.N. Doc. CCPR/C/OP/2 (1990), ¶15.

[215] ARSIWA (n.10) art.4.

[216] Ibid., art.8; *Nicaragua* (n.3) ¶116; *Genocide* (n.5) ¶400.

must be proven.[217] The standard of proof is high, both because Amestonia relies on circumstantial evidence and inferences of fact,[218] and because the question is of State responsibility: [219] the balance of probabilities is insufficient, and the standard of "beyond reasonable doubt" has twice been suggested for such a situation.[220] This standard is not met in our case.

a. The Amestonia Institute of Technology [AIT] Report is of insufficient probative value

The circumstances under which a statement was given, and the presumed interests of the parties involved, can preclude consideration of evidence.[221] In this vein, evidence from independent bodies is judged based on its source, the process by which it was

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[217] ARSIWA Commentary (n.12) 39; Michael Schmitt and Liis Vihul, *Proxy Wars in Cyberspace: The Evolving International Law of Attribution*, 1 FLETCHER SEC. REV. 53, 64 (2014) [*Proxy Wars*].

[218] *Corfu* (n.7) 18.

[219] Ibid, Dissenting Opinion of Judge Krylov, 72; *Nicaragua* (n.3) ¶109; *Proxy Wars* (n.217) 65; RIDDELL (n.6) 133.

[220] *Corfu* (n.7) 18; *Land and Maritime Boundary between Cameroon and Nigeria (Cam. v. Nig: Eq. Guinea intervening)*, [2002] 1.C.J. 303, Dissenting Opinion of Judge Ad Hoc Ajibola, ¶194.

[221] *Armed Activities* (n.27) ¶129-130; *Nicaragua* (n.3) ¶69.

generated, and its quality or character.[222] Amestonia bases its claim on the AIT's report, which comes from an Amestonian group, was generated through an unclear process, and aligns with Amestonian interests.[223] Despite the AIT's international reputation,[224] this significantly reduces the probative value of its report,[225] which should be treated with "great reserve" [226] and thus does not meet the above standard.

b. Tracing the attack to a Rieslandic computer does not attribute it to Riesland

Accepting *arguendo* the AIT report, it still does not provide sufficient evidence to attribute the attack to Riesland. Cyber attackers employ various methods to make themselves untraceable, such that the IT address from which an attack appears to emanate does not reflect its actual origin.[227] Even if the attack originated from a Rieslandic government computer, this does not prove the identity of the perpetrator, which is

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[222] *Genocide (2015)* (n.5) ¶190; *Genocide* (n.5) ¶227.

[223] *Compromis*, ¶38.

[224] Clarifications, ¶8.

[225] *Armed Activities* (n.27) ¶123.

[226] *Nicaragua* (n.3) ¶70.

[227] WHEELER AND LARSON, TECHNIQUES FOR CYBER ATTACK ATTRIBUTION 2 (2003); Nicholas Tsagourias, *Cyber Attacks, Self Defense and the Problem of Attribution*, 17 J. CONFLICT & SEC. L. 229, 233 (2012).

necessary for attribution:[228] a computer is not a State organ,[229] nor does this show effective control or direction.[230] Similarly, the fact that code segments similar to the Bureau's "Blaster" code were found does not indicate the identity of the perpetrator. Tracing the attack to a government computer, and identifying code segments, serves at best as *indication* of government involvement,[231] and is therefore insufficient for attribution.

2. VIOLATION OF A DUE DILIGENCE OBLIGATION DOES NOT LEAD TO ATTRIBUTION

Due diligence – the requirement that States not allow their territory to be used for acts against the rights of other States[232] – is a *primary* obligation. A violation establishes fault, rather than attributing responsibility.[233] Attribution of the conduct of private actors is generally based on the abovementioned standard of control or direction; only in

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[228] Tsagourias (n.227) 34; *Nicaragua* (n.3) ¶57.

[229] ARSIWA (n.10) art.4.

[230] Ibid, art.8.

[231] TALLINN (n.25) Rule 7.

[232] *Corfu* (n.7) 22; *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, [2010] I.C.J. 14, ¶101; *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1911, 1963 (Arb. Trib. 1941).

[233] Vassilis Tzevelekos, *Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility*, 36 MICH. J. INT'L L. 129, 154 (2014); *Proxy Wars* (n.217) 61.

specific, limited cases will it be attributable to a State based on due diligence.[234] Some such cases are prescribed specifically,[235] while others were recognized regarding *jus cogens* violations.[236] Even if Riesland had violated a due diligence obligation,[237] it would not lead to the attribution of the attacks to Riesland.

B. ASSUMING THEIR ATTRIBUTABILITY, THE CYBER ATTACKS WERE NOT AN INTERNATIONALLY WRONGFUL ACT

Riesland did not violate a due diligence obligation [1]. Furthermore, the attacks were neither illegal use of force [2], nor a violation of attorney-client privilege [3].

1. RIESLAND DID NOT VIOLATE A DUE DILIGENCE OBLIGATION

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[234] ARSIWA (n.10) art.8; Michael Schmitt, *In Defense of Due Diligence in Cyber Space* 125 YALE L. J. FORUM 68, 77 (2015); Alexander Kees, *Responsibility of States for Private Actors*, MPEPIL 2015, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1092?rskey=k2d33m&result=5&prd=EPIL.

[235] UNCLOS (n.36) art.263(3).

[236] S.C. Res. 1373 (2001); *Nicaragua* (n.3) ¶190; Report of the Committee against Torture, Twenty-third session (8-19 November 1999) Twenty-fourth session (1-19 May 2000), U.N. Doc. A/55/44, ¶186; *Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.)*, [2012] I.C.J. 422, ¶99.

[237] *Infra,* IV.B.1.

A State's responsibility to endeavor to avert harm is based on its ability to know about and prevent it.[238] The existence of control does not mean that a State necessarily knows, or ought to know, what occurs in a certain area,[239] particularly before an attack was underway.[240] This is the case in a State's territorial sea,[241] and thus even more so concerning its cyber infrastructure: it transcends territorial boundaries, and so too do hackers - often undetected.[242] Furthermore, in the cyber realm, constructive knowledge is insufficient to create an obligation.[243]

Regarding prevention, a State can only be required to do what is reasonable.[244] In developed States, government IT infrastructure alone can consist of millions of

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[238] Thilo Marauhn, *Customary Rules of International Environmental Law – Can They Provide Guidance for Developing a Peacetime Regime for Cyberspace?* in PEACETIME REGIME (n.27) 207.

[239] *Corfu* (n.7) 18; *Nicaragua* (n.3) ¶155.

[240] TALLINN (N.25) 34; Marauhn (n.238) 208.

[241] *Corfu* (n.7) 18.

[242] W. von Heinegg, *Territorial Sovereignty and Neutrality in Cyberspace*, 89 INT'L L. STUD. 123, 125 (2014); US DEPARTMENT OF DEFENSE, THE STRATEGY FOR HOMELAND DEFENSE AND CIVIL SUPPORT (June 2005), 12, https://www.hsdl.org/?view&did=454976.

[243] *In Defense* (n.234) 70-71; Pirker (n.32) 205.

[244] *Genocide* (n.5) ¶430; *In Defense* (n.234) 75.

computers;[245] the difficulties of monitoring such a system must be considered. If the attack was indeed perpetrated by forces outside of the government, this would not be the first time that the government network of a highly developed State was hacked.[246] Indeed, such States are particularly vulnerable to cyber attack.[247]

The obligation created by an attack that continues over time such as an ongoing distributed denial of service (DDoS) attack, as opposed to a one-time attack, is necessarily different.[248] While an ongoing violation implicates a State's responsibility to attempt to eliminate or mitigate harm,[249] this is almost impossible once the harm has

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[245] Davis, *Hackers of Government Computers Exposed 21.5 Million People* NEW YORK TIMES, 2015 http://www.nytimes.com/2015/07/10/us/office-of-personnel-management-hackers-got-data-of-millions.html.

[246] Ibid; *China Denies Australian Bureau of Meteorology "Hack"* BBC 2015 http://www.bbc.com/news/world-australia-34990807.

[247] Oona Hathaway et al, *The Law of Cyber-Attack*, 100 CAL. L. REV, 817, 842 (2012)*; In Defense* (n.234) 74.

[248] Robin Geiss and Henning Lahmann, *Freedom and Security in Cyberspace: Shifting the Focus Away from Military Responses towards Non-Forcible Countermeasures and Collective Threat Prevention*, *in* PEACETIME REGIME (n.27) 645; *In Defense* (n.234) 75.

[249] Atilla Tanzi, *Liability for Lawful Acts*, MPEPIL 2015, opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1065?rskey=ZX7Ylj&result=1&prd=EPIL.

already taken place. Where an obligation to investigate and persecute crimes exists, it does not specify the amount of time within which an investigation must take place.[250]

Riesland, particularly considering its reliance on IT,[251] cannot be reasonably expected to cripple its networks based on the mere potential of an attack. In considering responsibility to mitigate and investigate damage, the fact that the attack took place recently,[252] and is the subject of these current proceedings, leads to the conclusion that Riesland has not violated its obligations.

2. THE ATTACKS WERE NOT AN ILLEGAL USE OF FORCE

The attacks did not violate the prohibition on use of force enshrined in Article 2(4) of the UN Charter.[253] The commonly accepted approach to defining cyber use of force focuses on consequences: an act whose scale and effects are comparable to non-cyber use of force is considered use of force.[254] Severity, measured based on magnitude and duration,[255] is the most important criterion for measuring consequences.[256]

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[250] *Corfu* (n.7) 19-20; GC 31 (n.40) ¶15.

[251] *Compromis*, ¶1.

[252] Ibid, ¶37.

[253] UN Charter (n.3) art.2(4).

[254] TALLINN (n.25) 47; Reese Nguyen, *Navigating Jus ad Bellum in the Age of Cyber Warfare*, 101 CALIF. L. REV. 1079, 1122 (2013); Hathaway (n.247) 847.

[255] *Armed Activities* (n.27) ¶165.

When no physical damage to people or property occurs, there is no use of force.[257] Even where physical consequences exist, those of a very minor nature do not pass the "force" threshold.[258] Cyber attacks that have caused far more damage than the ones in this case - physically, to data, or in terms of disruption to national economies or institutions - were not recognized by the international community as force.[259] This includes attacks that harmed tens of thousands of computers, and spread for weeks or months.[260]

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[256] Michael Schmitt, *The Law of Cyber Warfare: Quo Vadis?* 25 STAN. L. & POL'Y REV 269, 281 (2014).

[257] Yoram Dinstein, *Computer Network Attacks and Self- Defense*, 6 INT'L L. STUD. SER. US NAVAL WAR COL. 99, 103 (2002); Russel Buchan, *Cyber Attacks: Unlawful Uses of Force or Prohibited Interventions?,* 17 J. OF CONFLICT & SEC. L. 212, 214 (2012).

[258] MARCO ROSCINI, CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW 54 (2014); *Fisheries Jurisdiction (Spain v. Can.)*, Jurisdiction, [1998] I.C.J. 432, ¶84.

[259] Nguyen (n.254) 1083; David Fidler, *Was Stuxnet an Act of War? Decoding a Cyberattack*, 9 IEEE SEC. & PRIVACY 56, 57 (2011); ROSCINI (n.258) 63.

[260] LTC MARCO DE FALCO, STUXNET FACTS REPORT (A TECHNICAL AND STRATEGICAL ANALYSIS) 4 (2012); TIKK ET AL, INTERNATIONAL CYBER INCIDENTS: LEGAL CONSIDERATIONS 20-21 (2010).

In contrast, the attacks in Amestonia were brief and limited in scope, affecting one law firm and one newspaper and causing no kinetic effects.[261] Therefore, Article 2(4) was not violated.

3. ATTORNEY-CLIENT PRIVILEGE WAS NOT VIOLATED

Attorney-client privilege mandates confidentiality of correspondence between attorney and client.[262] In the present case, any violation would have been of this privilege between a private citizen and law firm; as neither is a State, the issue is beyond the jurisdiction of the Court,[263] which has recognized the principle between a *State* and its counsel.[264]

Furthermore, and in any case, the cyber attacks targeted network switches and master boot records.[265] Both relate to functionality, specifically communications between computers and computer booting.[266] The result was data could not be *loaded*; not

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[261] *Compromis*, ¶37.

[262] *Certain Documents* (n.4) ¶27; *Reineccius et al v. Bank for International Settlements (2002)*, Procedural Order n.6, Reports of International Arbitral Awards, Volume III, 180.

[263] ICJ Statute (n.3) art.34(1).

[264] *Certain Documents* (n.4) ¶27.

[265] *Compromis*, ¶37.

[266] Microsoft TechNet, *Master Boot Record*, https://technet.microsoft.com/en-us/library/cc976786.aspx?f=255&MSPPError=-2147217396.

necessarily that it was accessed or otherwise compromised.[267] Without control over the data, its confidentiality could not have been violated.

[267] *Compromis*, ¶37-38.

PRAYERS FOR RELIEF

The Federal Republic of Riesland respectfully requests this Honorable Court to adjudge and declare that:

1. The *Ames Post* documents are inadmissible as evidence, and in any event do not evidence any breach by Riesland of an international obligation owed to Amestonia;
2. The arrest the VoR employees and expropriation of its facility and equipment were unlawful, entitling Riesland to the employees' release and compensation for the property;
3. Kafker's detention is consistent with Riesland's international law obligations, and he should therefore not be released, nor should related evidence be disclosed; and
4. The cyber attacks of 22 March 2015 cannot be attributed to Riesland, and in any event did not constitute an internationally wrongful act.