TEAM 176R

THE 2016 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

Case Concerning the Frost Files

THE STATE OF AMESTONIA
APPLICANT

v.

THE FEDERAL REPUBLIC OF RIESLAND
RESPONDENT

SPRING TERM 2016

On Submission to the International Court of Justice
The Peace Palace, The Hague, The Netherlands

MEMORIAL FOR THE RESPONDENT

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PLEADINGS 1

I. THE ILLICITLY-OBTAINED DOCUMENTS PUBLISHED ON THE WEBSITE OF *THE AMES POST* ARE INADMISSIBLE BEFORE THE COURT, BUT IN THE EVENT THAT THE COURT DOES FIND THEM TO BE ADMISSIBLE, THEY DO NOT EVIDENCE ANY BREACH BY RIESLAND OF AN INTERNATIONAL OBLIGATION OWED TO AMESTONIA. 1

A. The Frost Files are inadmissible. 1

1. Irrelevant evidence is inadmissible before this Court. 1

2. Documents are irrelevant if they cannot be authenticated. 2

3. The Frost Files cannot be authenticated, and are therefore irrelevant. 3

B. Even if the Court finds the documents to be admissible, they do not evidence any breach of an international obligation owed to Amestonia. 4

1. Riesland's intelligence programs do not violate the International Covenant on Civil and Political Rights (ICCPR). 4

a. Surveillance did not occur in an area under Riesland's effective control. 4

b. In any event, Riesland's actions did not violate the ICCPR. 6

i. Verismo and Carmen did not arbitrarily interfere with privacy. 6

ii. Any interference was in accordance with law. 7

iii. Any interference pursued a legitimate aim. 7

iv. Any interference was proportionate to its aim. 8

2. Riesland's intelligence programs are consistent with customary international law. 8

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. 10

A. The Broadcasting Treaty was in effect at the time of Amestonia's breach. 10

1. Riesland did not breach any VCLT provision justifying invocation of invalidity, suspension, or termination. 10

a. The Broadcasting Treaty is not invalid due to fraud. 10

b. The treaty is not suspended or terminated due to material breach. 11

B. Amestonia violated the Broadcasting Treaty. 13

1. Broadcasting Treaty Article 36 does not invalidate Riesland's privileges and immunities. 13

2. Amestonia's arrest of VoR employees and seizure of VoR property violated the Broadcasting Treaty. 14

C. The expropriation of VoR property violated Riesland's sovereign immunity. 16

1. State entities are entitled to a presumption of State immunity. 16

2. The Voice of Riesland is a state instrumentality. 16

3. The commercial activity exemption does not apply. 17

4. Riesland did not waive immunity. 18

D. Riesland is entitled to the immediate release of its nationals and compensation for the value of the confiscated property. 18

1. Riesland is entitled to immediate release of its nationals. 18

2. Riesland is entitled to compensation for the value of its property. 19

III. THE DETENTION OF JOSEPH KAFKER UNDER THE TERRORISM ACT IS CONSISTENT WITH INTERNATIONAL LAW, AND THE COURT HAS NO AUTHORITY TO ORDER KAFKER'S RELEASE OR DISCLOSURE OF INFORMATION RELATED TO HIS DETENTION. 19

A. Riesland's preventive detention of Joseph Kafker complied with Riesland's ICCPR obligations and customary law. 19

1. Kafker's detention was not arbitrary. 20

a. Kafker's detention accorded with procedures established by law. 20

b. Kafker's preventive detention was necessary and proportional to the threat he posed. 20

i. Kafker's detention was reasonable because he posed an imminent and severe threat 21

ii. No alternative means existed to mitigate the threat Kafker posed 22

c. The length of Kafker's detention was not arbitrary. 22

2. The National Security Tribunal satisfies Kafker's right to judicial review. 22

a. The NST is independent and impartial. 23

b. Kafker's detention was promptly reviewed. 23

c. Kafker's detention was adequately reviewed. 23

d. Kafker's representation by a Special Advocate was sufficient to satisfy Article 9. 24

3. Kafker was sufficiently notified of the reasons of his arrest. 24

B. If Kafker's detention did violate Article 9, Riesland lawfully derogated from the relevant obligations. 25

1. The Hive posed a threat to the life and health of the nation, justifying derogation during a state of emergency. 25

2. Riesland's derogations were only to the extent strictly required by the exigencies of the situation. 26

3. Riesland followed sufficient procedure for derogation. 27

4. The relevant provisions are lawfully derogable. 28

C. Article 14 does not apply to Kafker's detention. 28

D. If Kafker's detention is unlawful, Amestonia's remedy is "review and reconsideration," not release. 29

E. The Court cannot compel Riesland to disclose the confidential information forming the basis of Kafker's arrest. 29

IV. THE CYBER-ATTACKS AGAINST THE COMPUTER SYSTEMS OF THE AMES POST AND THE LAW FIRM CANNOT BE ATTRIBUTED TO RIESLAND, AND, IN ANY EVENT, THE CYBER-ATTACKS DO NOT CONSTITUTE AN INTERNATIONALLY WRONGFUL ACT. 30

A. Circumstantial evidence of Reislandic involvement in the cyber-activities must meet a heightened burden of proof. 30

B. The cyber-attacks cannot be linked to an organ of Riesland. 31

C. Riesland did not have effective control over the cyber-attackers. 32

a. Effective control is the appropriate standard 32

b. There is insufficient evidence of effective control 33

D. Riesland cannot be held liable merely because the cyber-attacks originated from its territory. 33

E. In any event, the Cyber-operations were not an internationally wrongful act 34

1. The cyber-operations were not an unlawful use of force. 34

2. If the cyber-operations were a use of force, they were justified under Riesland's right to self-defense. 35

3. The cyber-operations were not an unlawful intervention. 36

4. Alternatively, the cyber attacks were lawful countermeasures. 36

a. Amestonia violated international law by allowing Riesland's confidential data to be disseminated on its territory. 37

b. The countermeasures were proportional. 37

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INDEX OF AUTHORITIES

I.C.J. & P.C.I.J. CASES

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina/Serbia and Montenegro), Judgment, 2007 I.C.J. 43 .... 2, 29, 31, 33

Armed Activities on the Territory of the Congo (D.R.C./Uganda), Judgment, 2005 I.C.J. 168 1, 3, 5, 35

Armed Activities, 2005 I.C.J. 168 Sep. Op., J. Simma 35

Armed Activities, 2005 I.C.J. 168, Sep. op., J. Koojimans 35

Case Concerning Avena & Other Mexican Nationals, 2004 I.C.J. 12 29

Case Concerning Land and Maritime Boundary Between Cameroon & Nigeria, 2002 I.C.J. 303 31

Case Concerning Oil Platforms (Iran/U.S.), Judgment, 2003 I.C.J. 161 3

Case Concerning Pulau Ligitan and Pulau Sipadon Islands, 2002 I.C.J 666 30

Corfu Channel case (U.K. v. Alb.), Merits, 1949 I.C.J. 4 .... 2, 29, 30

Corfu Channel, Dissenting Opinion of Judge Ečer, 1949 I.C.J. 115 3

Factory at Chorzów (*Ger./Pol.*), 1927 P.C.I.J. (ser. A) 9 .... 18, 19

Gabcikovo-Nagymaros Project (Hungary/Slovakia), 1997 I.C.J. 7 .... 4, 11, 36, 37

Haya de la Torre Case, 1951 I.C.J. REP. 71 29

Jurisdictional Immunities of the State (Germany/Italy), Judgment, 2012 I.C.J. 99 17

LaGrand, 2000 ICJ Rep. 4 29

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, 1971 I.C.J. 16 11

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 .... 5, 27, 35

Mavromatis Jerusalem Concessions, 1925 P.C.I.J. (ser. A) 5 18

Military and Paramilitary Activities in and against Nicaragua (Nicaragua/U.S.), Merits, 1986 I.C.J. 14 .... passim

Nicaragua, 1986 I.C.J. 4, Sep. Op. Judge Ago. 32

Northern Cameroons Case, Preliminary Objections, 1963 I.C.J. REP. 15 29

Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste/Australia), Provisional Measures, 2014 I.C.J. 147 30

S.S. Lotus (Fr./Turk.), 1927 P.C.I.J. (ser. A) 4

United States Diplomatic and Consular Staff in Tehran (U.S./Iran), Judgment, 1980 I.C.J. 31, 18, 29

Wall Opinion, 2004 I.C.J. 136, Decl., Judge Buergenthal 35

OTHER INTERNATIONAL CASES

Al-Skeini et al./U.K., [ECtHR] 53 EHRR 589 (2011) 4, 5, 6

Askoy/Turkey, E.C.H.R. 21987/93 (1996). 26

Ayyash et al., Decision on the Admissibility of Documents Published on the Wikileaks Website, STL-11-01 2
Bankovic et al./17 NATO Member States, [ECtHR] No. 52207/99 (2001) 4, 16
Brannigan & McBride/United Kingdom, ECHR Series A No. 258-B (1993) 25
Case of Durand and Ugarte, I.A.Ct.H.R. Series C, No. 68 (2000) 25
Denmark & Others/Greece (The Greek Case), 3321/67, 3322/67; 3323/67, 3344/67 [E.Comm.H.R.] (1969) 26
Greece/U.K. (Cyprus Case), 2 YBECHR (1959-1960) 21
Ireland/U.K., (5310/71)E.C.H.R 1 (1978) 25
Island of Palmas Case (US/Neth.), 2. R.I.A.A. 829 (P.C.A. 1928) 31
Issa v Turkey, [ECtHR] No. 31821/96 (2004) 4, 8
Klass & Others/Germany, 2 EHRR 214, (1979) 25
Lawless/Ireland, [ECtHR] No. 332/57 (A/3), 15 (1961) 25, 26
Ocalan/Turkey (No. 2), ECtHR Nos. 24069/03, 197/04, 6201/06, and 10464/07 (2014) 24
Press Release, 26-01-2012, ECHR 032 (2012): *Berasategi/France* (29095/09), *Esparza Luri/France* (29119/09), *Guimon Esparza/France* (29116/09), *Sagarzazu/France* (29109/09), *Soria Valderrama/France*, 29101/09 22
Prosecutor/Dusko Tadic¸I.C.T.Y., Case IT-94-1-A (1999), 38 ILM 1518, ¶1117 (November 1999) 33
Prosecutor/Katanga and Ngudjolo Chui, Judgment, ICC-01/04-01/07 2
Prosecutor/Prlic et al., Interlocutory Appeal Decision, IT-04-74 2
See Cases of De Wilde, Ooms & Versyp/Belgium (2832/66) 1970 ECHR 2 (1970) 24
Tacna-Arica Question (Chile v. Peru), 2 R.I.A.A. 921 (1922) 11

International Conventions

Charter of the United Nations, 1 U.N.T.S. XVI (1945) 35
Convention for the Regulation of Antarctic Mineral Resource Activities, 27 I.L.M. 868 (1988) 34
Convention on Special Missions (1985), 1400 U.N.T.S. 231 13
European Convention on State Immunity (1972), C.E.T.S. No. 074 16
International Convention for the Suppression of Terrorist Bombings 2149 U.N.T.S. 284 [Terrorist Bombings Convention](1998) 37
International Convention for the Suppression of the Financing of Terrorism [Terrorism Financing Convention] T.I.A.S.No. 13075 (2000) 37
International Covenant on Civil and Political Rights (1966), 999 U.N.T.S. 171 .... passim
Statute of the International Court of Justice, 59 STAT. 1055 (1945) 1, 30
United Nations Convention on Jurisdictional Immunities of States and Their Property (2005), 44 I.L.M. 801 .... 16, 17, 18
Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (1967) 13
Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95 (1964) 13
Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 331 .... 10, 11, 14, 19

U.N. DOCUMENTS

Arbitrary Detention, U.N.Doc.A/HRC/Res/6/4 (2007) 20

Articles on the Responsibility of States for Internationally Wrongful Acts [ARSIWA], (I.L.C. Yearbook 2001-I) Pt. II .... passim

Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, GA Res. 43/173 (1988) 24

Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UN Doc. A/Res/20/2131 (1965) 36

Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, (I.L.C. Yearbook 2010-II) 34

ICTY Rules of Procedure and Evidence, U.N.Doc.IT/32/Rev.50 (2015) 2

Louis Joinet, Special Rapporteur, Report on the Practice of Administrative Detention, U.N.Doc.E/CN.4/Sub.2/1990 (1990) 19, 20

Permanent Sovereignty over Natural Resources, U.N.Doc.A/Res/1803 (2008) 19

Report of the Committee Against Torture, G.A.O.R.Supp.No.44(A/67/44)(2012)(Morocco) 24

Report of the Third Committee on the ICCPR, A/4045, 13 GAOR, Annexes (1958-1959). 22

Report of the Third Committee on the ICCPR, U.N.Doc.A/4045 (1958) 21

Report of the Working Group on Arbitrary Detention, U.N.Doc.A/HRC/22/44 (2012).. 20, 23, 27

Roberto Ago, Special Rapporteur, *Eighth Report on State Responsibility*, U.N.Doc.A/CN.4/318/ADD.5-7(1979) 36

Statute of the STL, Annex, U.N.Doc.S/RES/1757 (2007) 2

The Right to Privacy in the Digital Age, U.N.Doc.A/RES/68/167 (2003) 7

U.N. Security Council Resolution 1373, U.N.Doc.S/Res/1373 (2001) 35, 37

UN Basic Principles on the Independence of the Judiciary, U.N. Doc. A/CONF.121/22/Rev.1 (1985) 23

UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, THE LAW OF THE SEA: PRACTICE OF STATES AT THE TIME OF ENTRY INTO FORCE OF UNCLOS (UN Sales No.E.94.V.13, 1994) 5

NATIONAL CASES

A/Secretary of State for the Home Dep't, [2004] UKHL 56 27

Am. Civil Liberties Union/Dep't of State, [U.S. District Court] 878 F. Supp. 2d 215 (2012) 2

Bancoult/Sec'y of State for Foreign &Commonwealth Affairs (No. 2), UKSC 2015/0021 (2015) 2

Bin Nasir/Kerajean Malaysia & Others, 2002-4 M.L.J. 617 [Malaysia][2002] 24

Prosecutor/Sary, Request Regarding Admission of Newly-Available U.S. Diplomatic Cables, [Extraordinary Chambers, Courts of Cambodia] 002/19-09-2007-ECCC-OCIJ (2013) 2

R/Halliday (1917) AC 216 [Canada] 28

Union of India/Paul Nanicakn & Anr, Appeal (Crl) 21 of 2002, (2003) 28

NATIONAL LAWS

Anti-Terrorism Act of 2001, [Can.] Bill-36 21
Canadian Security Intelligence Services Act, 2008 CF 301 7
Criminal Code Act 1995, [Austl.] No. 1995, §105.4(5)(b-c) 20
Foreign Sovereign Immunities Act (1985), [Austl.] No. 196 16
Foreign Sovereign Immunities Act of 1976, [U.S.] 28 U.S.C. 1602–1611 16
State Immunities Act, [Can.] R.S.C., 1985, c. S-18 16
State Immunities Act, [U.K] 1978 c. 33, pt. I 16

BOOKS

A. SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION WITH SPECIAL REFERENCE IN THE TRAVAUX PREPARATOIRES AND CASE-LAW OF THE INTERNATIONAL MONITORING ORGANS (1992) 26, 28
ANTHONY AUST, MODERN TREATY LAW AND PRACTICE (2000) 10
ANTONIO CASSESE, INTERNATIONAL LAW (2005) 16, 17
BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED TO INTERNATIONAL COURTS AND TRIBUNALS (1953) 19
Brownlie, *State Responsibility and the International Court of Justice*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS (Fitzmaurice & Sarooshi, eds. 2004) 30
Christina Binder et al., *Unjust Enrichment* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2007) 19
Christopher C. Joyner & Catherine Lotrionte, *Information Warfare as International Coercion: Elements of a Legal Framework*, 12 EUROPEAN J. INT'L L. 825 (2001) 32
CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS (2011) 19, 21, 26, 28
Daniel Silver, *Intelligence and Counterintelligence* in NATIONAL SECURITY LAW (Moore et al., eds. 2005) 8
GEORG KERSCHENSCHNIG, CYBERTHREATS AND INTERNATIONAL LAW (2012) 32
GEORG SCHWARZENBERGER, INTERNATIONAL LAW (1945) 3
H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW (1952) 36
IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (2003) 15, 16
JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992) 26
JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS (1994) 27
JONATHON ZITRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT (2008) 32
MALCOLM SHAW, INTERNATIONAL LAW (2008) 16, 17
MALCOLM SHAW, INTERNATIONAL LAW (2014) 31
MARK VILLIGER, II CUSTOMARY INTERNATIONAL LAW AND TREATIES (1997) 14
NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA (2011) 5
NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS, COMMENTARY (2005) 25

PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES (1989) 10
PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY (Harding et al., eds. 1993)... 20
Robert Kolb, *General Principles of Procedural Law* in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, (Zimmermann *et al.*, eds. 2006) 1
Rosalyn Higgins, *Issues of State Responsibility Before the International Court of Justice*, in STATE RESPONSIBILITY (Fitzmaurice & Sarooshi, eds. 2004).. 31
ROZA PATI, DUE PROCESS AND INTERNATIONAL TERRORISM (2009)... 25
SAMMY FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW (1953)... 19
SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY (2000) 20
SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES,1945–1986 (1989)...................... 11
TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (M.Scmhitt, ed. 2013). .... passim
VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 839 (Dorr et al, eds. 2012) . 10
W. Hays Parks, *The International Law of Intelligence Collection* in NATIONAL SECURITY LAW (Moore et al., eds. 1990) 8
XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW (2015).................................. 16, 18
Y. ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002) 21
YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE (2010)..................................... 34, 36

ARTICLES

Afsheen Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 595 (2007) 8, 12, 13
Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT'L R. RED CROSS 15 (2005).... 29
Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 291 (2015) 4, 8, 9, 12
Christian J. Tams, *The Use of Force Against Terrorists*, 20 E.J.INT'L L. 359 (2009).................. 35
Christopher Baker, *Tolerance of International Espionage: A Functional Approach*, 19 AM. U. INT'L L. REV. 1091 (2004) 9
Craig Forcese, *Spies without Borders: International Law and Intelligence Collection*, 5 J. NAT'L SECURITY L. & Pol'y, 179 (2011) 9
Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM.J.INT'L.L. 1 (2012) 35
Evan Cooke, *The Zombie Roundup: Understanding, Detecting, and Disrupting Botnets*, SRUTI 05 Technical Paper, Univ. of Mich. (2005).. 31
Geoffrey Demarest, *Espionage in International Law*, 24 DENV. J. INT'L L. & POL'Y 321 (1996) 8

H. Cook, *Preventive Detention – International Standards on Protection of the Individual*, in PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW Perspective (Frankowski & Shelton, eds. 1992) 28

J.F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARVARD INT'L L. J. 25 (1981) 25, 26

Julius Stone, *Legal Problems of Espionage in Conditions of Modern Conflict* in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW (Stranger et al., eds. 1962) 8

Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs,* 83 AM.J.INTL.L. 1 (1989) 36

Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARVARD INT'L L.R. 81 (2015) 6, 9

Mauno Pihelgas, *Back-Tracing in Cyberspace*, in PEACETIME REGIME FOR STATE ACTIVITIES IN CYBERSPACE (Katharina Ziolkowski, ed., 2013) 31, 32

Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT'L L. 345 (2009) 36

McDougal et al., *The Intelligence Function and World Public Order*, 46 TEMPLE L.Q. 365 (1973) 9

Michael Scharf & Margeaux Day, *The International Court of Justice's Treatment of Circumstantial Evidence*, 13 CHICAGO J. INT'L LAW 123 (2012) 30

Michael Schmitt, *Computer Network Attack and the Use of Force in International Law*, 37 COLUM. J. TRANSNAT'L L. 885 (1999) 34

Michael Schmitt, *In Defense of Due Diligence in Cyberspace*, YALE LAW JOURNAL FORUM 68 (2015) 33

Patrick Norton, *A Law of the Future of the Future or of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474 (1991) 19

Paul Stephan, *The New International Law — Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999) 6

Raul Pedrozo, *Responding to Ms. Zhang's Talking Points on the EEZ*, 10 CHINESE J. INT'L L. 207 (2011) 6

Roger Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217 (1999) 8

Ruys & Verhoeven, *Attacks by Private Actors and the Right of Self-Defence*, 10 CONFLICT & SECURITY L. 285 (2005) 35

Ruys, *Quo Vadit Jus ad Bellum? A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq,* 12 MELBOURNE J. INT'L L. 334 (2008) 35

S.B. Elias, *Rethinking "Preventive Detention" from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects*, 41 COL. H.R.L.R. 130 (2009) 20, 21

Scott Shackelford, *From Nuclear War to Net War*, 27 BERKELEY J. INT'L L. 192 (2009) 34

Simon Chesterman, *The Spy Who Came in from the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071 (2007) 8, 9

Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 A.J.I.L 839, 840 (2001)............... 35
Tom Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM.J.INT'L.L. 405 (1985).. 35
William Worster, *The Effect of Leaked Information on the Rules of International Law*, 28 AM.U.INT'L.L.R. 443 (2013) (newspapers have a commercial interest in publishing documents) 3
Yihdego, *Ethiopia's Military Action Against the Union of Islamic Courts and Others in Somalia*, 56 I.C.L.Q. (2007).. 35

<u>H. R. C. DOCUMENTS</u>

A./Australia, CCPR/C/59/D/560/1993 (1997) 20, 22, 24
Ahani/Canada, UN.Doc.CCPR/C/1051/2002 (2002). 23, 28
C./Australia, CCPR/C/76/D/900/1999 (2002).. 20
Caldas/Uruguay, CCPR/C/19/D/43/1979, (1983).. 25
Campbell/Jamaica, UN.Doc.CCPR/C/47/D/307/1988, (1993) 25, 27
Concluding Observations: Cameroon, CCPR/C/79/Add.33 (1994) 27
Concluding Observations: Honduras, CCPR/C/HND/CO/1/2006 27
Concluding Observations: Ireland, CCPR/C/79/Add.21 (1993)................................ 27
Concluding Observations: Israel, CCPR/C/79/Add.93, (1998) 28
Concluding Observations: Mauritius, CCPR/CO/83/MUS, 2005 27
Concluding Observations: Peru, CCPR/C/79/Add, 8, (1992)................................ 27
Concluding Observations: Phillipines, CCPR/CO.PHL.2003 27
Concluding Observations: Russian Federation, CCPR/C/RUS/CO/6.2009, ... 27
D. & E./Australia, U.N.Doc.CCPR/C/87/D/1050/2002 (2006)................................ 21
Fjalkowska/Poland, CCPR/C/84/D/1061/2002 (2005) 23
Freemantle/Jamaica, CCPR/C/68/D/625/1995 (2000) 23
Gavrilin/Belarus, CCPR/C/D/1342/2005 (2007)................................ 23
Gueye et al./France, U.N.Doc.CCPR/C/35/D/196/1985 (1989) 5
HRC, General Comment No.16, U.N.Doc.HRI/GEN/1/Rev.1 (1988)................................ 7
HRC, General Comment No.29, U.N.Doc.CCPR/C/21/Rev.1/Add.11 (2001) 19, 26, 27, 28
HRC, General Comment No.31, U.N.Doc.CCPR/C/21/Rev.1/Add.13 (2004) 20
HRC, General Comment No.35, U.N.Doc.CCPR/C/GC/35 (2014) .... passim
Jalloh/Netherlands, CCPR/C/74/D/794/1998, (2002)................................ 22
Lopez Burgos/Uruguay, CCPR/C/13/D/52/1979 (1981) 5
Montero/Uruguay, CCPR/C/OP/2 (1990) 5
Morais/Angola, CCPR/C/83/D/1128/2002 (2005) 21
Mukong/Cameroon, 458/1991, CCPR/C/45/D/458/1991 (1991) 21
Mulezi/DRC, CCPR/C/81/D/962/2001 (2004)................................ 23
Nabil Sayadi & Patricia Vinck v. Belgium, CCPR/C/78/933/2000, Concurring Opinion of Nigel Rodley (2008)................................ 28

Perterer/Austria, CCPR/C/81/D/1015/2001 (2004) 29
Rameka/New Zealand, CCPR/C/79/D/1090/2002 (2003) 23
Schweizer/Uruguay, CCPR/C/17/D/66/1980 (1980) 19, 21
Shafiq/Australia, CCPR/C/88/D/1324/2004 (2004) 21, 24
Thomas/Jamaica, CCPR/C/65/D/614/1995 (1999). 22
Torres/Finland¸ CCPR/C/38/D/291/1988 (1990) 23
Van Alphen/Netherlands, U.N.Doc.CCPR/C/39/D/305/1988 (1989) 21
Vuolanne/Finland, 265/1987, U.N.Doc.Supp.No.40 A/44/40 (1989) 23

OTHER AUTHORITIES

Commentaries on the Draft Convention on the Law of Treaties, ILC Yearbook (1966-II) ... 10, 11
Commentaries to the Draft Articles on State Responsibility (I.L.C. Yearbook 2001-II) Pt. II 33
Contract Principles, International Institute for the Unification of Private Law Principles (2010) 10
Council of Europe Commissioner for Human Rights, Opinion 1/2002 (Comm. DH (2002) 7, 28 August 2002) 26
David Sanger, *In Spy Uproar, 'Everyone Does It' Just Won't Do*, N.Y. TIMES, Oct. 25, 2013 .. 9
Donald Anton, *The Timor Sea Treaty Arbitration: Timor-Lester Challenges Australian Espionage and Seizure of Documents*, 18 AM. SOC. INT'L L. BLOG 6 (26 February 2014) 10, 11
Embassy Espionage: The NSA's Secret Spy Hub in Berlin, DER SPIEGEL, (27 October 2013) 8
Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion, 1990 IACtHR (Ser. A) No. 11 (1990) 24
George Roberts, *Indonesia Summons Australian Ambassador to Jakarta Greg Moriarty over Spying Reports*, AUSTRALIAN BROADCASTING CORP. (1 November 2013) 12
Gerhard Schmid, Special Rapporteur*, Report on the Existence of a Global System for the Interception of Private and Commercial Communications* (ECHELON Interception System) (2001/2098(INI)) 6
Harold Koh, Memorandum Opinion on the Geographic Scope of the ICCPR, 4 (19 October 2010) 4
I.C.J. Rules of Court, *I.C.J. Acts and Documents No. 6* (2007) 1, 3
International Committee of Jurists, *States of Emergency: Their Impact on Human Rights* (Geneva 1983) 28
Jens Glüsing et al., *Fresh Leak on US Spying: NSA Accessed Mexican President's Email*, DER SPIEGEL (20 October 2013) 12
Kate Mitchell et al., *Espionage & Good Faith in Treaty Negotiations: East Timor v. Australia*, J. EUR. L. BLOG (20 January 2014) 11
Office of Gen. Counsel, U.S Dep't of Def., An Assessment of International Legal Issues in Information Operations (May 1999) 8
Paul Farrell, History of 5-Eyes, GUARDIAN (Dec. 2, 2013) 9
Principles and Best Practices on the Protections of Persons Deprived of Liberty in the Americas, OAS OEA/Ser/L/V/II 131 Doc.26 (2008) 21

Report on Terrorism and Human Rights, [Inter-Am. Commission on Human Rights], OAS OEA/Ser.L/V/VII 116 Doc. 5, rev. 1, corr. 22 (2002) 21, 26
Timor-Leste, Provisional Measures, Memorial of Australia 30
Tony Abbott, Comments Before Australian Parliament, 18 Nov. 2013 8
Understanding on Rules and Procedures Regarding the Settlement of Disputes, WTO Analytical Index (2011) 1
Venice Commission Report on Counter-Terrorism Measures and Human Rights, CDL-AD(2010)022 (2010) 21
W. Michael Reisman, *Covert Action,* 20 YALE J.INT'L.L. 419 (1995) 9

STATEMENT OF THE FACTS

BACKGROUND

Riesland and Amestonia are neighboring States with a common language and similar ethnic composition. They enjoy healthy cross-border economic, cultural, and security ties. Riesland is the top importer of Amestonian agricultural products, which has contributed to Amestonia's rapid GDP growth. The States have concluded a number of bilateral treaties on subjects such as tourism, extradition, and intelligence-sharing.

THE BROADCASTING TREATY

One bilateral agreement between the States is the 1992 Treaty on the Establishment of Broadcasting Facilities ("the Broadcasting Treaty"). The Broadcasting Treaty entitles each state to furnish and operate a television station in the other's territory. To accomplish this, the treaty provides certain protections from interference in the receiving State and extends privileges and immunities to the stations' premises, property, and employees. Voice of Riesland ("VoR"), a division of Riesland's state-owned and -operated broadcasting corporation, Riesland National Television ("RNT"), operates Riesland's station in Amestonia. Since its inaugural program in 1992, VoR has broadcasted a variety of award-winning and highly acclaimed programs.

THE FROST FILES

In December 2014, Riesland national Frederico Frost, a former Riesland Secret Service Bureau ("the Bureau") intelligence analyst, gave a law firm in Amestonia a USB drive containing nearly 100,000 documents marked "top secret" ("the Frost Files"), which Frost claims were downloaded from Bureau computers. Frost also gave a copy of the USB to two reporters from *The Ames Post,* Amestonia's most widely-circulated newspaper. In January and February 2015, *The Ames Post* gradually published thousands of these documents, unredacted, on its website. Riesland requested the documents' return and Frost's extradition under the States'

extradition treaty. Amestonia refused both requests.

The Frost Files contained information indicating that beginning May 2013, as part of a program called "Verismo," the Bureau collected and stored telecommunications metadata from Amestonian citizens through a recording pod installed on an undersea fiber optic cable located in Riesland's exclusive economic zone. The documents also discuss Riesland's alleged operation of a program known as "Carmen." This operation allegedly entailed the collection of data from the phones of Amestonian public and private leaders while those officials were guests on "Tea Time with Margaret." Authorizations and safeguards for these intelligence operations were provided in the Secret Surveillance Bureau Act ("SSBA").

VoR Arrests and Seizures

On 16 February 2015, the day *The Ames Post* published the Carmen documents, Amestonian police applied for and received a warrant to seize VoR's assets and property, citing the documents as probable cause. Upon execution, the police seized the station's property. At 3:15AM the following morning, Amestonian border patrol arrested three VoR employees, including Margaret Mayer, attempting to cross into Riesland by train. The three refused to produce travel documents upon request and were subsequently detained. Upon this development, the Amestonian police sought and obtained an arrest warrant for all three on suspicion of espionage. Amestonian investigators later determined that some confiscated VoR property was used for surveillance. The Amestonian Ministry of Justice obtained a forfeiture order against VoR's real estate and property. Amestonia intends to sell the property at public auction, pending the resolution of this case.

The Hive

For several years, Rieslandic companies have supplied Amestonian farmers with

insecticides known as neocontinoids, or "neonics," which boost farmers' yields. On 2 October 2012, the Institute for Land and Sustainable Agriculture ("ILSA") published the results of a study identifying neonics' negative effects on bees and other pollinators. ILSA called on Riesland and Amestonia to reevaluate the use of this insecticide.

Sometime after 2 July 2013, an anonymous post appeared on www.longlivethehive.com. The post condemned politicians for failing to "respond to peaceful initiatives," and called on the group to "command attention." The post expressed a need to respond "effectively and in kind." The website was primarily used by environmental activists to discuss ways to stop neonic use, including occasional calls for violent action, including sabotage and arson.

On the night of 2 February 2014, seven Amestonian warehouses, which stored neonics, were simultaneously set on fire. The arson attacks killed 5 people, including two Rieslandic nationals, and injured many others. The attacks caused €75 million of damage, and are expected to have long-term adverse health consequences for the local population. Police found spray-painted images of a bee on the asphalt outside the warehouses.

On 7 March 2014, 263 envelopes containing white powder and stamped with the image of a bee were sent to Ministries of Trade and Agriculture officials in Riesland and Amestonia, prominent Amestonian farmers, and board members of three Rieslandic neonic-producing corporations. That night, an anonymous online tweet warned that the "threat is real" and that "next time" the envelope recipients would "taste [their] own poison." Following the attacks and subsequent threats, Riesland's Prime Minister announced that she had ordered Riesland's security and intelligence services to direct operations against the threat.

On 16 October 2014, the Bureau Director informed the Amestonian Government that Bureau intelligence identified a plot to contaminate a large shipment of honey bound for

Riesland with toxic neonicontinoids. The next day, Riesland issued a Terrorism Alert pursuant to the Terrorism Act 2003 ("Terrorism Act"). On 21 October 2014 Amestonian police arrested three members of a group calling itself "The Hive" in possession of toxic neonics and detailed maps of Amestonian honey extraction facilities. Riesland reissued Terrorism Alerts in April 2015 and October 2015.

JOSEPH KAFKER

Riesland's Attorney General announced that Rieslandic intelligence linked Joseph Kafker, a vocal opponent of neonics, to the highest echelons of the Hive. Documents show he was a "high level suspect" in the attempted poisoning of honey bound for Riesland. On 7 March 2015, Riesland detained Joseph Kafker in Riesland's territory, announcing the Terrorism Act as the basis for his detention. Kafker's detention was reviewed in a closed hearing on 10 March 2015 by the National Security Tribunal ("the Tribunal"), comprising five Rieslandic judges. The Tribunal granted the petition to detain Kafker for national security reasons and ruled that evidence against Kafker was "closed material" pursuant to the Terrorism Act. Kafker was represented at this proceeding by a Special Advocate but was not able to attend, communicate with his lawyer, or access the evidence presented. Kafker's detention has been reviewed and extended by the Tribunal every 21 days. Kafker was granted consular assistance, given access to his family, and allowed communication with the outside world throughout his detention.

CYBER ATTACKS

On 22 March 2015, malware similar to that used in the Carmen program and traceable to the computer infrastructures of the Rieslandic government was used to attack the networks and communication switches at Chester & Walsingham and *The Ames Post*. As a result of the attacks, the two targets suffered a combined €45-50 million in damages, *The Ames Post* shut

down operations for two months, and a significant number of proceedings in Amestonian courts were delayed for months.

APPLICATION TO THE COURT

Amestonia and Riesland have agreed to refer this dispute to this Court by Special Agreement. Riesland, however, does not consent to the introduction of information derived from the Frost Files. The parties have stipulated in Article 2(b) of the Special Agreement that the issue of the admissibility of the documents is left for this Court to decide.

SUMMARY OF PLEADINGS

FIRST PLEADING

The illicitly-obtained documents published in *The Ames Post* (hereinafter "Frost Files") are inadmissible before this Court. The Frost Files violate this Court's standards of relevance and proof of authenticity. The documents do not derive from an independent body, result from personal and direct confirmation, or have multiple, impartial sources to verify their content. Because the documents are inadmissible, Amestonia cannot meet its burden to prove that Riesland's intelligence programs violated international law. Even if this Court finds the documents to be admissible, they do not evidence any breach of an international obligation owed to Amestonia. Riesland's intelligence programs did not violate its treaty obligations under the ICCPR because the programs were not under Riesland's effective control, and in any event, did not constitute arbitrary interference into Amestonians' right to privacy. Riesland's intelligence programs also did not violate customary law because state practice and *opinio juris* support states' right to engage in intelligence collection.

SECOND PLEADING

By entering Riesland's broadcasting station without permission, ordering the forfeiture of its premises and property, and arresting and detaining the station's employees, Amestonia violated Articles 1, 14, and 15 of the Treaty on the Establishment of Broadcasting Facilities Between the State of Amestonia and the Federal Republic of Riesland (hereinafter "Broadcasting Treaty"). The treaty's privileges and immunities remained in effect at the time of Amestonia's breach because the station never ceased to function as envisaged by the Treaty, and in any event, any cessation of functions only impacted Article 15. Amestonia cannot declare the Treaty invalid under a fraud defense because Amestonia was not induced to conclude the treaty based on

fraudulent conduct. Amestonia also cannot declare the Treaty suspended or terminated under a material breach defense because Riesland never acted to frustrate the Treaty's object and purpose. In any event, Amestonia's expropriation of Rieslandic property violated the customary norm of sovereign immunity because the station was a State instrumentality engaged in sovereign acts, and Riesland never explicitly waived its right to such immunity. As a result, Riesland is entitled to the release of its nationals and compensation for the value of its expropriated property, both of which are remedies within this Court's power to order.

THIRD PLEADING

The detention of Joseph Kafker under the Terrorism Act is consistent with international law. Riesland's preventive detention of Kafker complied with its obligations under ICCPR Article 9. Kafker's detention was not arbitrary and was reviewed by an independent and impartial tribunal, and Riesland provided sufficient notice of the reasons for Kafker's arrest. Even if this Court finds that Kafker's detention violated Article 9, Riesland lawfully derogated from the relevant Article 9 obligations. A state of emergency was justified under ICCPR Article 4 due to the actual and imminent threat to Riesland posed by Hive terrorists. Riesland's derogation was necessary and proportional to the harm averted, concerned provisions that were lawfully derogable and followed proper procedure. ICCPR Article 14, concerning criminal trials, does not apply to Kafker's detention. This Court also has no authority to order Kafker's release or disclosure of information about his detention, as the detaining state has the choice of means for compliance with this Court's judgment, and in any event, the disclosure of confidential information poses a threat to national security.

FOURTH PLEADING

The cyber-attacks against the *Ames Post* and Chester & Walsingham computer systems cannot be attributed to Riesland. Circumstantial evidence of Riesland's involvement in these operations cannot be linked to an organ of Riesland. Riesland also did not have effective control over the perpetrators and cannot be held liable for knowingly or negligently allowing the cyber-attacks. In any event, the cyber-attacks do not constitute an internationally wrongful act. The cyber-attacks were not an unlawful use of force because they did not meet the threshold of physical damage, and in any event, the attacks constituted a legitimate exercise of Riesland's right to self-defense. The cyber-attacks also did not violate the norm of non-intervention because they were not coercive. The cyber-attacks were also a valid countermeasure because Amestonia previously violated international law by allowing confidential data to be disseminated on its territory, and Riesland's response was proportional to that violation.

PLEADINGS

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

A. The Frost Files are inadmissible.

1. Irrelevant evidence is inadmissible before this Court.

Only relevant evidence is admissible before this Court, and the "burden of evidence" lies upon the party seeking to prove a claim.[1] The ICJ Statute requires relevance in requests for production of documents,[2] and the Court's Rules extend this requirement to evidentiary submissions.[3] This Court, relying on practice from its *Nicaragua*[4] and *Tehran*[5] decisions, stated in *Armed Activities* that it would "examine the facts relevant to each of the component elements of the claims advanced by the Parties," and "explain what items it should eliminate from further consideration."[6] The practice of requiring relevance is reflected in other international tribunals.[7]

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[1] Robert Kolb, *General Principles of Procedural Law* in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 818 (Zimmermann *et al.*, eds. 2006).

[2] Statute of the International Court of Justice, 59 STAT. 1055 (1945), [hereinafter "I.C.J. Statute"], Art.34.

[3] I.C.J. Rules of Court, *I.C.J. Acts and Documents No. 6* (2007), Art.49(1)(memorials), Art.50(1)&(2)(pleadings), Art.63(1) (testimony), Art.71(translations), Art.76(provisional measures submissions).

[4] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua/U.S.)*, Merits, 1986 I.C.J. 14, ¶¶85-91.

[5] *United States Diplomatic and Consular Staff in Tehran (U.S./Iran)*, Judgment, 1980 I.C.J. 3, ¶13.

[6] *Armed Activities on the Territory of the Congo (D.R.C./Uganda)*, Judgment, 2005 I.C.J. 168, ¶59.

[7] Understanding on Rules and Procedures Regarding the Settlement of Disputes, WTO Analytical Index (2011), Art.XI(B)(3)(b)(ii)(599); Statute of the STL, Annex,

2. Documents are irrelevant if they cannot be authenticated.

International tribunals such as the Special Tribunal for Lebanon,[8] International Criminal Court,[9] and International Criminal Tribunal for Yugoslavia[10] note that a document's *prima facie* reliability is essential in determining whether the prerequisite of relevance is met. Regional[11] and State[12] courts have similarly found that documents with questionable authenticity lack the reliability required for admission.

This Court's recent *Genocide* decision specifically noted the importance of authenticity in determining relevance and admissibility.[13] Although parties before the Court rarely question documents' authenticity, in its determination of relevance, the Court looks at factors such as whether evidence stems from personal and direct confirmation,[14] derives from official, independent bodies;[15] and emanates from identified,[16] multiple sources,[17] demonstrating

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U.N.Doc.S/RES/1757 (2007), Art.16(5); ICTY Rules of Procedure and Evidence, U.N.Doc.IT/32/Rev.50 (2015), Rule 89(C).

[8] *Ayyash et al.*, Decision on the Admissibility of Documents Published on the Wikileaks Website, STL-11-01, ¶40.

[9] *Prosecutor/Katanga and Ngudjolo Chui*, Judgment, ICC-01/04-01/07, ¶75.

[10] *Prosecutor/Prlic et al.*, Interlocutory Appeal Decision, IT-04-74, ¶33.

[11] *Prosecutor/Sary*, Request Regarding Admission of Newly-Available U.S. Diplomatic Cables, [Extraordinary Chambers, Courts of Cambodia] 002/19-09-2007-ECCC-OCIJ, ¶¶7, 11 (2013).

[12] *Am. Civil Liberties Union/Dep't of State*, [U.S. District Court] 878 F. Supp. 2d 215, 221 (2012); *Bancoult/Sec'y of State for Foreign &Commonwealth Affairs (No. 2),* UKSC 2015/0021, ¶¶89, 93 (2015).

[13] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina/Serbia and Montenegro)*, Judgment, 2007 I.C.J. 43, ¶¶225-227.

[14] *Corfu Channel Case (U.K./Alb.)*, Merits, 1949 I.C.J. 4, 16-17 (regarding witness testimony).

[15] *Genocide Case*, ¶227; *Nicaragua*, ¶¶65, 68.

[16] *Genocide Case*, ¶227.

contemporaneous and direct knowledge.[18] The Court also examines the manner in which statements were made public[19] and whether parties' statements constitute acknowledgement of facts.[20] This acknowledgement must be explicit when the subject matter is classified.[21]

3. The Frost Files cannot be authenticated, and are therefore irrelevant.

The Frost Files do not derive from personal and direct confirmation from the purported author, from an official, independent body, or from multiple sources. Frost did not allege to have sent or received the original documents himself, and the source of each document was never disclosed.[22] No statements by Riesland could be interpreted as explicitly acknowledging the classified documents' veracity. Although reporters and lawyers employed by *The Ames Post* reviewed these documents,[23] they were not sufficiently impartial to review authentication, as the corporation employing them has a vested commercial interest in publishing the documents.[24] State alleging a violation of international law has the burden to prove the existence and violation of that obligation;[25] without the Frost Files, Amestonia lacks competent evidence to prove that

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[17] *Case Concerning Oil Platforms (Iran/U.S.)*, Judgment, 2003 I.C.J. 161, ¶60; *Armed Activities*, ¶61.

[18] *Nicaragua*, ¶¶62, 65.

[19] *Nicaragua*, ¶65.

[20] I.C.J. Rules of Court, Art 26(i).

[21] *Nicaragua*, ¶74.

[22] Clarifications, ¶3.

[23] Compromis, ¶22.

[24] William Worster, *The Effect of Leaked Information on the Rules of International Law*, 28 AM.U.INT'L.L.R. 443, 445 (2013) (newspapers have a commercial interest in publishing documents).

[25] *Corfu Channel*, Dissenting Opinion of Judge Ečer,119-120, 129; GEORG SCHWARZENBERGER, INTERNATIONAL LAW 396 (1945); *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, 1997

Riesland's intelligence programs violated international law**.**

B. Even if the Court finds the documents to be admissible, they do not evidence any breach of an international obligation owed to Amestonia.[26]

1. Riesland's intelligence programs do not violate the International Covenant on Civil and Political Rights (ICCPR).

The ICCPR, to which Riesland and Amestonia are parties,[27] protects individuals from "arbitrary or unlawful interference" with "privacy, family, home or correspondence."[28]

a. Surveillance did not occur in an area under Riesland's effective control.

The ICCPR requires states to respect and ensure the rights recognized in the Covenant "to all individuals within its territory and subject to its jurisdiction."[29] Although some argue for a strictly territorial application of the ICCPR,[30] State practice indicates that the ICCPR applies, at most, only to areas under a state's effective control.[31] Scholars generally agree that the locus for determining effective control is the location of the interference itself.[32]

I.C.J. 7, ¶79; *See S.S. Lotus (Fr./Turk.)*, 1927 P.C.I.J. (ser. A), 18.

[26] Riesland's discussion hereinafter of evidence originating from the Frost Files does not indicate acceptance of the documents' authenticity.

[27] Compromis, ¶43.

[28] International Covenant on Civil and Political Rights (1966), 999 U.N.T.S. 171 [hereinafter "ICCPR"], Art.17(1).

[29] ICCPR, Art.2(1).

[30] Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 291, 307-8 (2015) (discussing statements of Israel, Australia, Belgium, Germany, and the United Kingdom).

[31] *Bankovic et al./17 NATO Member States*, [ECtHR] No. 52207/99, ¶71 (2001); *Issa v Turkey*, [ECtHR] No. 31821/96, ¶58 (2004); *Al-Skeini et al./U.K.*, [ECtHR] 53 EHRR 589, ¶¶133-137 (2011); Harold Koh, Memorandum Opinion on the Geographic Scope of the ICCPR, 4 (19 October 2010).

[32] Deeks, 300.

Physical or legal control over a person or area is required to establish effective control. This Court has only found that ICCPR applied extraterritorially where a State's security forces physically occupied the relevant territory for an extended period.[33] Instances in which other courts have found extraterritorial application include the physical arrest of a person,[34] confiscation of property at a consulate,[35] and failure to provide state-owed pensions.[36] The European Court of Human Rights similarly outlined three exhaustive examples of extraterritorial jurisdiction: the use of force by State agents, military action, and military occupation.[37]

The statute authorizing Rieslandic intelligence permits only the collection of "foreign intelligence," defined as "any information located or emanating from outside Riesland's territory."[38] Applicant has provided no evidence that those surveilled under either program had any legal relationship with Riesland or that the programs physically injured any Amestonian citizens. Located in Riesland's EEZ,[39] the Verismo program's interception of communications occurred outside of any State's territory. Under UNCLOS Article 58, broadly considered custom,[40] states may engage in intelligence collection in any EEZ without other States' notice or

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[33] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 2004 I.C.J. 136, 110-111; *Armed Activities*, ¶59.

[34] *Lopez Burgos/Uruguay*, CCPR/C/13/D/52/1979, ¶¶12.2-12.3 (1981).

[35] *Montero/Uruguay*, CCPR/C/OP/2, 136 (1990).

[36] *Gueye et al./France*, U.N.Doc.CCPR/C/35/D/196/1985, ¶¶9.4-9.5 (1989).

[37] *Al-Skeini*, 27-32.

[38] Compromis, ¶4.

[39] Compromis, ¶22.

[40] UNITED NATIONS DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, THE LAW OF THE SEA: PRACTICE OF STATES AT THE TIME OF ENTRY INTO FORCE OF UNCLOS 133 (UN Sales No.E.94.V.13, 1994); NATALIE KLEIN, MARITIME SECURITY AND THE LAW OF THE SEA 45 (2011).

consent.[41] The Carmen program was located in Amestonia's territory under Amestonian control. No use of force, military action, or military occupation occurred at the broadcasting station.[42] Thus, the ICCPR cannot apply to these programs.

b. In any event, Riesland's actions did not violate the ICCPR.

Courts frequently use a four-part test to determine whether surveillance programs violate the ICCPR: whether there was an interference with privacy or correspondence, whether the interference was in accordance with the law, whether the interference pursued a legitimate aim, and whether it was proportionate to that aim.[43]

i. Verismo and Carmen did not arbitrarily interfere with privacy.

Verismo only collected metadata of Amestonian citizens, filtering out irrelevant results.[44] Carmen surveilled only high-level public and private officials.[45] Monitoring electronic data of a large group of citizens is too broadly directed and superficial to constitute arbitrary interference,[46] and targeted surveillance on high-level officials is too particularized to constitute arbitrary interference because it does not implicate average citizens.[47]

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[41] United Nations Convention on the Law of the Sea, 1833 U.N.T.S 3 (1982), Art.58(1); Raul Pedrozo, *Responding to Ms. Zhang's Talking Points on the EEZ*, 10 CHINESE J. INT'L L. 207, 223 (2011) (noting activities of NATO, China, Japan, Australia, Russia, and South Africa).

[42] Broadcasting Treaty, Art.23(1).

[43] Marko Milanovic, *Human Rights Treaties and Foreign Surveillance,* 56 HARVARD INT'L L.R. 81, 112 (2015); Gerhard Schmid, Special Rapporteur, *Report on the Existence of a Global System for the Interception of Private and Commercial Communications* (ECHELON Interception System) (2001/2098(INI), ¶7.2.1.

[44] Compromis, ¶¶22, 23.

[45] Compromis, ¶25.

[46] Milanovic, 120.

[47] Paul Stephan, *The New International Law — Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1563 (1999); Milanovic, 319.

ii. Any interference was in accordance with law.

The Human Rights Committee notes that interference must "take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant."[48] Any interference was in accordance with Rieslandic law, explicitly outlined in the SSBA.[49] Structural safeguards, similar to those frequently used by States,[50] limited Riesland's surveillance,[51] including a "necessity" requirement, capacity for independent investigations, judicial review, issuance of limiting regulations, and a ban on surveillance implicating Rieslandic nationals. Riesland's surveillance programs were regularly reviewed.[52]

iii. Any interference pursued a legitimate aim.

States regularly use surveillance both to advance their foreign policy interests[53] and promote national security efforts.[54] Rieslandic law limits intelligence collection to the pursuit of these aims.[55] The Verismo program targeted potential threats to Riesland's national security,[56] and the Carmen program advanced Riesland's foreign policy interests.[57]

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[48] HRC, General Comment No.16, U.N.Doc.HRI/GEN/1/Rev.1, ¶3 (1988).

[49] Compromis, ¶4.

[50] Canadian Security Intelligence Services Act, 2008 CF 301, ¶24.

[51] Compromis, ¶5.

[52] Compromis, ¶23; Clarifications, ¶5.

[53] *See infra* §I(B)(2).

[54] *See infra* §I(B)(2); The Right to Privacy in the Digital Age, U.N.Doc.A/RES/68/167 (2003), Preamble.

[55] Compromis, ¶4.

[56] Compromis, ¶25.

[57] Compromis, ¶26.

iv. Any interference was proportionate to its aim.

Both programs abided by the SSBA limitations, which prevented them from exceeding the scope required by their objective. The Verismo program relied on specifically tailored search terms to track potential ecoterrorists[58] and only stored information for a maximum of two years.[59] The Carmen program only surveilled approximately 100 individuals, all of whom were high-ranking Amestonian leaders.[60]

2. Riesland's intelligence programs are consistent with customary international law.

No customary restrictions on surveillance exist in international law,[61] based either on a right to territorial sovereignty or privacy.[62] The widespread and long-standing practice of surveillance,[63] the statements of States about surveillance,[64] and arrangements between States to

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[58] Compromis, ¶22.

[59] Compromis, ¶23.

[60] Compromis, ¶¶25, 26.

[61] *See* Office of Gen. Counsel, U.S Dep't of Def., An Assessment of International Legal Issues in Information Operations, 29 (May 1999); Daniel Silver, *Intelligence and Counterintelligence* in NATIONAL SECURITY LAW 965 (Moore et al., eds. 2005); W. Hays Parks, *The International Law of Intelligence Collection* in NATIONAL SECURITY LAW 433–434 (Moore et al., eds. 1990); Geoffrey Demarest, *Espionage in International Law*, 24 DENV. J. INT'L L. & POL'Y 321, 321 (1996); Afsheen Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 595, 596 (2007); Roger Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 217 (1999).

[62] Julius Stone, *Legal Problems of Espionage in Conditions of Modern Conflict* in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW, 36 (Stranger et al., eds. 1962); Simon Chesterman, *The Spy Who Came in from the Cold War*, 27 MICH. J. INT'L L. 1071, 1098 (2007); *Weber & Saravia/Germany*, 2006 ECHR 1173, ¶81.

[63] Deeks, 305.

[64] *Embassy Espionage: The NSA's Secret Spy Hub in Berlin*, DER SPIEGEL, (27 October 2013); Tony Abbott, Comments Before Australian Parliament, 18 Nov. 2013.

limit surveillance[65] support the permissiveness of surveillance. Many scholars interpret this widespread practice as an indication that states affirmatively recognize a right to engage in such conduct[66] because spying is an integral part of a State's right to protect itself.[67] Neither specific type of intelligence program undertaken by Riesland is customarily prohibited; this includes tapping communications of diplomats,[68] which no State or diplomat has ever asserted was illegal,[69] and mass telecommunications surveillance,[70] a practice engaged in by many States.[71]

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[65] *See* Paul Farrell, History of 5-Eyes, GUARDIAN (Dec. 2, 2013); W. Michael Reisman, *Covert Action,* 20 YALE J.INT'L.L. 419, 421 n.3 (1995).

[66] *See, e.g.* McDougal et al., *The Intelligence Function and World Public Order*, 46 TEMPLE L.Q. 365, 394 (1973); *See* David Sanger, *In Spy Uproar, 'Everyone Does It' Just Won't Do*, N.Y. TIMES, Oct. 25, 2013 (Modern examples of state spying).

[67] *See* Craig Forcese, *Spies without Borders: International Law and Intelligence Collection*, 5 J. NAT'L SECURITY L. & POL'Y, 179, 198–99 (2011); Christopher Baker, *Tolerance of International Espionage,* 19 AM. U. INT'L L. REV. 1091, 1092 (2004).

[68] Chesterman, 1086 (discussing U.S. and British intelligence services tapping communications of UNSC members).

[69] *Id.*

[70] Milanovic, 82; Chesterman, 1081.

[71] Deeks, 297.

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.

A. The Broadcasting Treaty was in effect at the time of Amestonia's breach.

1. Riesland did not breach any VCLT provision justifying invocation of invalidity, suspension, or termination.

a. The Broadcasting Treaty is not invalidated by fraud.

The VCLT, to which both States are parties,[72] represents an exhaustive list of methods for invalidating, suspending, or terminating a treaty.[73] Article 49 allows invalidation of a treaty if a State is "induced to give consent to a treaty which it would not otherwise have given" due to the other party's fraudulent conduct.[74] The term fraud includes "deceit or willful misrepresentation"[75] "in the formation of an international agreement,"[76] with the intention of "lead[ing] the other party into error."[77] A treaty between States has never been declared invalid due to fraud.[78]

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[72] Compromis, ¶43.

[73] VCLT, Art.42

[74] Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 331 [hereinafter "VCLT"], Art.49; Commentaries on the Draft Convention on the Law of Treaties, ILC Yearbook, [hereinafter "VCLT Commentaries"], (1966-II), 245.

[75] VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 839 (Dorr et al, eds. 2012).

[76] PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 137-38 (1989); Donald Anton, *The Timor Sea Treaty Arbitration: Timor-Lester Challenges Australian Espionage and Seizure of Documents*, 18 AM. SOC. INT'L L. BLOG 6 (26 February 2014).

[77] Contract Principles, International Institute for the Unification of Private Law Principles, Art 3.2.5,cmt. 2 (2010).

[78] Anton, 6; ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 254-55 (2000); Kate Mitchell et al., *Espionage & Good Faith in Treaty Negotiations: East Timor v. Australia*, J. EUR.

There is no evidence that fraudulent conduct was used in the formation of the Broadcasting Treaty. Unlike in the Timor-Leste arbitration, the only currently pending case involving a fraud accusation,[79] Applicant has presented no evidence that espionage occurred during the Treaty negotiation; in fact, the Frost Files suggest otherwise; the execution of the Broadcasting Treaty predated the Carmen and Verismo programs by at least seven months, when the Broadcasting station first operated.[80] Additionally, Applicant has presented no evidence that any statements made by Riesland in treaty negotiation "induced" Amestonia to conclude the Treaty.

b. The treaty is not suspended or terminated due to material breach.

The standard for material breach under VCLT Article 60 is objective, independent of the determination by the party invoking the claim.[81] For a breach to be material, it must involve a provision essential to accomplishing the treaty's object and purpose[82] and must be deliberate and persistent.[83] The object and purpose can be determined by looking at the treaty's text and preamble.[84]

Riesland did not violate a principle essential to the object and purpose of the Treaty.

L. BLOG (20 January 2014).

[79] Anton, 6.

[80] Compromis, ¶8.

[81] SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES,1945–1986, 38 (1989); *Tacna-Arica Question (Chile/Peru)*, 2 R.I.A.A. 921, 945–944 (1922).

[82] VCLT Commentaries, 245; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, 1971 I.C.J. 16, ¶95; *Gabcikovo-Nagymaros*, ¶109.

[83] *Namibia*, ¶95.

[84] VCLT, Art.31(2).

References to "friendship" and "cooperation" in the preamble illustrate that the object and purpose is to promote friendship through the broadcasting of television. The preamble directs the parties to "offer their citizens television channels,"[85] the title refers only to the "establishment of broadcasting facilities," and Articles I and II, outlining the stations' functions, refer only to actions required for broadcasting. In *Nicaragua*, this Court noted, "There must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of a Treaty."[86] In that case, the Court found that certain unfriendly acts, such as cutting off economic aid, did not breach a "friendship" treaty between states which pertained to maritime commerce.[87]

Riesland broadcasted award-winning programs for 22 years and continued to broadcast diverse content until Amestonia's expropriation of property and arrest of VoR employees.[88] Even if this Court finds that the intelligence program did not further friendship, such action, at the very least, does not harm friendship between States. States commonly use their property on foreign soil to conduct espionage,[89] often with implicit acceptance of host states.[90] Although spies have sometimes been declared *persona non grata* and expelled,[91] in no instances has the operating

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[85] Broadcasting Treaty, Preamble.

[86] *Nicaragua*, ¶137

[87] *Nicaragua*, ¶276.

[88] Compromis, ¶8.

[89] Jens Glüsing et al., *Fresh Leak on US Spying: NSA Accessed Mexican President's Email*, DER SPIEGEL (20 October 2013) (describing spying from U.S. Embassies in Mexico City and Brasilia); George Roberts, *Indonesia Summons Australian Ambassador to Jakarta Greg Moriarty over Spying Reports*, AUSTRALIAN BROADCASTING CORP. (1 November 2013).

[90] Deeks, 312; Radsan, 621–622.

[91] Deeks, 312; Radsan, 621–622.

treaty for a mission, consulate, or other special entity, which commonly contain "friendship" provisions,[92] been resultantly declared invalid.[93] Amestonia's acceptance of intelligence from Riesland's intelligence programs on over 50 occasions,[94] including intelligence on a terrorist plot to poison a large shipment of honey[95] supports the compatibility of Carmen and Verismo with the Broadcasting Treaty.

B. Amestonia violated the Broadcasting Treaty.

1. Broadcasting Treaty Article 36 does not invalidate Riesland's privileges and immunities.

Article 36 outlines the only method in which privileges and immunities can be suspended, stating: "All privileges and immunities provided for in this Treaty, save for those in Article 15(1)(c) above, shall cease to have effect upon the cessation of the station's functions as envisaged in the Present Treaty."[96] Article 36 does not apply because the station in Amestonia never ceased to function as envisaged in the Treaty.[97] Articles 1 and 2 outline the planned functions of the broadcasting stations, including the process for establishing stations, how they would be established and managed, and how programming would commence. The station continued to perform all of these functions until Amestonia's violation.[98] Riesland's only

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[92] *See* Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95 (1964) Preamble; Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (1967) Preamble; Convention on Special Missions (1985), 1400 U.N.T.S. 231, Preamble.

[93] Radsan, 622.

[94] Compromis, ¶23.

[95] Compromis, ¶18.

[96] Broadcasting Treaty, Art.36.

[97] *See supra* §II(A)(1)(b).

[98] See *infra* §II(B)(2).

potential violation involves "respecting the laws of the host state;" however, this Treaty provision specifically states that such violations are "without prejudice to their privileges and immunities."[99]

Even if privileges and immunities are invalidated under Article 36, this provision cannot nullify any Treaty provision other than Article 15. Under the treaty-interpretation principle of *expressio unius*, the specification of one issue implies the exclusion of all others.[100] Since the Treaty included "immunities and privileges" language only in Article 15, the parties are presumed to have intended only Article 15 to be subject to termination under Article 36. Thus, even if the station ceases to function as envisaged, Riesland can claim relief for Applicant's other Treaty violations.

2. Amestonia's arrest of VoR employees and seizure of VoR property violated the Broadcasting Treaty.

A treaty is interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in light of the treaty's object and purpose.[101] Interpretation begins by examining the treaty's text, both the body and preamble.[102]

The text of the Broadcasting Treaty states that the station's land is procured and held in the operating state's name,[103] that the station's premises[104] and documents[105] are inviolable, and

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[99] Broadcasting Treaty, Art.23.

[100] MARK VILLIGER, II CUSTOMARY INTERNATIONAL LAW AND TREATIES 160 (1997).

[101] VCLT, Art.31(1-2).

[102] VCLT, Art.31(2-3).

[103] Broadcasting Treaty, Art.1(2).

[104] Broadcasting Treaty, Art.14(1).

[105] Broadcasting Treaty, Art.14(4).

that agents of the host state cannot enter the station without consent.[106] The station's premises and property are immune from "search, requisition, attachment, expropriation, or execution."[107] Similarly, station employees are immune from arrest, attachment, and the receiving state's criminal jurisdiction.[108] The Treaty also imposes a "special duty" on the host state to protect the station from intrusion or damage, prevent impairment of the premises' dignity,[109] treat the station's employees "with due respect," and prevent attack on employees' freedom or dignity.[110]

Based on the ordinary meaning given to these terms, Amestonia breached each of these provisions. Amestonia entered the broadcasting station without permission, catalogued and removed equipment and documents,[111] arrested and detained employees for criminal charges,[112] ordered forfeiture of the premises and property,[113] and attempted to auction off the station's real estate and property.[114]

C. The expropriation of VoR property violated Riesland's sovereign immunity.

1. State entities are entitled to a presumption of State immunity.

The universally recognized principle of foreign sovereign immunity[115] creates a

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[106] Broadcasting Treaty, Art.14(1).

[107] Broadcasting Treaty, Art.14(2).

[108] Broadcasting Treaty, Art.15(1)(b).

[109] Broadcasting Treaty, Art.14(3).

[110] Broadcasting Treaty, Art.15(1)(a).

[111] Compromis, ¶27.

[112] Compromis, ¶28.

[113] Compromis, ¶40.

[114] Compromis, ¶40.

[115] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 326 (2003); ANTONIO CASSESE,

presumption of immunity for both States and state instrumentalities.[116] Unless Amestonia can demonstrate the applicability of an exemption,[117] its exercise of jurisdiction through enforcement against a Rieslandic instrumentality violates Riesland's sovereign rights.[118]

2. The Voice of Riesland is a state instrumentality.

To determine whether an entity is a state instrumentality, courts consider whether the entity is indistinct or distinct from the State,[119] or "performing acts in the exercise of sovereign authority of the State."[120] Courts examine factors such as ownership and control of the entity; appointment and dismissal of administrative personnel; degree and nature of government control; constitution of the entity; and relationship between the entity and government.[121]

VoR is a division of RNT, a state-owned and -operated corporation.[122] VoR was created specifically by a treaty between States designed to promote friendship through public

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INTERNATIONAL LAW 100 (2005); MALCOLM SHAW, INTERNATIONAL LAW 697, 701 (2008).

[116] *See* United Nations Convention on Jurisdictional Immunities of States and Their Property (2005), 44 I.L.M. 801, [hereinafter "Immunities Convention"], Arts. 10–11, 13–17; European Convention on State Immunity (1972), C.E.T.S. No. 074, Arts. 4–12; Foreign Sovereign Immunities Act (1985), [Austl.] No. 196, §§11–12, 14–20; Foreign Sovereign Immunities Act of 1976, [U.S.] 28 U.S.C. 1602–1611, Art.1605(a)(2)–(4), (6); State Immunities Act, [Can.] R.S.C., 1985, c. S-18, §§5, 7–8; State Immunities Act, [U.K] 1978 c. 33, pt. I, §§2–4, 6–11.

[117] *Nicaragua*, ¶101.

[118] *See* BROWNLIE, 323, 325-26; CASSESE, 100, 102; SHAW, 697, 701; *Prosecutor/Blaskic*, Judgment of 18 July 1997, [ICTY] IT-95-14, ¶72 (1997).

[119] XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 297 (2015) (citing cases in England, Singapore, Germany, France, South Africa, and the U.S).

[120] Immunities Convention, Art.2(1)(b)(iii).

[121] Yang, 297.

[122] Compromis, ¶8.

broadcasting.[123] The Rieslandic government was responsible for "staffing, running, and funding the station," "procur[ing] at its own expense and in its own name" the station's equipment, and "establishing and operating" the station.[124] The government, through the Bureau, also provided direct oversight over VoR's intelligence activities and served as a conduit for interpreting the station's intelligence.

3. The commercial activity exemption does not apply.

Only a state instrumentality's commercial acts are subject to foreign jurisdiction; all other acts are immune.[125] To determine whether an act is commercial, both its nature and purpose are considered.[126] In *Jurisdictional Immunities*, this Court ruled that the commercial activities exemption did not apply to property serving as an Italian-German cultural exchange center[127] because it was "intended to promote cultural exchanges," was "organized and administered on the basis of an agreement between the two Governments," and involved State oversight in its "managing structure."[128]As in *Jurisdictional Immunities*, the broadcasting station intended to promote cultural exchanges, was organized and administered under an agreement between States, and was managed by Riesland government agents. Additionally, the facility engaged in public broadcasting, which, by its definition, serves to broadcast content without making a profit. Riesland's intelligence activities also did not intend to procure any commercial value from

[123] See *supra* §II(A)(1)(b).

[124] Broadcasting Treaty, Arts. 1, 2.

[125] CASSESE, 100; SHAW, 708.

[126] Immunities Convention, Art.2(2); CASSESE, 101.

[127] *Jurisdictional Immunities of the State (Germany/Italy),* Judgment, 2012 I.C.J. 99, ¶120.

[128] *Jurisdictional Immunities*, ¶119.

Amestonian citizens, and the information collected was not used for any commercial benefit to Riesland.

4. Riesland did not waive immunity.

Although States may waive immunity,[129] States' intention to waive must be clearly expressed and specific to the litigation at issue.[130] Riesland never explicitly or implicitly waived its right to privileges and immunities for the VoR premises or property, and the only privileges and immunities mentioned in the Broadcasting Treaty concern employees.

D. Riesland is entitled to the immediate release of its nationals and compensation for the value of the confiscated property.

1. Riesland is entitled to immediate release of its nationals.

In circumstances where ceasing the wrongful act and restoring it to its prior situation is possible, this Court[131] and its predecessor[132] have recognized restitution as a remedy in international law; reparations should "re-establish the situation which would, in all probability, have existed if that act had not been committed."[133] Although the remedy for wrongful deprivations of liberty is typically "review and reconsideration,"[134] immediate release of nationals is the proper remedy when State immunity is violated, either by treaty or custom.[135]

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[129] Yang, 316.

[130] Immunities Convention, Art.7.

[131] *Nicaragua*, p.145 ¶12; *Tehran*, p.45, ¶5.

[132] *Mavromatis Jerusalem Concessions*, 1925 P.C.I.J. (ser. A) 5, 51; *Factory at Chorzów* (*Ger./Pol.*), 1927 P.C.I.J. (ser. A) 9, 541.

[133] *Chorzow Factory*, 541.

[134] See *infra* §III(D).

[135] *See Tehran*, ¶¶84-87, 91-92.

2. Riesland is entitled to compensation for the value of its property.

A State may not expropriate foreign-owned property without providing full compensation.[136] *Opinio juris* evidenced in General Assembly Resolution 1803[137] illustrates this standard, and modern courts reaffirm it.[138] When Amestonia expropriated VoR property, Riesland became entitled to full compensation for such property.

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

A. Riesland's preventive detention of Joseph Kafker complied with the ICCPR and customary law.

ICCPR Article 9 protects individuals from arbitrary detention.[139] States can lawfully detain individuals preventively, without criminal charges, in a manner fully consistent with the ICCPR.[140] The practice of ICCPR Parties, which this Court must consider,[141] confirms this

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[136] *Chorzow Factory*, 30; BROWNLIE, 54; BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED TO INTERNATIONAL COURTS AND TRIBUNALS 39 (1953); SAMMY FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 204 (1953).

[137] Permanent Sovereignty over Natural Resources, U.N.Doc.A/Res/1803, ¶4 (2008).

[138] Christina Binder et al., *Unjust Enrichment* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 4 (2007); Patrick Norton, *A Law of the Future of the Future or of the Past? Modern Tribunals and the International Law of Expropriation*, 85 AM. J. INT'L L. 474, 476-477 (1991).

[139] ICCPR, Art.9(1).

[140] Louis Joinet, Special Rapporteur, Report on the Practice of Administrative Detention, U.N.Doc.E/CN.4/Sub.2/1990, [hereinafter "Joinet Report"], 29 (1990); CLAIRE MACKEN, COUNTER-TERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS 95 (2011); *Schweizer/Uruguay*, CCPR/C/17/D/66/1980, ¶18.1 (1980); *See* HRC, General Comment No.29, U.N.Doc.CCPR/C/21/Rev.1/Add.11, ¶15 (2001).

[141] VCLT Art.31(3)(b).

interpretation.[142] Though ICCPR substantive protections from deprivation of liberty are coextensive with customary law, ICCPR procedural protections are stricter than custom.[143]

1. Kafker's detention was not arbitrary.

a. Kafker's detention accorded with procedures established by law.

Preventive detention is arbitrary when it is not conducted according to clear procedures established by domestic law.[144] Specific authorization and circumscribed procedure are required safeguards against arbitrariness.[145] Kafker was detained pursuant to the Terrorism Act, which allows detention only when it is "required for reasons of national security or public safety,"[146] and his detention was reviewed by the NST.[147]

b. Kafker's preventive detention was necessary and proportional to the threat he posed.

Preventive detention must be necessary and proportional to the threat posed by the individual,[148] such that the deprivation of liberty is not inappropriate, unpredictable, or

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[142] PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY (Harding et al., eds. 1993) (examining preventive detention in 17 African, Asian, and European States); S.B. Elias, *Rethinking "Preventive Detention" from a Comparative Perspective*, 41 COL. H.R.L.R. 130 (2009)(citing preventive detention frameworks in 11 European and South American States).

[143] Report of the Working Group on Arbitrary Detention, U.N.Doc.A/HRC/22/44, [hereinafter "Working Group Report"], ¶¶42-51 (2012); Joinet Report, 7.

[144] HRC, General Comment No.35, U.N.Doc.CCPR/C/GC/35, ¶¶22, 23 (2014); ICCPR, Art.9.

[145] *See* SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY, 211 (2000).

[146]Terrorism Act, §3(d).

[147] Compromis, ¶33.

[148] Arbitrary Detention, U.N.Doc.A/HRC/Res/6/4, ¶5(e) (2007); HRC, General Comment No.31, U.N.Doc.CCPR/C/21/Rev.1/Add.13, ¶6 (2004); *A./Australia*, CCPR/C/59/D/560/1993, ¶9.2 (1997); *C./Australia*, CCPR/C/76/D/900/1999, ¶14 (2002); *See, e.g.* Criminal Code Act 1995, [Austl.] No. 1995, §105.4(5)(b-c).

substantively unjust.[149] Courts require that detention be reasonable under the circumstances[150] and that no alternative means could accomplish the objective.[151] International[152] and national[153] courts grant significant deference to State authorities' judgments on the necessity and proportionality of detentions for security reasons.

i. Kafker's detention was reasonable because he posed an imminent and severe threat.

Preventive detention is an exceptional step,[154] reasonable when the detainee poses an imminent and severe threat to State security.[155] Such a threat exists when reasonable grounds[156] indicate that an individual will assist in preparation or planning for a terrorist act.[157] Rieslandic intelligence linked Kafker to the "senior echelons" of a terrorist group that had killed Rieslandic

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[149] *Van Alphen/Netherlands*, U.N.Doc.CCPR/C/39/D/305/1988, ¶5.8 (1989); Report of the Third Committee on the ICCPR, U.N.Doc.A/4045, Annexes Agenda Item 32, ¶7 (1958)

[150] *Shafiq/Australia*, CCPR/C/88/D/1324/2004, ¶4.10 (2004); *Morais/Angola*, CCPR/C/83/D/1128/2002, ¶6.1, (2005).

[151] *D. & E./Australia*, U.N.Doc.CCPR/C/87/D/1050/2002, ¶ 7.2 (2006); MACKEN, 50; Principles and Best Practices on the Protections of Persons Deprived of Liberty in the Americas, OAS OEA/Ser/L/V/II 131 Doc.26, [hereinafter "IACHR Detention Principles"], Prin. III.2 (2008).

[152] *See* Y. ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR, 180(2002); *Greece/U.K. (Cyprus Case)*, 2 Y.B.E.C.H.R. (1959-1960), 176.

[153] Elias, 130 (referring to 13 State courts).

[154] *Mukong/Cameroon*, CCPR/C/45/D/458/1991, ¶9.8 (1991);

[155] General Comment No.35, ¶15; *Schweizer/Uruguay*, ¶114; Report on Terrorism and Human Rights, [Inter-Am. Commission on Human Rights], OAS OEA/Ser.L/V/VII 116 Doc. 5, rev. 1, corr. 22, [hereinafter "Terrorism Report"], ¶124 (2002).

[156] Venice Commission Report on Counter-Terrorism Measures and Human Rights, CDL-AD(2010)022, §D(50) (2010); *See, e.g.* Anti-Terrorism Act of 2001, [Can.] Bill-36, §86.3.

[157] *See, e.g*. Criminal Code Act 1995 (Cth) Sub-S 105.4 (Australia); *See also* Martin Scheinin, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN.Doc.A/HRC/14/46 (2010), ¶42.

citizens and threatened Reislandic officials.[158] Furthermore, Kafker was a "high-level" suspect in the plot to poison a large shipment of honey.[159] These ties justified his detention.

ii. No alternative means existed to mitigate the threat Kafker posed.

The HRC has observed that detention is necessary when a subject may flee[160] or could thwart an ongoing investigation.[161] Detention was the only means to monitor Kafker, eliminate his ability to coordinate with the Hive, and prevent him from absconding to assist in an act of terrorism.

c. The length of Kafker's detention was not arbitrary.

The HRC has found a detention lasting 14 months not to violate Article 9(4),[162] and has only found violations where detentions persisted for several years without trial.[163] By comparison, Riesland has only detained Kafker for 10 months, and the maximum allowed by the Terrorism Act is only 540 days.[164]

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158 Compromis, ¶16,18.

159 Compromis, ¶36; *See supra n.*26.

160 *A./Australia*, CCPR/C/59/D/560/1993, ¶9.5 (1997).

161 *Jalloh/Netherlands*, CCPR/C/74/D/794/1998, ¶8.2 (2002)

162 *Thomas/Jamaica*, CCPR/C/65/D/614/1995, ¶9.6 (1999).

163 *See* Press Release, 26-01-2012, ECHR 032 (2012): *Berasategi/France* (29095/09), *Esparza Luri/France* (29119/09), *Guimon Esparza/France* (29116/09), *Sagarzazu/France* (29109/09), *Soria Valderrama/France*, 29101/09; *See also* Report of the Third Committee on the ICCPR, A/4045, 13 GAOR, Annexes, Agenda Item 32, 7 (1958-1959).

164 Terrorism Act, §3(h).

2. The National Security Tribunal satisfies Kafker's right to judicial review.

a. The NST is independent and impartial.

Prompt review of a detention by an independent tribunal–which enjoys judicial independence from other branches to decide legal matters in proceedings that are judicial in nature[165]–is necessary in all circumstances to satisfy Article 9(4).[166] Valid national security concerns justify holding a review hearing without the detainee present,[167] as in Kafker's case. The NST is independent from the executive and comprised of judges. Specialized courts created by legislation, like the NST, satisfy Article 9 if they meet the Article's other criteria.[168]

b. Kafker's detention was promptly reviewed.

The HRC and the Working Group on Arbitrary Detention state that prompt review of a detention must occur within "a few days."[169] The Terrorism Act requires review within three days of arrest,[170] and Kafker's detention complied.[171]

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[165] *Vuolanne/Finland*, 265/1987, U.N.Doc.Supp.No.40 A/44/40, ¶9.6 (1989); UN Basic Principles on the Independence of the Judiciary, U.N. Doc. A/CONF.121/22/Rev.1, Prin. 2(1985); *Torres/Finland*¸ CCPR/C/38/D/291/1988, ¶7.2(1990).

[166] HRC Gen. Comm. 35, ¶¶39-41,46; *Gavrilin/Belarus*, CCPR/C/D/1342/2005¶7.4(2007); *Mulezi/DRC*, CCPR/C/81/D/962/2001, ¶5.2(2004); *Fjalkowska/Poland*, CCPR/C/84/D/1061/2002, ¶8.4(2005).

[167] *See Ahani/Canada,* UN.Doc.CCPR/C/1051/2002, ¶2.3 (2002).

[168] HRC Gen Comm. 35, ¶¶18-22; Rameka/New Zealand, CCPR/C/79/D/1090/2002, ¶7.4 (2003); *Torres/Finland*, ¶7.2, 9.6.

[169] HRC Gen. Comm 35, ¶33; Working Group Report, ¶52; *See Freemantle/Jamaica*, CCPR/C/68/D/625/1995 ¶7.4 (2000).

[170] Terrorism Act §3(b).

[171] Compromis, ¶.

c. Kafker's detention was adequately reviewed.

The essential components of review are: (1) that the reviewing court have the power to order release if the detention is unlawful,[172] and (2) that it re-review regularly.[173] The NST has the power to order release if evidence is insufficient to support detention and reviews detention every 21 days.[174]

d. Kafker's representation by a Special Advocate satisfies Article 9.

Article 9 does not expressly confer a right to counsel outside of criminal trials.[175] ICCPR States Parties interpret Article 9 to allow suspension of access to counsel if "it is deemed indispensable…to maintain security and good order."[176] Though the HRC recognizes an absolute right to counsel,[177] the aforementioned interpretation of the parties and international tribunals contradict this view.[178]

3. Kafker was sufficiently notified of the reasons of his arrest.

Article 9(1) requires a State to promptly notify the detainee of the reasons for his

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[172] ICCPR Art.9(4); *See Cases of De Wilde, Ooms & Versyp/Belgium* (2832/66) 1970 ECHR 2, ¶76 (1970); *A./Australia*, ¶9.5; *Shafiq/Australia*, ¶7.4 (2004).

[173] HRC Gen. Comm. 35, ¶15.

[174] Terrorism Act, §3(d),(g); Compromis, ¶33.

[175] ICCPR, Art.9.

[176] Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment, GA Res. 43/173 (1988), Prin.18(3); *See Bin Nasir/Kerajean Malaysia & Others*, 2002-4 M.L.J. 617 [Malaysia][2002]; Report of the Committee Against Torture, G.A.O.R.Supp.No.44(A/67/44)(2012), 63-64,¶8(Morocco).

[177] HRC Gen. Comm. 35, ¶15

[178] *See, e.g.,* Exceptions to the Exhaustion of Domestic Remedies, Advisory Opinion, 1990 IACtHR (Ser. A) No. 11, ¶28 (1990); *Ocalan/Turkey (No. 2)*, ECtHR Nos. 24069/03, 197/04, 6201/06, and 10464/07 (2014).

arrest.[179] Oral notification satisfies this requirement[180] if it is precise enough to allow the grounds for detention to be challenged.[181] The Terrorism Act, stated as the authorization for Kafker's arrest, includes a specific definition of the suspected conduct, accompanied by relevant factors for consideration.[182] The purpose of Article 9's notification requirement was satisfied by Kafker's Special Advocate, who did have access to the "closed materials" forming the basis of his detention and challenged detention on Kafker's behalf.[183]

B. <u>If Kafker's detention did violate Article 9, Riesland lawfully derogated from the relevant obligations.</u>

1. The Hive posed a threat to the life and health of the nation, justifying derogation during a state of emergency.

International courts grant a measure of discretion to State authorities in declaring states of emergency and determining how to respond.[184] Threats to state security from terrorism can be legitimate grounds for derogation,[185] provided the threat is imminent[186] and affects the

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[179] ICCPR, Art.9(1); *See* HRC Gen. Comm. 35, ¶25-30.

[180] HRC Gen. Comm. 35, ¶¶24-27

[181] *Caldas/Uruguay*, UN.Doc.CCPR/C/19/D/43/1979, ¶13.2(1983); *Campbell/Jamaica*, UN.Doc.CCPR/C/47/D/307/1988, ¶6.3(1993); NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS 174(2005)

[182] Terrorism Act, §3(a),(d).

[183] Compromis, ¶33.

[184] J.F. Hartman, *Derogation from Human Rights Treaties in Public Emergencies*, 22 HARVARD INT'L L. J. 25, 27 (1981); *See Lawless/Ireland*, [ECtHR] No. 332/57 (A/3), 15,28 (1961); *Klass & Others/Germany*, 2 E.H.R.R. 214, ¶¶48-49(1979); *Ireland/U.K.*, (5310/71)ECHR 1, ¶207 (1978); *See also* ROZA PATI, DUE PROCESS AND INTERNATIONAL TERRORISM 20, n.69 (2009).

[185] *Case of Durand and Ugarte,* I.A.Ct.H.R. Series C, No. 68, ¶99 (2000); *Brannigan & McBride/United Kingdom*, ECHR Series A No. 258-B, ¶59(1993); IACHR Terrorism Report, Executive Summary, ¶8.

[186] *See* A. SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION WITH SPECIAL REFERENCE IN THE TRAVAUX PREPARATOIRES AND CASE-LAW OF THE

"organized life of the State" as a whole.[187]

Threats must be more concrete than "general terrorist activity" in a region,[188] which could otherwise be used to justify derogation in perpetuity.[189] Riesland derogated during a Terrorism Alert, which could only be issued when the government of Riesland learned of a "credible danger of an imminent terrorist act."[190]

Threats must pertain to the entire populace.[191] The Hive had already killed two Rieslandic citizens and attempted to poison a large shipment of a Riesland household good.[192] Threats which harm the functioning of public institutions, in particular, are threats to "organized life."[193] The Hive threatened mass harm to Rieslandic government officials through mailing letters filled with imitation poison.[194]

2. Riesland derogated only to the extent strictly required by the exigencies of the situation.

Derogations must be limited "to the extent strictly required by the exigencies of the

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INTERNATIONAL MONITORING ORGANS 292 (1992).

[187] *The Greek Case,* 3321/67, 3322/67; 3323/67, 3344/67 [E.Comm.H.R.] ¶ 153 (1969); *Lawless/Ireland*¸ ¶28; *See* HRC Gen Comm 29, ¶4.

[188] Council of Europe Commissioner for Human Rights, Opinion 1/2002 (Comm. DH (2002) 7, 28 August 2002), ¶33.

[189] JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY 22 (1992); MACKEN 84.

[190] Terrorism Act, §2.

[191] *Lawless/Ireland*, ¶90; ORAA 29; *See Askoy/Turkey,* E.C.H.R. 21987/93, ¶70(1996).

[192] Compromis, ¶14,18.

[193] *Lawless/Ireland,* ¶29: SVENSSON-MCCARTHY, 294; Hartman, 16.

[194] Compromis, ¶16.

situation."[195] The existence of a state of emergency is also considered in the necessity analysis for individual detainees.[196] Following *ex ante* procedures is the chief safeguard against disproportionality.[197] Riesland has adhered to the Terrorism Act during Kafker's detention and periodically reviewed that detention.[198]

3. Riesland followed sufficient procedure for derogation.

States wishing to derogate must announce that intention by declaring a state of emergency.[199] Riesland has notified the Secretary-General of each Terrorism Alert, [200] which effectively declares a state of emergency in Riesland. This notification comports with the practice of States Parties,[201] despite the HRC's stricter interpretation.[202] In any event, failure to follow proper notification does not preclude derogations from taking effect.[203]

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[195] ICCPR Art.4(1); HRC Gen Comm 29, ¶4; Working Group Report, ¶50-51; *See A/Secretary of State for the Home Dep't*, [2004] UKHL 56, ¶¶39, 46.

[196] HRC Gen. Comm. 35, ¶66.

[197] *See* Concluding Observations: Phillipines (CCPR/CO.PHL.2003), ¶14, Mauritius (CCPR/CO/83/MUS, 2005), ¶12, Russian Federation (CCPR/C/RUS/CO/6.2009), ¶24, Honduras (CCPR/C/HND/CO/1/2006), ¶13.

[198] Compromis, ¶33; *See Campbell/Jamaica*, ¶6.4.

[199] *Wall Opinion*, ¶127.

[200] Clarifications, ¶7.

[201] JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS 3-5(1994); *See, e.g.* Concluding Observations: Peru, CCPR/C/79/Add.8, ¶10(1992); Ireland, CCPR/C/79/Add.21, ¶11(1993); Cameroon, CCPR/C/79/Add.33, ¶7(1994).

[202] Gen. Comm. 29, ¶17.

[203]*Nabil Sayadi & Patricia Vinck v. Belgium,* CCPR/C/78/933/2000, Concurring Op., Nigel Rodley (2008); SVENSSON-MCCARTHY, 226.

4. The relevant provisions are lawfully derogable.

The provisions of Article 9 are not listed as non-derogable in the ICCPR[204] and thus almost all can be lawfully derogated from during public emergencies.[205] The right to prompt judicial review, which is non-derogable under any circumstances,[206] was granted to Kafker.[207]

C. Article 14 does not apply to Kafker's detention.

Article 14 expressly refers to criminal proceedings.[208] Preventive detentions are not carried out in order to pursue criminal sanctions on the basis of guilt,[209] but rather are precautionary measures to mitigate a threat to society.[210] The HRC generally does not apply Article 14 to detentions that are not preceding criminal charge.[211] Scholars suggest indefinite detention without criminal trial can violate Article 14,[212] but Kafker's detention is limited to 540 days by law.[213]

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[204] ICCPR, Art.4(2).

[205] MACKEN 90.

[206] HRC Gen. Comm. 29, ¶¶16,31; Concluding Observations: Israel, CCPR/C/79/Add.93, ¶21(1998).

[207] *See supra* §3(A)(2).

[208] ICCPR, Art.14.

[209] H. Cook, *Preventive Detention – International Standards on Protection of the Individual*, in PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW Perspective 1 (Frankowski & Shelton, eds. 1992); *See also* International Committee of Jurists, *States of Emergency: Their Impact on Human Rights* (Geneva 1983), 394.

[210] *R/Halliday* (1917) AC 216 [Canada]; International Committee of Jurists, 394; *Union of India/Paul Nanicakn & Anr*, Appeal(Crl)[India] 21 of 2002(2003).

[211] *Ahani/Canada*, ¶¶4.15, 4.16.

[212] *See* Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT'L R. RED CROSS 15, 19 (2005); *See also Perterer/Austria*, CCPR/C/81/D/1015/2001, ¶9.2(2004).

[213] Terrorism Act, §3(h).

D. **If Kafker's detention is unlawful, Amestonia's remedy is "review and reconsideration," not release.**

This Court has stated that the choice of the specific method of compliance with its judgments is for parties before the court, not the court itself.[214] Outside the context of a violation of State immunity,[215] the Court has noted that the proper remedy for wrongful detention is "review and reconsideration" of the action, and that the choice of means should be left to the detaining state.[216] In *Avena*, the Court reaffirmed the appropriateness of allowing the detaining state to choose the means of compliance.[217] Thus, the appropriate remedy for a violation of Article 9 would be for Riesland to review and reconsider Kafker's detention, considering what response would adequately address the violation of rights alleged.[218]

E. **The Court cannot compel Riesland to disclose the confidential information forming the basis of Kafker's arrest.**

The Court does not have authority to compel States to disclose confidential information threatening national security.[219] Such disclosure risks irreparable injury to States.[220] Furthermore, though the Court can request evidence from parties in evidentiary proceedings,[221] it cannot

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[214] *Haya de la Torre Case*, 1951 I.C.J. REP. 71, p.79; *Northern Cameroons Case,* Preliminary Objections, 1963 I.C.J. REP. 15, p.37.

[215] *See Tehran,* ¶84-87, 91-92; *See also supra* §I(D)(1).

[216] *LaGrand*, 2000 ICJ Rep. 4, ¶125.

[217] *Case Concerning Avena & Other Mexican Nationals*, 2004 I.C.J. 12, ¶120, ¶127-132.

[218] *See Avena* ¶¶138-143; *LaGrand,* ¶128.

[219] *See Genocide Case* ¶¶44, 205-206., *Corfu Channel*, p. 32.

[220] *See Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste/Australia)*, Provisional Measures, 2014 I.C.J. 147, ¶¶46-49.

[221] ICJ Statute, Art.49.

compel that production, given that "the parties are sovereign states."[222] This limitation also applies to remedial production of documents implicating State security.[223] The evidence for Kafker's arrest was "closed material" from confidential sources in the intelligence community,[224] which justifies maintaining its confidentiality.

IV. THE CYBER-ATTACKS AGAINST THE COMPUTER SYSTEMS OF *THE AMES POST* AND THE LAW FIRM CANNOT BE ATTRIBUTED TO RIESLAND, AND, IN ANY EVENT, THE CYBER-ATTACKS DO NOT CONSTITUTE AN INTERNATIONALLY WRONGFUL ACT.

A. Circumstantial evidence of Rieslandic involvement in the cyber-activities must meet a heightened burden of proof.

This court's jurisprudence has consistently reflected a heightened degree of proof for claims based primarily on circumstantial evidence without direct evidence.[225] This Court in *Corfu Channel* distinguished "indirect evidence" from direct evidence, requiring that inferences of fact from indirect evidence "leave no room for reasonable doubt."[226] In *Cameroon v. Nigeria*¸ this Court rejected a claim when the indirect evidence did not provide a "clear and precise picture" of the facts.[227] The more serious the charges, the higher the degree of proof of

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[222] Michael Scharf & Margeaux Day, *The International Court of Justice's Treatment of Circumstantial Evidence*, 13 CHICAGO J. INT'L LAW 123, 127 (2012).

[223] *See Timor-Leste,* Provisional Measures, Memorial of Australia, ¶75(c).

[224] Compromis, ¶33-34.

[225] Scharf & Day, 149; *See Nicaragua*, ¶¶109-16; *Pulau Ligitan and Pulau Sipadon Islands*, 2002 I.C.J 666, ¶¶85, 90; *Oil Platforms*, ¶60; *See also* Brownlie, *State Responsibility and the International Court of Justice*, in ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS 13, 17 (Fitzmaurice & Sarooshi, eds. 2004).

[226] Corfu Channel, p.18.

[227] *Cameroon/Nigeria,* ¶¶232, 234; Rosalyn Higgins, *Issues of State Responsibility before the International Court of Justice*, in STATE RESPONSIBILITY 1, 9.

attribution required from circumstantial evidence.[228] Applicant's evidence of Rieslandic involvement in the cyberattacks rests entirely on circumstantial evidence, comprising an academic report and general facts about Riesland's telecommunications infrastructure.

B. <u>The cyber-attacks cannot be linked to an organ of Riesland.</u>

Acts of an organ of a state are attributable to that state.[229] Even if the AIT report is correct,[230] cyber-activity originating from or transmitted through Riesland's cyber infrastructure is not sufficient to prove attribution.[231] Modern cyber-attackers are able to use proxy servers and virtual private networks to mask their true origin.[232] Cyber-attackers can assume the identity of another by infiltrating and controlling computers through "zombie" networks.[233] Once these computers are infected, a cyber-attacker can control the zombies while masking the perpetrator's true identity.[234] Even without directly utilizing another's hardware, sophisticated cyber-attackers can feign the identity of an individual or organization using proxy servers, virtual private networks, or by electronically falsifying data.[235] Cyber-attackers in 1998 successfully

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[228] *Genocide* Case, ¶¶209-210, 373; *See Island of Palmas Case (US/Neth.)*, 2. R.I.A.A. 829, 852 (P.C.A. 1928); MALCOLM SHAW, INTERNATIONAL LAW 567 (2014).

[229] Articles on the Responsibility of States for Internationally Wrongful Acts [ARSIWA], (I.L.C. Yearbook 2001-I)Pt. II, Art.4(1); TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE, Rule 6, ¶6 (M.Scmhitt, ed. 2013).

[230] Compromis

[231] *See* TALLINN MANUAL, Rule 7, 8.

[232] *See* Mauno Pihelgas, *Back-Tracing in Cyberspace*, in PEACETIME REGIME FOR STATE ACTIVITIES IN CYBERSPACE 42-46 (Katharina Ziolkowski, ed., 2013).

[233]Pihelgas, 46-47.

[234] TALLINN MANUAL, Rule 6, ¶11; *See also* Evan Cooke, *The Zombie Roundup: Understanding, Detecting, and Disrupting Botnets*, SRUTI 05 Technical Paper, Univ. of Mich. (2005).

[235] TALLINN MANUAL, Rule 7, ¶4. *See* Christopher C. Joyner & Catherine Lotrionte, *Information Warfare as International Coercion*, 12 EUROPEAN J. INT'L L. 825, 839 (2001); Pihelgas, 42-49.

misdirected the United States by creating the impression that an attack launched on the Department of Defense from California and Israel originated in countries from 5 different time zones.[236] Given these various methods of obscuring an attacker's identity in cyberspace, the circumstantial evidence in the Compromis[237] is insufficient to prove attribution through a Rieslandic government organ.

C. **Riesland did not have effective control over the cyber-attackers.**

a. Effective control is the appropriate standard.

Attribution of an act taken by non-state actors to a state requires "instruction," "direction," or "control" over the acts.[238] This Court interprets customary law to require that a State had "effective control" over the actors at the time of the allegedly wrongful act.[239] NATO's committee of experts convened to summarize customary cyber-law decided that, in the electronic realm, "the State needs to have issued specific instructions or directed or controlled a particular operation to engage State responsibility."[240] The "overall control" test for attribution, adopted by the majority in the *Tadic* case,[241] is not the appropriate standard. *Tadic* addressed individual criminal responsibility under international humanitarian law rather than State responsibility under customary law of attribution.[242] This Court distinguished *Tadic* in the *Genocide*

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[236] JONATHON ZITRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 37-45 (2008).

[237] Compromis, ¶38; Clarifications, ¶8.¶

[238] ARSIWA, Art.8; GEORG KERSCHENSCHNIG, CYBERTHREATS AND INTERNATIONAL LAW 149-151 (2012).

[239] *Nicaragua* ¶¶109, 115; *Nicaragua*, Sep. Op. Judge Ago, ¶17.

[240] TALLINN MANUAL, Rule 6, ¶11.

[241] *Prosecutor/Dusko Tadic*¸I.C.T.Y., Case IT-94-1-A (1999), 38 ILM 1518, ¶1117 (November 1999).

[242] *See* Commentaries to the Draft Articles on State Responsibility (I.L.C. Yearbook 2001-II) Pt.

judgment.[243]

b. There is insufficient evidence of effective control.

Applicant can provide no evidence that Riesland provided instruction or direction to the perpetrators of the Amestonian attacks. In *Nicaragua*, this Court held that the indirect evidence of U.S. involvement in *Contra* activities was insufficient to prove attribution absent direct evidence,[244] in spite of evidence that every *Contra* offensive had been preceded by an infusion of United States funding[245] and reports of CIA training for paramilitary operatives.[246] Evidence of origination in Riesland of an attack by unknown actors, with no direct evidence of support from Rieslandic officials, provides even less proof than the facts of *Nicaragua*.

D. <u>Riesland cannot be held liable merely because the cyber-attacks originated from its territory.</u>

No evidence exists that Riesland failed to exercise due diligence to prevent the cyber-attacks.[247] To hold Riesland strictly liable without such evidence would flagrantly contravene customary law. Strict liability has been consistently rejected in the law of State responsibility outside of "ultra-hazardous activities."[248]

II, Art.8, p.72.

[243] *Genocide Case*, ¶¶403-405.

[244] *Nicaragua*, ¶111.

[245] *Nicaragua*, ¶¶109-111.

[246] *Nicaragua*, ¶¶103-04, 110.

[247] *See* TALLINN MANUAL, Rule 8, ¶2; Michael Schmitt, *In Defense of Due Diligence in Cyberspace*, YALE LAW JOURNAL FORUM 68, 73 (2015).

[248] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, (I.L.C. Yearbook 2010-II) Pt.2, Art.3 & Cmt.3; *See* Convention for the Regulation of Antarctic Mineral Resource Activities, 27 I.L.M. 868 (1988) Art.8.

E. In any event, the cyber-operations were not an internationally wrongful act.

1. The cyber-operations were not an unlawful use of force.

Cyber-attacks do not violate Article 2(4) unless their scale and effects are comparable to traditional uses of force,[249] which generally requires physical damage.[250] This flows from the Court's focus on scale and effects to determine whether force had been used in its *Nicaragua* judgment.[251]

The scale of the attacks was too small to be classified as a use of force, only affecting computers at two Amestonian organizations.[252] The disruption in Amestonia was far less severe than in Estonia in 2008, and the attack on Estonia was not condemned by the international community as a use of force.[253]

The effects of the cyber-attacks on Amestonia were not comparable to traditional uses of force. The attacks exclusively targeted computer systems, and resulted merely in the elimination of data at private organizations and disruption of electronic infrastructure.[254] The international community does not regard mere economic loss as a violation of Article 2(4).[255]

2. If the cyber-operations were a use of force, they were justified under

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[249] YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 88 (2010); TALLINN MANUAL, Rule 11.

[250] Michael Schmitt, *Computer Network Attack and the Use of Force in International Law*, 37 COLUM. J. TRANSNAT'L L. 885, 917 (1999).

[251] *Nicaragua*, ¶195.

[252] Compromis, ¶37,38.

[253] *See* Scott Shackelford, *From Nuclear War to Net War*, 27 BERKELEY J. INT'L L. 192, 209-10 (2009).

[254]Compromis,¶37,38.

[255]Tom Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM.J.INT'L.L. 405, 411 (1985).

Riesland's right to self-defense.

States have the right to use force in self-defense to repel an imminent armed attack,[256] which can include an ongoing threat from a pattern of terrorist activity.[257] Customary law supports the existence of such a right,[258] evidenced by the lack of condemnation, and even support, from the international community for uses of force against alleged terrorist groups,[259] and other non-state actors.[260] The *Armed Activities* Court explicitly left open the question of whether the right exists.[261] The right can also justify force affecting States harboring non-state actors.[262] Uses of force in self-defense must be both necessary to prevent further damage and proportional to harm averted.[263] Riesland's cyber-attacks were necessary to prevent the Hive's use of confidential information, such as the kind of information that prevented the honey attack,

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[256] Charter of the United Nations, 1 U.N.T.S. XVI, Art.51 (1945).

[257] Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM.J.INT'L.L. 1,6 (Prin. 4&5) (2012).

[258] *See Armed Activities*, Sep. Ops., Simma, ¶12, Koojimans, ¶30; *Wall Opinion*, Decl., Judge Buergenthal, ¶30.

[259] *See* Thomas Franck, *Terrorism and the Right of Self-Defense*, 95 A.J.I.L 839 (2001); *See, e.g.* Yihdego, *Ethiopia's Military Action Against the Union of Islamic Courts and Others in Somalia*, 56 I.C.L.Q. 666, 673 (2007); Ruys, *Quo Vadit Jus ad Bellum? A Legal Analysis of Turkey's Military Operations against the PKK in Northern Iraq,* 12 MELBOURNE J. INT'L L. 334, 354 (2008).

[260] Tams, 381 (cross-border anti-terrorism operations by Rwanda, Tajikstan, and Burma).

[261] *Armed Activities*, ¶147; *See* Christian J. Tams, *The Use of Force Against Terrorists*, 20 E.J.INT'L L. 359, 385(2009).

[262] Ruys & Verhoeven, *Attacks by Private Actors and the Right of Self-Defence*, 10 CONFLICT & SECURITY L. 285, 315 (2005); UNSC Res. 1373, U.N.Doc.S/Res/1373 (2001).

[263] Roberto Ago, Special Rapporteur, *Eighth Report on State Responsibility*, U.N.Doc.A/CN.4/318/ADD.5-7, ¶120(1979); DINSTEIN, 184.

which Amestonia refused to confiscate.[264] The cyber-attacks were proportionate to the threat of harm from large-scale terrorist attacks from the Hive following a pattern of activity.

3. The cyber-operations were not an unlawful intervention.

States violate the norm of non-intervention when they interfere in other States' internal affairs using coercion.[265] That interference must be of a level that "subordinates the sovereign will" of the target state over a matter that the victim state is rightfully entitled to decide.[266] The vast majority of State action within another State's territory does not violate this norm.[267] The attacks on Amestonia temporarily disrupted the activities of a law firm and removed stolen information from a private newspaper.[268] The scale of these effects is not sufficient to amount to coercion.

4. Alternatively, the cyber-attacks were lawful countermeasures.

States injured by internationally wrongful acts may resort to proportional[269] cyber countermeasures.[270] States must notify the violating State of intent to pursue countermeasures,[271]

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[264] Compromis, ¶35.

[265] *Nicaragua*, ¶205; H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 64 (1952).

[266] Declaration on the Inadmissibility of Intervention, UN Doc. A/Res/20/2131 (1965) ¶2; Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT'L L. 345, 348 (2009).

[267] Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs,* 83 AM.J.INTL.L. 1 (1989) 14-17.

[268] Compromis, ¶37-38.

[269] ARSIWA, Art.51; *Gabcikovo-Nagymaros*, ¶¶85, 87.

[270] TALLINN MANUAL, Rule 9; *See* ARSIWA, Art.49(1).

[271] ARSIWA Art.52(1).

though this requirement is flexible when a state must act urgently to prevent injury.[272]

a. Amestonia violated international law by allowing Riesland's confidential data to be disseminated on its territory.

The Security Council identified acts of international terrorism as threats to international peace and security,[273] and declared that all states are obliged to prevent the use of their territory for planning or facilitating terrorist acts.[274] Furthermore, Amestonia violated the object and purpose of two anti-terrorism treaties obliging Amestonia's cooperation to prevent terrorist attacks.[275]

Riesland called on Amestonia to cease allowing Amestonian entities to possess and publish Riesland's stolen, confidential, documents, which contained information that the Hive could use to counter Riesland's intelligence operations.[276] Riesland notified Amestonia it would take measures to prevent the leaked documents from causing harm.[277]

b. The countermeasures were proportional.

Countermeasures must be "directed against"[278] the violating state and "equivalent with the alleged breach,"[279] and must be temporary and reversible.[280] The attacks on Amestonia

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[272] ARSIWA Art.52(2).

[273] UNSC Res.1373, U.N.Doc.S/Res/1373(2001).

[274] Resolution 1373, ¶2(d).

[275] *See* Terrorist Bombings Convention, 149 U.N.T.S. 284 (1998) Preamble; Terrorism Financing Convention, T.I.A.S.No. 13075 (2000) Preamble.

[276] Compromis, ¶¶22-27,35.

[277] Compromis, ¶35.

[278] *Gabcikovo*, ¶83; ARSIWA Cmt 22,n.5.

[279] *See Air Services Agreement*, 18 R.I.A.A. 416, ¶83(1946).

[280] ARSIWA, Art.49, n.7.

targeted exclusively the data that was the cause of Amestonia's breach.[281] The damage caused by the breach, which was entirely non-physical, was reversed in months.

[281] Compromis, ¶37.

PRAYER FOR RELIEF

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

I.

The illicitly-obtained documents published on the *Ames Post* are not admissible evidence, and, if the Court does find them admissible, they do not evidence a breach of international law; and

II.

The arrest of VoR employees and expropriation of VoR property violated the Broadcasting Treaty and international law generally, and therefore Riesland is entitled to the release of its nationals and compensation for its confiscated property; and

III.

Riesland's detention of Joseph Kafker under the Terrorism Act is consistent with international law, and the Court has no authority to order his release or disclosure of information relating to his apprehension; and

IV.

The cyber attacks against the computer systems of Amestonian corporations cannot be attributed to Riesland, and in any event, were not an internationally wrongful act.

Respectfully Submitted,

Agents of the Government of the Federal Republic of Riesland