TEAM 176A

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 APPLICANT

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STATEMENT OF JURISDICTION

The State of Amestonia and the Federal Republic of Riesland appear before the International Court of Justice in accordance with Article 40(1) of its Statute through submission of a special agreement for resolution of all the differences between them concerning the Frost Files. This Court has jurisdiction over the dispute pursuant to Article 36(1) of its Statute, as both parties have agreed that this Court will adjudicate the dispute under its *ad hoc* jurisdiction. The parties concluded this special agreement and Compromis in The Hague, The Netherlands and jointly notified this Court of their special agreement on 1 September 2015.

QUESTIONS PRESENTED

The State of Amestonia respectfully requests the Court to adjudge:

I.

Whether documents published on the website of *The Ames Post* are admissible as evidence before the Court, whether Riesland's mass electronic surveillance programs against Amestonian public figures and nationals revealed in those documents violate international law, and whether Amestonia is entitled to an order directing the immediate cessation of those programs with assurances of non-repetition; and

II.

Whether the seizure and forfeiture of the VoR station and its equipment, and the arrest of Margaret Mayer and two other VoR employees, violated the Broadcasting Treaty and were in accordance with Amestonia's other international law obligations; and

III.

Whether the detention of Joseph Kafker under the Terrorism Act violated international law, and whether Amestonia is entitled to his immediate release, the disclosure of all information which formed the basis of his apprehension, and the payment of compensation for his detention; and

IV.

Whether the cyber-attacks against the computer systems of *The Ames Post* and Chester & Walsingham are attributable to Riesland and whether they constitute an internationally wrongful act for which Amestonia is entitled to compensation.

STATEMENT OF FACTS

BACKGROUND

Amestonia is a developing nation with a population of 20 million and an agrarian-based economy. It borders Riesland, a developed country with a population five times that of Amestonia and a world-renowned information technology and communications sector. The two nations share a language and have enjoyed largely positive political and economic relations. They have concluded a number of bilateral treaties in diverse fields of cooperation, among them 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 in hopes of facilitating mutual understanding and fortifying the friendship between the two nations. To this end, the treaty extends certain privileges and immunities to the stations and their employees, obligates the station's employees to respect the laws of the host State and not to interfere in its internal affairs, and requires that the station not be used in any manner incompatible with the treaty.

THE FROST FILES

The Riesland Secret Surveillance Bureau ("the Bureau") engages in spying and covert activities pursuant to the Secret Surveillance Bureau Act of 1967 ("SSBA"). The SSBA provides for some external oversight of the Bureau's activities by other Rieslandic government bodies. In December 2014, whistleblower Frederico Frost, a former Bureau intelligence analyst, fled to Amestonia and turned over numerous top-secret documents relating to the Bureau's activities ("the Frost Files") to Chester & Walsingham, a law firm representing him, and *The Ames Post*, an Amestonian newspaper. *The Ames Post* independently reviewed and published the documents on its website gradually over January and February 2015. Amestonia declined

Riesland's request for Frost's extradition under the political offense exception in the countries' Extradition Treaty.

VERISMO AND CARMEN

The Frost Files revealed that beginning in May 2013, as part of a surveillance program called "Verismo," the Bureau collected and stored 1.2 million gigabytes of data a day from an undersea fiber optic cable that serves as Amestonia's primary means of international communication.

The Frost Files also revealed that from its establishment in 1992 pursuant to the Broadcasting Treaty, the Voice of Riesland ("VoR"), a division of state-owned corporation Riesland National Television, had operated as the pretext for a Rieslandic surveillance program known as "the Carmen Program." Under this program, Bureau employees acting as VoR employees covertly collected information from Amestonian public and private sector leaders, including U.N. Ambassador Cornwall. These prominent Amestonians were invited to be guests on "Tea Time with Margaret," a weekly show hosted by Rieslandic television icon Margaret Mayer, the government-appointed head of the VoR. While Mayer interviewed her guests, Bureau employees would install a rootkit malware known as "Blaster" on their electronic devices, allowing the Bureau full remote privileged access to the interviewees' phones and computers. The program's primary objective, as described in the leaked documents, was "to collect information concerning Amestonia's domestic and foreign policy, in order to advance Riesland's political and economic interests in the region."

THE VOR ARRESTS AND SEIZURES

On 16 February 2015, the day *The Ames Post* published the Carmen documents, Amestonian police applied for a warrant to seize VoR assets and property, citing the documents

as probable cause. While the police were applying for the warrant, the VoR interrupted its broadcasting and replaced it with reruns of Teatime with Margaret. The judge thereafter granted the warrant. Upon execution, the police found the station unattended and seized the station's property. At 3:15AM the following morning, Amestonian border patrol encountered three VoR employees, including Margaret Mayer, attempting to cross into Riesland by train. The three refused to produce their travel documents upon request by the Amestonian officials and were subsequently detained. Amestonian police then sought and obtained an arrest warrant for all three on suspicion of espionage. Amestonian investigators later determined that the confiscated property had been used for surveillance. The Amestonian Ministry of Justice obtained a forfeiture order against VoR real estate and property. Amestonia intends to sell the property at public auction, pending the resolution of this case.

THE NEONICS CONTROVERSY

To boost crop yield, Amestonian farmers use a class of insecticides known as neonicotinoids ("neonics") produced by Rieslandic companies. Following a report finding a correlation between the use of neonics and a dramatic decline in the region's honeybee population, environmental activists began advocating for legislation to ban the production and use of neonics. Some online contributors advocated for violence on the activist website www.longlivethehive.com.

On 2 February 2014, seven Amestonian warehouses were set on fire, killing three Amestonian nationals and two Rieslandic nationals and injuring many others. On 7 March 2014, Amestonian and Rieslandic government officials and Rieslandic businessmen received 263 envelopes of white powder, later determined to be non-toxic neonics. That night, an anonymous online tweet warned that the "threat is real" and that "next time" the envelope recipients would

"taste [their] own poison." On 16 October 2014, Tom Sivaneta, the Bureau's Director, informed the Amestonian Minister of Foreign Affairs that the Bureau had identified a group of environmental activists planning to contaminate a honey shipment bound for Riesland with a toxic neonicotinoid. The next day, Riesland issued a Terrorism Alert pursuant to the Terrorism Act 2003. On 21 October 2014, Amestonian police arrested three college students—self-professed members of an environmental group called "The Hive"—in possession of toxic neonics and maps of Amestonian honey extraction facilities. Riesland reissued Terrorism Alerts in April 2015 and October 2015.

THE DETENTION OF KAFKER

On 7 March 2015, shortly after the VoR arrests and Amestonia's refusal to extradite Frost, Riesland detained Joseph Kafker—a 70-year-old retired Amestonian politician and vocal opponent of the use of neonics—after a speaking engagement in Riesland. Pursuant to provisions of the Terrorism Act applying to detentions when a Terrorism Alert is in force, Kafker was denied, *inter alia*, appearance in person before the Tribunal, contact with his appointed special advocate, and access to the information providing the basis for his arrest. The Tribunal continues to extend his detention every 21 days, and the Supreme Court of Riesland has denied Kafker's motion challenging his detention.

CYBER-ATTACKS

On 22 March 2015, malware similar to that used in the Blaster program and traceable to the cyber-infrastructure 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 approximately two months, and a significant number of proceedings in Amestonian courts were delayed for months.

APPLICATION TO THIS COURT

Amestonia and Riesland have agreed to refer this dispute to this Court by a Special Agreement. Riesland, however, does not consent to the introduction of information derived from confidential documents published by *The Ames Post*. 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 Frost Files are admissible before this Court, Riesland's surveillance programs violate international law, and Amestonia is entitled to immediate cessation and a guarantee of non-repetition of such surveillance programs. This Court does not exclude evidence on the bases of reliability or providence. In any event, the Frost Files are of sufficient reliability and probative value to warrant their admission, and Amestonia did not violate international law in accessing and submitting them. The Frost Files and additional evidence prove the existence and scope of Riesland's surveillance programs. These programs violated Riesland's treaty obligations under the ICCPR and the Broadcasting Treaty, as they deprived Amestonian civilians of their fundamental human rights and contravened Amestonian law. These programs further violated Amestonia's territorial integrity and U.N. Ambassador Cornwall's diplomatic immunities. Amestonia is entitled to immediate cessation and a guarantee of non-repetition of Riesland's programs, as Riesland continues to store unlawfully-collected Amestonian data and is otherwise likely to develop analogous programs.

SECOND PLEADING

Amestonia's arrest and detention of VoR employees and seizure of VoR property did not violate the Broadcasting Treaty or Amestonia's other international law obligations. The immunities and privileges of the employees and premises terminated pursuant to Article 36 upon the station's use as a pretext for the Carmen Program. Alternatively, the station ceased to function as envisaged when it was abandoned. In any event, *exceptio non adimpleti contractus* justifies Amestonia's non-performance of its obligations. Furthermore, the treaty was suspended

due to material breach or was invalid due to fraud. Riesland violated provisions of the Broadcasting Treaty essential to its object and purpose. Riesland had the intention to do so at the time the treaty was concluded and thereby induced Amestonia's agreement. Finally, the Voice of Riesland was not entitled under international law to State immunity from domestic jurisdiction because international law does not require immunity for corporations, even if they are state-owned. Even if the VoR was entitled to immunity, it waived that immunity by opting into an alternate regime.

THIRD PLEADING

Riesland's detention of Joseph Kafker under the Terrorism Act violated numerous provisions of the ICCPR. Riesland violated Article 9 by detaining Kafker without adequately informing him of the reasons for his detention, for impermissible reasons, unnecessarily, and without prompt appearance before a judge. Kafker was entitled to a fair hearing in accordance with the provisions of Article 14, which Riesland violated by depriving Kafker of his rights to counsel, equality of arms, review by a higher tribunal, and trial without undue delay. Riesland was not entitled to derogate from its obligations under Article 4 because it did not provide notification of the provisions from which it derogated, the circumstances did not justify derogation, the circumstances did not justify derogation, the rights in question are non-derogable, and the derogation was not strictly required by the exigencies of the situation. The laws of armed conflict do not apply, and in any event would not absolve Riesland of its human rights obligations. In addition to compensation, Amestonia is entitled to the release of Kafker and the disclosure of information relating to his apprehension, both of which remedies are within this Court's power to order.

FOURTH PLEADING

The cyber-attacks against *The Ames Post* and Chester & Walsingham are attributable to Riesland and constitute an unlawful act for which Amestonia is entitled to compensation. The evidence indicates that the attacks were carried out by the government of Riesland or by a person or entity acting under its control. In any event, because Riesland had an obligation to exercise due diligence in preventing the attacks and failed to do so, it is responsible for a breach of its international obligations. The attacks constitute an unlawful use of force, a violation of the principle of non-intervention, a violation of the customary norm of good neighborliness, and a violation of Article 17 of the ICCPR. Furthermore, the attacks are not justifiable under international law because they were not a valid exercise of the right to self-defense and because they were not valid countermeasures.

PLEADINGS

I. THE DOCUMENTS PUBLISHED ON THE WEBSITE OF THE AMES POST ARE ADMISSIBLE AS EVIDENCE BEFORE THE COURT; RIESLAND'S MASS ELECTRONIC SURVEILLANCE PROGRAMS AGAINST AMESTONIAN PUBLIC FIGURES AND NATIONALS REVEALED IN THOSE DOCUMENTS VIOLATE INTERNATIONAL LAW; AND AMESTONIA IS THEREFORE ENTITLED TO AN ORDER DIRECTING THE IMMEDIATE CESSATION OF THOSE PROGRAMS WITH ASSURANCES OF NON-REPETITION.

A. The Frost Files are admissible before this Court.

1. This Court's rules of evidence do not provide for the exclusion of relevant leaked documents.

This Court may exercise jurisdiction over "the existence of any fact which, if established, would constitute a breach of an international obligation."[1] This Court frames its own procedural rules regarding matters under its jurisdiction.[2] The ICJ Rules of Court and Practice Directions limit the admissibility of evidence only when evidence is untimely,[3] irrelevant,[4] or submitted by certain non-parties.[5] Accordingly, this Court has never excluded evidence on the grounds of unreliability[6] or unlawful procurement.[7] Instead, this Court has assigned evidence weight based

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[1] Statute of the International Court of Justice (1945), 59 STAT. 1055, [hereinafter "I.C.J. Statute"], Art.36(2)(c).

[2] I.C.J. Statute, Art.30.

[3] I.C.J. Rules of Court, *I.C.J. Acts and Documents No. 6* (2007), [hereinafter "I.C.J. Rules"], Art.56; I.C.J. Practice Directions, *I.C.J. Acts and Documents No. 6* (2007), Dir. IX.

[4] I.C.J. Rules, Arts.63, 79, 84.

[5] I.C.J. Practice Directions, Dir. XII.

[6] Markus Benzing, *Evidentiary Issues* in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (Zimmermann et al., eds. 2012), 1254; Pierre-Marie Dupuy, *Fact-Finding in the Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)* in FACT-FINDING BY INTERNATIONAL TRIBUNALS (Lillich ed. 1991), 83.

[7] Hugh Thirlway, *Dilemma or Chimera?—Admissibility of Illegally Obtained Evidence in International Adjudication*, 78 AM. J. INT'L L. 621, 624 (1984).

on its reliability and probative value.[8] Though international criminal courts may exclude unreliable evidence, fact-finding before these courts entails substantially different procedures from fact-finding before this Court.[9]

2. Even if reliability is a basis for exclusion, the Frost Files are sufficiently reliable.

Some international courts find leaked documents unreliable and thus inadmissible when their content is contested or unverifiable.[10] In contrast, courts find leaked documents reliable and admit them when their content is "susceptible of confirmation"[11] and includes "detail that tallies perfectly with…the rest of the record."[12] The Frost Files bear "sufficient indicia of credibility,"[13] as they are highly-detailed primary-source materials that include dates, include names, and are on official letterhead.[14] They have been confirmed by third-party authentication and subsequent investigation.[15] Riesland has implicitly admitted the Frost Files' accuracy by charging Frost with theft.[16]

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[8] *Armed Activities on the Territory of the Congo (D.R.C./Uganda)*, Judgment, 2005 I.C.J. 168, ¶59; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua/U.S.)*, Merits, 1986 I.C.J. 14, ¶¶60, 68, 84-85; *Corfu Channel Case (U.K./Alb.)*, Merits, 1949 I.C.J. 4, 7.

[9] Rosalyn Higgins, Speech, G.A. Sixth Committee (2 November 2007).

[10] *Ayyash et al.*, Decision on the Admissibility of Documents Published on the Wikileaks Website, STL-11-01, ¶¶40,42.

[11] *Prosecutor/Taylor*, Decision of 27 January 2011, SCSL-03-01-T-1171, 4-5.

[12] *ConocoPhillips Company et al./Bolivarian Rep. of Venezuela*, Dissenting Opinion of Georges Abi-Saab, [ICSID] No.ARB/07/30, ¶59 (2013); *Prosecutor/Gotovina and Markac*, Decision of 2 October 2012, [ICTY] IT-06-90-A, ¶26.

[13] *Prosecutor/Gotovina and Markac*, ¶26.

[14] Compromis, ¶23.

[15] Compromis, ¶¶22, 27; Clarifications, ¶2.

[16] Compromis, ¶¶24, 31.

3. The Frost Files' history of procurement does not preclude admissibility.

This Court[17] and a majority of international courts[18] have never excluded unlawfully-obtained evidence from the record. Even if this Court were to exclude unlawfully-obtained evidence, the illegality of the procurement of the Frost Files is a matter of Rieslandic domestic law, not international law, the subject of ICJ jurisdiction.[19]

B. Riesland's surveillance programs violated international law.

1. Riesland's surveillance programs breached its ICCPR obligations.

The ICCPR, to which Riesland and Amestonia are parties, prohibits "arbitrary or unlawful interference" with individuals' privacy and correspondence,[20] and applies to mass surveillance, electronic interception of communications, and storage of personal data.[21]

a. The ICCPR applies to Riesland's surveillance programs.

States must respect the rights of individuals "subject to [their] jurisdiction,"[22] regardless of territorial borders.[23] Jurisdiction is non-spatial[24] and may arise as a function of cyber-

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[17] Thirlway, 624.

[18] William Worster, *The Effect of Leaked Information on the Rules of International Law*, 28 AM. U. INT'L L. REV. 443, 456-463 (2013).

[19] I.C.J. Statute, Art.36.

[20] International Covenant on Civil and Political Rights (1976), 999 U.N.T.S. 171 [hereinafter "I.C.C.P.R."], Art.2(1).

[21] HRC General Comment No.16 (1988), U.N.Doc.HRI/GEN/1/Rev.1, ¶¶8,10; The Right to Privacy in the Digital Age, U.N.Doc.A/RES/68/167 (2003), Preamble.

[22] I.C.C.P.R., Art.2(1).

[23] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶111; *Armed Activities*, ¶220; HRC General Comment No.31 (2004), U.N.Doc.CCPR/C/21/Rev.1/Add.13, ¶10; Marko Milanovic, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*, 56 HARV. INT'L L. REV. 81,109-110 (2015).

interferences.[25] Extraterritorial jurisdiction exists when a state's actions "produce effects outside its territory."[26] Extraterritorial jurisdiction can arise from the confiscation of a passport,[27] failure to provide state-owed pensions,[28] or arrest of an individual.[29] This Court has found that the ICCPR applies extraterritorially when a State's security forces occupied an area.[30] Riesland's programs, by impacting millions of Amestonians,[31] established a jurisdictional relationship between Riesland and surveilled Amestonians.

Even if this Court finds that jurisdiction requires a spatial relationship, Riesland owned and operated VoR premises, was afforded territorial protections on VoR premises,[32] and staffed the VoR with its agents. Riesland therefore exercised effective control over VoR premises,[33] where the Carmen Program unlawfully collected and stored Amestonian data.

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[24] *Montero/Uruguay*, U.N.Doc.CCPR/C/OP/2, ¶5 (1990); *Al-Skeini et al./U.K.*, [ECtHR] 53 EHRR 589, ¶¶133-137 (2011).

[25] European Parliament Report on the ECHELON System, Gerhard Schmid, Special Rapporteur (2001), ¶8.3.2; TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Schmitt, ed. 2013), [hereinafter "Tallinn Manual"], Rule 2.

[26] *Drozd and Janousek/France and Spain*, [ECHR]14 EHRR 445, ¶91 (1992); *Salas and Others/U.S.*, [IACHR] No.10.573, ¶2 (1994).

[27] *Montero/Uruguay*, ¶5.

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

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

[30] *Wall Opinion*, ¶111; *Armed Activities*, ¶220.

[31] Compromis, ¶2, 22.

[32] Broadcasting Treaty, Art.1(2), 14.

[33] *See M./Denmark*, No.17392/90, ¶1 (ECtHR 1992); Harold Koh, Memorandum Opinion on the Geographic Scope of the ICCPR, 7 (19 October 2010).

b. Arbitrary or unlawful interferences violate ICCPR Article 17.

In determining whether surveillance violates the ICCPR, courts frequently consider whether interferences pursue legitimate aims, are proportionate to those aims, and accord with sufficiently-limiting domestic law.[34]

i. The interferences had no legitimate aim.

Vague political and economic interests cannot justify interference.[35] National security concerns only justify interference when a State's existence, territorial integrity, or political independence is threatened.[36] The purpose of the Carmen Program was to protect political and economic interests,[37] and the purpose of the Verismo Program was to promote Rieslandic national security.[38] As Riesland faced no major security threats,[39] neither program had legitimate aim.

ii. The interferences were disproportionate to legitimate aims.

Neither surveillance program had a legitimate aim,[40] rendering proportional surveillance

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[34] HRC Gen. Comm. 16, ¶4; Lars Rehof, *Article 12* in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY (Eide et al., eds. 1992), 189-190 (quoting New Zealand representative); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS 291 (2005); *Toonen/Australia*, U.N.Doc.CCPR/C/50/D/488/1992, ¶6.4 (1994)

[35]The Right to Privacy in the Digital Age, Office of the U.N. High Commissioner for Human Rights [UNHCHR], U.N.Doc.A/HRC/27/37, ¶22 (2014). Siracusa Principles on the Limitation and Derogation Provisions in the I.C.C.P.R., [hereinafter "Siracusa Principles"], U.N.Doc.E/CN.4/1985/4 (1985), Limitation Clauses; European Convention on Human Rights (2010), 213 U.N.T.S. 221, Art.8.

[36] Siracusa Principles, Prins.29-32.

[37] Compromis, ¶26.

[38] Compromis, ¶¶31, 35.

[39] *See infra* §III.A.3.b.

[40] *See supra* §I.B.1.b.i.

impossible. Beyond this, the use of "mass interception capabilities" is *per se* disproportionate.[41] The Verismo Program's violation of millions of Amestonians' rights was disproportionate to Riesland's national security concerns, particularly as Amestonia is Riesland's ally and the program predates Hive eco-activism.[42]

iii. The SSBA provided insufficient limitations on interferences.

Domestic laws governing interferences must: (1) narrowly tailor interferences to specific aims; (2) precisely dictate boundaries regarding permissible circumstances for interferences, authorization processes, categories of susceptible persons, and procedures for storing collected data; and (3) provide safeguards against abuse.[43] The SSBA provides for broad, rather than tailored, programs, gives Rieslandic politicians discretion over where, how, and on whom data are collected and stored, and does not require notification of surveilled persons.[44] The SSBA Tribunal and Committee were inadequate safeguards, lacking expert input and never challenging programs' lawfulness.[45]

2. **Riesland's Carmen Program violated the Broadcasting Treaty.**

Article 23(1) requires that VoR employees "respect the laws and regulations" of

[41] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N.Doc.A/HRC/23/40, ¶¶37, 62 (2011).

[42] Compromis, ¶¶7, 13, 22.

[43] Right to Privacy in the Digital Age (UNHCHR), ¶28; *Bakhtiyari/Australia*, U.N.Doc.CCPR/C/79/D/1069/2002, ¶9.6 (2003); *Weber and Saravia/Germany*, 2006 ECHR 1173, ¶¶79, 84, 93-95.

[44] Compromis, ¶5.

[45] Compromis, ¶23.

Amestonia.[46] The Carmen Program, through which VoR employees conducted domestically-unlawful surveillance, contravenes this provision. Article 23(2) requires that VoR premises not be used in any manner "incompatible" with VoR functions "as envisaged in the treaty."[47] Espionage is incompatible with the VoR's functions as a vehicle for advancing inter-State friendship.[48] Furthermore, the element of "incompatibility" in near-identical provisions in the VCDR[49] and VCCR[50] refers to activity that violates the receiving State's laws and to acts that fall outside the typical, designated functions of the mission.[51] Both concerns are implicated here, as the Carmen Program violated Amestonian law and falls outside the designated functions of the premises as a broadcasting station.

3. Riesland's surveillance programs violated Amestonian territorial integrity.

The sovereign equality of States, enshrined in U.N. Charter Article 2(1),[52] constitutes a basic international law principle. Sovereign States "may not exercise…power in any form" in the

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

[47] Broadcasting Treaty, Art.23(2).

[48] *See infra* §II.A.1.

[49] Vienna Convention on Diplomatic Relations (1964), 500 U.N.T.S. 95, [hereinafter, "V.C.D.R."], Art.41(1).

[50] Vienna Convention on Consular Relations (1967), 596 U.N.T.S. 261, [hereinafter, "V.C.C.R."], Art.55(1).

[51] EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 471 (2008); B.S. MURTY, THE INTERNATIONAL LAW OF DIPLOMACY: THE DIPLOMATIC INSTRUMENT AND WORLD PUBLIC ORDER, 417 (1989); Martin Den Heijer, *Diplomatic Asylum and the Assange Case*, 26 LEIDEN J. OF INT'L. L. 399, 413.

[52] Charter of the United Nations (1945), 1 U.N.T.S. XVI, Art.2.

territory[53]—which encompasses cyber-infrastructure[54]—of another State. Peacetime espionage, including cyber-espionage targeting cyber-infrastructure,[55] conducted within another State constitutes a violation of territorial integrity,[56] as evidenced by State condemnations of such espionage.[57] Even if limited espionage is lawful, extensive espionage, such as that conducted by Riesland,[58] is not.[59]

4. **Riesland's Carmen Program violated the immunities afforded U.N. representatives.**

U.N. representatives are entitled to "inviolability for all papers and documents,"[60]—

[53] *S.S. Lotus (Fr./Turk.)*, 1927 P.C.I.J. (ser.A) No.10, 18. *See also* Declaration on Principles of International Law Concerning Friendly Relations, U.N.Doc.A/Res/25/2625 (1970), Art.1.

[54] Tallinn Manual, Rule 1.

[55] Michael Schmitt, *Cyber Activities and the Law of Countermeasures in Rights and Obligations of States in Cyberspace* in PEACETIME REGIME FOR STATE ACTIVITIES IN CYBERSPACE (Ziolkowski, ed. 2013), 665-666; Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 291, 305 (2015); Wolff Heinegg, *Legal Implications of Territorial Sovereignty in Cyberspace* in PROCEEDINGS OF THE 4TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT, 14-15 (Czosseck et al., eds. 2012).

[56] *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste/Australia)*, Memorial of Timor-Leste, ¶3.4 (2014); Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs* in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW (Stranger ed. 1962), 12; JOHN KISH, INTERNATIONAL LAW AND ESPIONAGE 83-84 (Turns, ed. 1995); Manuel Garcia-Mora, *Treason, Sedition and Espionage as Political Offences Under the Law of Extradition*, 26 U. PITT. L. REV. 65, 79-80 (1964).

[57] U.S.S.R. Draft Resolution, U.N.S.C., U.N.Doc.S/4321 (23 May 1960) (Condemning incursions by American surveillance U-2s), Art.1; Condemnation of U.S. Espionage in Mercosur States, MERCOSUR/PM/SO/DECL.07/2014 (10 November 2014).

[58] Compromis, ¶¶22, 25-26.

[59] *See* Terry Gill, *Non-Intervention in the Cyber-Context* in PEACETIME REGIME, 225-226.

[60] Convention on the Privileges and Immunities of the United Nations (1946), 1 U.N.T.S. 15, Art.4.

including protection from cyber-operations[61]—and to secrecy in voting.[62] Riesland's surveillance of U.N. Ambassador Cornwall, which collected information regarding Amestonia's General Assembly votes,[63] was therefore unlawful.

C. Amestonia is entitled to immediate cessation and a guarantee of non-repetition of Riesland's surveillance programs.

Because the storage of Amestonians' personal data constitutes a continuing wrong,[64] Amestonia is entitled to cessation of Riesland's surveillance programs. A guarantee of non-repetition is necessary when risk of repetition is high.[65] Given Riesland's public support for its programs[66] and technological sophistication, indicating high likelihood of repetition, a guarantee of non-repetition is necessary.

II. THE DETENTION AND ARREST OF VOR EMPLOYEES, AND THE SEIZURE AND FORFEITURE OF THE VOR FACILITY AND EQUIPMENT, DID NOT VIOLATE THE BROADCASTING TREATY OR AMESTONIA'S OTHER INTERNATIONAL OBLIGATIONS.

A. The privileges and immunities provided under the Broadcasting Treaty terminated pursuant to Article 36.

1. The station ceased to function as envisaged in the treaty when it became the headquarters of the Carmen Program.

Broadcasting Treaty Article 36 states, "[A]ll 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

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[61] Tallinn Manual, Rule 84.

[62] G.A. Rules of Procedure, U.N.Doc.A/520/Rev.17 (2007), Rules 30, 88, 92, 103.

[63] Compromis, ¶26.

[64] Compromis, ¶36; *See Rainbow Warrior Case (Fr./N.Z.)*, 82 I.L.C. 499, ¶114 (1990).

[65] *Avena and Other Mexican Nationals (Mex./U.S.), Judgment,* 2004 I.C.J. 121, ¶¶150-153.

[66] Compromis, ¶31.

of the station's functions as envisaged in the Present Treaty."[67] The VCLT requires treaties to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in light of its object and purpose."[68] The context within which treaties are to be interpreted includes the treaty's text (both the body and the preamble) and any other relevant, applicable rules of international law.[69]

The Broadcasting Treaty's object and purpose is the fortification and reinforcement of decades of friendly relations between Amestonia and Riesland through the operation of the broadcasting station.[70] The preamble recognizes the parties' "desir[e] to fortify the friendship between the two countries" and "recognit[ion of] the importance of understanding and cooperation between their peoples."[71] The treaty's text also supports this reading, balancing the extension of privileges and immunities with the duty to respect the laws and regulations of the receiving state.[72] In interpreting object and purpose, this Court has recognized parties' intent to promote friendship, cooperation, and mutual understanding achieved through the specific field the treaty addresses, and that the "friendship" provisions of a preamble should be "regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied."[73]

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[67] Broadcasting Treaty, Art.36.

[68] Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 331, [hereinafter "V.C.L.T."], Art.31(1).

[69] V.C.L.T., Art.31.

[70] Compromis, ¶6; Broadcasting Treaty, Preamble.

[71] Broadcasting Treaty, Preamble.

[72] Broadcasting Treaty, Arts.14, 15, 23, 36.

[73] *Oil Platforms (Iran/U.S.)*, Preliminary Objection, 1996 I.C.J. 803, ¶28; *Nicaragua*, Merits,

The station's functions are therefore best understood as broadcasting television in service of "fortify[ing] the friendship between the two countries."[74] Interpreting the station's functions as synonymous with merely broadcasting would be wholly inconsistent with the treaty's object and purpose. When the station began to function as a façade for a hostile and illegal espionage scheme against Amestonia, it ceased to "function as envisaged" as a vehicle promoting friendship and cooperation, and the privileges and immunities provided under the Broadcasting Treaty terminated pursuant to Article 36.

2. Alternatively, the station's functions ceased when its broadcasting was interrupted and its premises abandoned.

Even if "cessation of the station's functions" merely means "cessation of broadcasting," the station ceased to function as envisaged when VoR staff cut the television broadcasting and abandoned the station.[75] The attempt by VoR employees, including the station's head, to flee Amestonian territory that night demonstrates that the employees did not intend to return and resume the broadcast.[76] No warrant was provided for the seizure of VoR property until after the station had cut its broadcast,[77] and upon execution of the warrant Amestonian police confirmed that the premises had been abandoned by the staff.[78]

¶273.

[74] Broadcasting Treaty, Preamble.

[75] Compromis, ¶¶25-27.

[76] Compromis, ¶28.

[77] Compromis, ¶27.

[78] Compromis, ¶27.

3. Articles 14(1-3) and 15(1)(a-b) constitute "privileges and immunities" within the meaning of Article 36.

The rights and privileges enumerated in Article 15 are explicitly labeled "immunities and privileges." Further, Article 36's explicit exception of Article 15(1)(c) illustrates that 15(1)(a) and (b) are clearly within Article 36's ambit. Though Article 14 does not explicitly use the label "privileges and immunities," it uses the same language in Article 14—"shall be inviolable"—as does Article 15.[79] Article 14 also says VoR employees "shall be immune," clearly indicating intent to confer an "immunity."[80] This reading comports with the ordinary meaning of "privileges and immunities."[81]

4. The former VoR employees do not retain functional immunity pursuant to Article 15(1)(c) with respect to the acts at issue.

VoR employees were not immune from arrest under the functional immunity extended under Article 15(1)(c), which provides, "In respect of acts performed by an employee of the station in the exercise of its functions, the immunities and privileges shall continue to subsist after the employee's functions at the station have come to an end."[82] The unlawful actions for which the VoR staff members were detained and arrested—initially failing to present travel document, and subsequently espionage[83]—were plainly not "in the exercise of [the station's]

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[79] Edward Gordon, *The World Court and the Interpretation of Constitutive Treaties*, 59 AM. J. INT'L L. 794, 814 (1965)(A "rule of interpretation constantly mentioned by the Court is…that a treaty must be read as a whole…to avoid inconsistency.").

[80]For other treaties using the language "shall be immune" to confer an "immunity," *see, e.g.*, V.C.D.R., Art.22; V.C.C.R., Art.31; Convention on Special Missions (1985), 1400 U.N.T.S. 231, Art.4.

[81] "Immunity, n." O.E.D. ONLINE, December 2015, Oxford University Press ("Freedom from… jurisdiction, etc… esp. from prosecution or arrest.").

[82] Broadcasting Treaty, Art.15.

[83] Compromis, ¶28.

functions"[84]

B. In any event, the treaty was not in effect at the time of the arrest of the VoR employees and the seizure and forfeiture of the VoR facility and its equipment.

1. The Broadcasting Treaty was invalid due to fraud.

The VCLT states, "A party which has been induced to conclude a treaty by the fraudulent conduct of another negotiating State may invoke the fraud as invalidating its consent to be bound by the treaty."[85] The term "fraud" includes "any false statements, misrepresentations or other deceitful proceedings"[86] by a State meant to induce consent to a treaty. More succinctly, "[f]raud is the antithesis of good faith."[87]

From its inception, the VoR station was used to "gain an advantage to the detriment of"[88] Amestonia.[89] Only seven months elapsed between the signing of the treaty and the first broadcast.[90] During that period, Riesland built an extensive covert facility underneath the broadcasting station and installed and developed the necessary equipment to conduct surveillance on VoR guests.[91] Planning for this elaborate operation certainly began before the time the treaty was concluded. The Court may draw adverse inferences from circumstantial

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[84] Broadcasting Treaty, Art.15; *see supra* §II.A.1.

[85] V.C.L.T., Art.49.

[86] Commentaries on the Draft Convention on the Law of Treaties, ILC Yearbook (1966-II), [hereinafter "V.C.L.T. Commentaries"], Art.46 Cmt.3.

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

[88] Dörr, 839.

[89] Compromis, ¶25.

[90] Compromis, ¶¶7-8.

[91] Compromis, ¶¶25.

evidence where direct evidence is in the exclusive control of the other party.[92] Signing the treaty in bad faith constitutes a misrepresentation by Riesland that induced Amestonia to consent to its conclusion.

2. Alternatively, Riesland's violations of the Broadcasting Treaty constitute a material breach.

VCLT Article 60 provides that "the violation of a provision essential to the accomplishment of the object or purpose of the treaty" constitutes grounds for its suspension.[93] This requires inquiry into the character of the provision(s) breached and their relationship to the treaty's object and purpose.[94] Material breaches can result from violations of ancillary provisions considered by a party to be essential to the object and purpose.[95]Amestonia's failure to initiate VCLT termination or suspension procedures before now does not preclude its claiming prior material breach in response to Riesland's allegations.[96] Further, having made notification through these proceedings, Amestonia need not continue performing its obligations.[97]

Riesland's violations of Article 23(1) and 23(2) of the Broadcasting Treaty[98] amount to material breaches. These provisions are essential to the object and purpose of the treaty because they represent reciprocal obligations due the receiving state.

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[92] *Corfu Channel*, 18.

[93] V.C.L.T., Art.60.

[94] Bruno Simma and Christian Tam, *Reacting against Treaty Breaches* in OXFORD GUIDE TO TREATIES (Hollis, ed. 2012), 582-583.

[95] V.C.L.T. Commentaries, Art.7 Cmt.9.

[96] V.C.L.T., Art.65(5); V.C.L.T. Commentaries, Art.62 Cmt.8.

[97] E.J. De Aréchaga, *International Law in the Past Third of a Century*, 159 RCADI 59, 81 (1978).

[98] *See supra* §I.B.2.

Riesland's illegal espionage scheme, carried out by VoR employees over the course of more than two decades under the direction of the Bureau,[99] demonstrates blatant and calculated disrespect and disregard for Amestonia's laws in contravention of Article 23(1).[100] Further, the use of the VoR premises as the headquarters of the Carmen Program, to Amestonia's detriment,[101] constitutes a significant breach of Article 23(2).[102]

3. Amestonia's non-performance of the treaty was justified by *exceptio non adimpleti contractus*.

Exceptio non adimpleti contractus dictates that "in an agreement creating reciprocal obligations, one Party cannot obtain from the other the execution of its obligation, if it does not respect its own commitment"[103] and follows from the contractual nature of treaties.[104] Modern scholars regard *exceptio* as an "implied promise of reciprocity" contained within treaties imposing synallagmatic—or intertwined—obligations.[105] *Exceptio* is a defense and requires no procedures or prior notifications to invoke it.[106]

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[99] Compromis, ¶¶25-26.

[100] Broadcasting Treaty, Art.23.

[101] Compromis, ¶¶25-26.

[102] Broadcasting Treaty, Art.23.

[103] Joseph Nisot, *L'exception 'non adimpleti contractus' en droit international*, 74 RGDIP 668, 668 (1970). *See also*, *Diversion of Water from the Meuse (Netherlands/Belgium)*, Dissenting Opinion of Judge Anzilotti, 1937 P.C.I.J. (ser.A/B) No.70, 49-50.

[104] *Appeal Relating to the Jurisdiction of the ICAO Council (India/Pakistan)*, Separate Opinion of Judge De Castro, 1972 I.C.J. 46, ¶2 n.1.

[105] D.W. Greig, *Reciprocity, Proportionality and the Law of Treaties*, 34 VA. J. INT'L L. 295, 400 (1994); James Crawford and Simon Olleson, *The Exception of Non-performance: Links between the Law of Treaties and the Law of State Responsibility*, 21 AUSTRALIAN YIL 55, 55-58 (2000).

[106] ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES 15 (1984); *Application of the Interim Accord of 13 September 1995*

As argued above, Riesland violated its obligations under Article 23. This provision represents the mutual obligations of the parties governing appropriate uses of the station and is synallagmatic with the special status conferred to the premises. Therefore, Amestonia was justified in its non-performance of Article 15.

C. Amestonia's actions concerning VoR property and personnel did not violate Amestonia's other obligations under international law.

1. The VoR is not entitled to State immunity under customary international law.

Though States themselves enjoy immunity from other States' domestic jurisdiction under customary international law,[107] there is no customary international law obligating the extension of immunity to state-owned corporations and entities.[108] The practice of treating state-owned corporations as "instrumentalities" of the state, subject to the presumption of sovereign immunity,[109] is solely a feature of some States' domestic laws, not a customary norm.[110] Other States only grant immunity to state-owned entities for *acta jure imperii*,[111] and others do not extend sovereign immunity at all to separate legal entities.[112] During the drafting of the U.N. Convention on Jurisdictional Immunities of States and Their Property, States expressed divergent views on whether state-owned corporations with separate legal personalities could avail

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(Greece/FYROM), Counter-memorial of Greece ¶8.26 (2010).

[107] ANTONIO CASSESE, INTERNATIONAL LAW 99-101 (2005).

[108] XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 278-279 (2015).

[109] *E.g.,* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1602–1611 (U.S.), §1603(b).

[110] *See, e.g.*, *OBB Personenverkehr AG/Sachs*, 136 S.Ct. 390 (2015) (U.S.).

[111] State Immunities Act, 1978 c. 33, pt. I (U.K.), §14.

[112] *See, e.g.*, *Central Bank of Nigeria Case*, 65 I.L.R. 131 (Germany, 1975) ("Separate legal entities of a foreign State enjoy no immunity.").

themselves of State immunity, reflecting diverse domestic practices.[113]

Therefore, as supported by scholarly opinion,[114] insufficient State practice and *opinio juris*[115] exists to indicate crystallization of a norm entitling state-owned corporations to immunity. Both approaches are therefore in line with international law obligations, and a State is entitled to deny immunity to foreign State-owned corporations in accordance with its own domestic law.[116] Riesland National Television is a State-owned corporation with a separate legal personality,[117] and the VoR is a division of that corporation.[118] Therefore, Amestonia is in observance of its international law obligations in denying jurisdictional immunity to the VoR.

2. Alternatively, Riesland waived State immunity with respect to the VoR by opting into an alternate regime under the Broadcasting Treaty.

A State entitled to immunity in a foreign court may waive that immunity, either explicitly or by implication.[119] Once waived, immunity cannot be reasserted.[120] Waiver, whether implicit or explicit, must clearly express an intention to waive, and that waiver must be specific to the

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[113] Report of the Working Group on Jurisdictional States and their Property, ILC Yearbook (1999-II), ¶¶61-83; United Nations Convention on Jurisdictional Immunities of States and Their Property (2005), 44 I.L.M. 801 (U.N.Doc.A/59/22), Art.2.

[114] Yang, 279; HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 353 (2008); David Stewart, *Current Developments: The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L LAW 194, 199 (2005).

[115] *North Sea Continental Shelf (Germany/Denmark, Germany/Netherlands)*, Merits, 1969 I.C.J. 3, ¶77.

[116] *Lotus Case*, 18.

[117] Compromis, ¶40

[118] Compromis, ¶8.

[119] Yang, 316.

[120] Fox & Webb, 376-377.

litigation at issue.[121]

The Broadcasting Treaty provided a detailed immunities regime,[122] including circumstances for termination of immunities.[123] Opting into this regime evinces a clear intention to submit to the domestic jurisdiction of the receiving State if the circumstances provided are met.[124] This interpretation comports with a well-recognized canon of treaty construction[125] by preventing surplusage. If Article 36 did not express an intent to waive immunity, Articles 14 and 15 would be inoperative, as many of the immunities—extant under customary international law—provided therein would be redundant. Furthermore, Article 36 would be inoperative, as the termination of the treaty-provided immunities would have no practical effect on the VoR's legal status.

III. THE DETENTION OF JOSEPH KAFKER UNDER THE TERRORISM ACT VIOLATED INTERNATIONAL LAW, AND AMESTONIA IS THEREFORE ENTITLED TO HIS IMMEDIATE RELEASE, THE DISCLOSURE OF ALL INFORMATION WHICH FORMED THE BASIS OF HIS APPREHENSION, AND THE PAYMENT OF COMPENSATION FOR HIS DETENTION.

A. Riesland's detention of Kafker violated international law.

Amestonia may bring a diplomatic protection claim on behalf of a national injured by an internationally wrongful act[126] who has exhausted domestic remedies.[127] Kafker, an Amestonian

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[121] MALCOLM SHAW, INTERNATIONAL LAW 740-741 (2008).

[122] Broadcasting Treaty, Arts.14, 15.

[123] Broadcasting Treaty, Arts.14, 15, 36.

[124] Broadcasting Treaty, Art.36.

[125] GIDEON BOAS, PUBLIC INTERNATIONAL LAW 65 (2012).

[126] *Mavrommatis Palestine Concessions (Greece/U.K.)*, Judgment No.2, 1924 P.C.I.J. (ser.B) No.3, 12.

[127] *See, e.g.*, *Arhuacos/Colombia*, UN.Doc.CCPR/C/60/D/612/1995, ¶8.2 (2003).

citizen, exhausted domestic remedies by appealing to Riesland's highest court.[128] In human rights cases relating to detention, "presumptions apply in favour of the ostensibly weaker party" and against the State possessing information about the detention.[129] Because Riesland admits possession of "closed materials" on Kafker's detention,[130] it must affirmatively demonstrate the detention's legality.

1. The detention violated Article 9 of the ICCPR.

Arbitrariness under Article 9(1) encompasses both violations of Article 9's procedural guarantees and broader concepts like "inappropriateness, injustice, lack of predictability and due process of law…reasonableness, necessity and proportionality."[131] It applies to all deprivations of liberty,[132] even those carried out in full compliance with domestic law.[133] The court may consider procedural deficiencies cumulatively.[134]

a. Riesland did not inform Kafker of the reasons for his detention.

Section 3(a) of the Terrorism Act provides that suspected "terrorist act"[135] involvement is grounds for detention up to 180 days. During that period, every 21 days a hearing must determine whether the conditions requiring detention—"reasons of national security and public

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[128] Compromis, ¶33.

[129] *Ahmadou Sadio Diallo (Guinea/D.R.C.)*, Separate Opinion of Judge Trindade, 2010 I.C.J. 347, ¶73.

[130] Compromis, ¶36.

[131] HRC General Comment No.35 (2014), U.N.Doc.CCPR/C/GC/35, ¶12.

[132] HRC General Comment No.8 (1982), U.N.Doc.HRI/GEN/1/Rev.6, ¶1.

[133] *A./Australia*, U.N.Doc.CCPR/C/59/D/560/1993, ¶9.5 (1997).

[134] *Diallo*, Merits, 2010 I.C.J. 639, ¶82.

[135] As defined in the Convention for the Suppression of the Financing of Terrorism (2000), 2178 U.N.T.S. 197, [hereinafter "C.S.F.T."], Art.2.1(b).

safety," including consideration of a non-exhaustive list of six factors in Section 3(d)—have changed. After 180 days, however, Section 3(h) allows the detention to be extended to 540 total days "in appropriate circumstances." 3 September 2015 marked 180 days since Kafker's arrest on 7 March 2015.[136]

Even if Kafker was informed that he was detained under the Terrorism Act, Riesland did not provide him any "factual specifics" of the basis for his detention, as Article 9(2) requires.[137] Whether Kafker surmised the basis himself is irrelevant.[138] Further, the Terrorism Act provides "vague and expansive" grounds for detention, contrary to Article 9.[139] The HRC has previously noted the potential illegality of arrests under domestic laws for "extremist activity,"[140] "terrorism,"[141] and "national security."[142] The exceedingly vague "appropriate circumstances" criterion under which Riesland has held Kafker since 3 September is manifestly unlawful.

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[136] Compromis, ¶32.

[137] HRC Gen. Comm. 35, ¶25; *Ilombe and Shandwe/D.R.C.*, U.N.Doc.CCPR/C/86/D/1177/2003, ¶6.2 (2006).

[138] *Akwanga/Cameroon*, U.N.Doc.CCPR/C/101/D/1813/2008, ¶7.4 (2011).

[139] HRC Gen. Comm. 35, ¶38.

[140] HRC Concluding Observations: Russian Federation, U.N.Doc.CCPR/C/RUS/CO/6, ¶24 (2009).

[141] HRC Concluding Observations: Mauritius, U.N.Doc.CCPR/CO/83/MUS, ¶12 (2005). *See also* HRC Concluding Observations: Bosnia and Herzegovina, U.N.Doc.CCPR/C/BIH/CO/1, ¶18 (2006) ("public security").

[142] HRC Concluding Observations: Sudan, U.N.Doc.CCPR/C/79/Add.85, ¶13 (1998).

b. Riesland is detaining Kafker for impermissible reasons.

Detentions are arbitrary when made for improper purposes,[143] including suppression of political expression,[144] use of detainees as bargaining chips,[145] and retribution for third-party actions.[146] The circumstances of Kafker's arrest—his speech on environmental law and online activism, his opposition to neonics,[147] and Amestonia's arrest of VoR employees less than three weeks before—strongly suggest that Riesland detained him to silence his advocacy and to retaliate for Amestonia's VoR investigation.

c. Kafker's detention is not reasonably necessary.

Even if Riesland did detain Kafker for legitimate security reasons, it must provide *specific* reasons for the measures.[148] Riesland bears the burden—increasing with the length of detention—of proving a "present, direct, and imperative threat"[149] that cannot be addressed by "less intrusive means,"[150] such as regular court proceedings.[151] Even States that permit

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[143] *See*, *e.g.*, *Hassan/United Kingdom*, [ECtHR] No.20750/09, ¶85 (2014).

[144] *Blanco/Nicaragua*, U.N.Doc.CCPR/C/51/D/328/1988, ¶10.3 (1994); *Castells/Spain*, [ECtHR] 14 EHRR 445, No.11798/85, ¶48 (1992).

[145] *Anon./Minister of Defense*, [S.C. Israel] 54(1) P.D. 721, 743 (2000).

[146] *Yklymova/Turkmenistan*, U.N.Doc.CCPR/C/96/D/1460/2006, ¶7.2 (2009).

[147] Compromis, ¶¶32, 36.

[148] NOWAK, 382.

[149] HRC Gen. Comm. 35, ¶15.

[150] *C./Australia*, U.N.Doc.CCPR/C/76/D/900/1999, ¶8.2 (2002).

[151] *Benhadj/Algeria*, U.N.Doc.CCPR/C/90/D/1173/2003, ¶8.8 (2007); *Madani/Algeria*, U.N.Doc.CCPR/C/89/D/1172/2003, ¶8.7 (2007). This requirement also stems from the rule that "similar cases be dealt with in similar proceedings" under Article 14(1) and 14(3). *See* HRC General Comment No.32 (2007), U.N.Doc.CCPR/C/GC/32, ¶14; Evelyne Schmid, *A Few Comments on a Comment*, 14 INT'L J. HUM. RIGHTS 1058, 1062 (2010).

preventive detention routinely handle eco-terrorism using standard criminal law.[152] Riesland's sole justification—the "integrity of particular intelligence sources"[153]—is vague, common to many criminal investigations, and unpersuasive in light of the subsequent revelation of the sources of intelligence on Kafker's activities.[154] Riesland offers no evidence that Kafker is likely to commit new crimes, destroy evidence, or receive amnesty in Amestonia. Finally, laws permitting detention for evidence-gathering in relation to suspected terrorism typically limit the period of detention to a few days or weeks,[155] which Riesland has not shown to be insufficient.

d. Kafker was not brought promptly before a judge.

Article 9(3)'s requirement of prompt appearance *in person*[156] before a judge protects those arrested but not yet charged.[157] 302 days after Kafker's arrest (at time of writing), Riesland has not permitted him to appear in person before a court or to communicate to the court through his lawyer. Even if his lawyer's appearance at the hearing on 10 March was an adequate substitute, delays of greater than 48 hours—including three-[158] and four-day[159] delays—"are

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[152] *See, e.g.*, Animal Enterprise Terrorism Act, 18 U.S.C. §43 (USA); Serious Organised Crime and Police Act of 2005 (U.K.).

[153] Compromis, ¶34.

[154] Compromis, ¶37.

[155] CLAIRE MACKEN, COUNTERTERRORISM AND THE DETENTION OF SUSPECTED TERRORISTS, 2-3 (2011).

[156] HRC Gen. Comm. 35, ¶42; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N.Doc.A/RES/43/173 (1988), Prin.32(2).

[157] *Schweizer/Uruguay*, U.N.Doc.CCPR/C/17/D/66/1980, ¶19 (1982); *de Morais/Angola*, U.N.Doc.CCPR/C/83/D/1128/2002, ¶6.4 (2005).

[158] *Hammel/Madagascar*, U.N.Doc.CCPR/C/29/D/155/1983, ¶19.4 (1990).

[159] *Freemantle/Jamaica*, U.N.Doc.CCPR/C/68/D/625/1995, ¶7.4 (2000).

absolutely exceptional and must be justified under the circumstances.[160] Riesland has given no justification for failing to bring Kafker before a judge on or before 9 March, when the 48-hour window expired.

2. The detention violated Kafker's fair trial rights under Article 14.

Article 14 applies to the "determination of any criminal charge." If the "purpose, character, or severity" of the sanction is penal in nature, domestic law cannot avoid Article 14's procedural protections by characterizing a detention as non-criminal.[161] Kafker's arrest and detention on suspicion of "instigating, authorizing, planning, financing, carrying out, or aiding a Terrorist Act"[162]—which is a domestic criminal offense[163]—demonstrates the penal nature of the sanction. Violations of discrete provisions of Article 14 may constitute violations of Kafker's broader rights to a fair trial and presumption of innocence enshrined in Article 14(1).[164] Furthermore, detention following an unfair trial is arbitrary under Article 9.[165]

a. Riesland deprived Kafker of his right to counsel.

Article 14(3)(b) entitled Kafker to *communicate* with counsel *of his choosing* during hearings before the Tribunal. Kafker's counsel was not permitted to consult or otherwise share

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[160] HRC Gen. Comm. 35, ¶33; *Abramova/Belarus*, U.N.Doc.CCPR/C/107/D/1787/2008, ¶¶7.3–7.5 (2013).

[161] *Perterer/Austria*, U.N.Doc.CCPR/C/81/D/1015/2001, ¶9.2 (2004); *Fardon/Australia*, U.N.Doc.CCPR/C/98/D/1629/2007, ¶7.4 (2010).

[162] Terrorism Act, §3(a).

[163] Terrorism Act, §3(d)(4); C.S.F.T. Art.4(a).

[164] *See Alegre/Peru*, U.N.Doc.CCPR/C/85/D/1126/2002, ¶7.5 (2005); *Barney/Colombia*, U.N.Doc.CCPR/C/87/D/1298/2004, ¶7.2 (2006); *Roque/Peru*, U.N.Doc.CCPR/C/85/D/1125/2002, ¶7.3 (2005); *Kulov/Kyrgyzstan*, U.N.Doc.CCPR/C/99/D/1369/2005, ¶8.7 (2010).

[165] HRC Gen. Comm. 35, ¶17.

information with Kafker[166] and was chosen from a list compiled by the very agency conducting the investigation.[167]

b. Riesland deprived Kafker of his right to equality of arms.

Kafker had the right to "adequate time and facilities for the preparation of his defense" under Article 14(3)(b), to present and examine evidence and witnesses under Article 14(3)(e), and to be tried in his presence under Article 14(3)(d). Article 14(3)(b) entitled Kafker's special advocate to pre-trial access to all government evidence and other information required for an effective defense.[168] The defense must enjoy the "same legal powers" as the government in presenting evidence.[169] Kafker and his counsel had only three days to prepare a defense prior to the initial hearing did not have access to his attorney or to the "closed material" that allegedly provided the basis for his detention,[170] and did not enjoy the government's rights to be present, to introduce secret evidence, or to offer anonymous testimony.[171] He therefore could not effectively challenge the grounds for his detention.

c. Riesland deprived Kafker of his right to review by a higher tribunal.

Article 14(5) establishes the right to review by a higher tribunal, requiring "full review of the legal and factual aspects" of the lower court's decision.[172] Section 3(b) provides that no court other than the Tribunal may review the detention of an individual under the Terrorism Act.

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[166] Compromis, ¶33.

[167] Terrorism Act, §3(i).

[168] *Arutyunyan/Uzbekistan*, U.N.Doc.CCPR/C/80/D/917/2000, ¶6.3 (2004).

[169] HRC Gen. Comm. 32, ¶39.

[170] Compromis, ¶33.

[171] Terrorism Act, §§3(e), 3(f).

[172] *Vázquez/Spain*, U.N.Doc.CCPR/C/69/D/701/1996, ¶8.6 (2000).

Accordingly, Kafker's motion challenging the constitutionality of the proceedings was denied by the Supreme Court,[173] seemingly without review of the evidence upon which Kafker was detained.

3. Riesland was not entitled to derogate from its human rights obligations.

The lawfulness of derogations from human rights obligations is judicially reviewable.[174] Unlike derogations under ECHR Article 15, derogations under ICCPR Article 4 are entitled to little or no deference, or "margin of appreciation," in judicial review of the stated basis for derogation.[175]

a. Riesland did not provide adequate notification of derogation.

On each of the three occasions Rieland issued Terrorism Alerts (October 2014, April 2014, and October 2015),[176] it failed to inform the U.N. Secretary-General of the provisions from which it derogated and the reasons for derogation,[177] as required by Article 4(3). These failures bar Riesland from asserting derogation *ex post* under Articles 9 and 14.[178]

b. The circumstances did not justify derogation.

According to Article 4, States claiming derogation have the burden of demonstrating a

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[173] Compromis, ¶33.

[174] *See, e.g.*, *Ireland/U.K.*, [ECtHR] (ser.A) No.25 (1978), ¶214.

[175] Sarah Joseph, *Human Rights Committee: General Comment 29*, 2 HUM. RIGHTS L. REV. 81, 86 (2002); Geneva Academy of International Humanitarian Law and Human Rights, *Derogations from Human Rights Treaties in Situations of Emergency*, http://www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php.

[176] Compromis, ¶18; Clarifications, ¶7.

[177] Clarifications, ¶7.

[178] *See Wall Opinion*, ¶127; *Weisz/Uruguay*, U.N.Doc.CCPR/C/11/D/28/1978, ¶14 (1984); *Montejo/Colombia*, U.N.Doc.CCPR/C/15/D/64/1979, ¶10.3 (1985); JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW 59 (1992).

"public emergency which threatens the life of the nation,"[179] defined by the European Court as "actual or imminent"[180] and "exceptional[,] affect[ing] the whole population and constitut[ing] a threat to the organised life of the community."[181] This standard is higher than, and distinct from,[182] exceptions in the ICCPR for reasons of "national security."[183] Amestonia's claims do not implicate any rights subject to such exceptions. Large-scale massacres involving paramilitary groups,[184] frequent fatal bombings by separatist forces,[185] countrywide strikes and protests,[186] and violent seizures of hundreds of hostages from an embassy[187] have been found not to warrant Article 4 derogations.

The planned contamination of honey by three college students on Amestonian soil—even if it had resulted in "serious bodily injury"[188] to some consumers—would scarcely have affected the whole population and organized life of Riesland, a developed country of approximately 100 million people.[189] Riesland has made no showing of an actual or imminent emergency since the

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[179] *Silva/Uruguay*, U.N.Doc.CCPR/C/23/D/34/1978, ¶8.3 (1981).

[180] *Greek Case (Denmark/Greece)*, [ECHR] 12 Y.B. 1, ¶112 (1969).

[181] *Lawless/Ireland*, [ECtHR] No.332/57 (A/3), ¶28 (1961).

[182] HRC General Comment No.29 (2001), U.N.Doc.CCPR/C/21/Rev.1/Add.11, ¶4.2.

[183] *See, e.g.*, I.C.C.P.R. Art.14(1)(third sentence) (permitting exclusion of the public from trials for "national security" and other reasons).

[184] HRC Concluding Observations: Colombia, U.N.Doc.CCPR/C/79/Add.76, ¶25 (1997).

[185] HRC Concluding Observations: United Kingdom, U.N.Doc.CCPR/CO/73/UK, ¶4 (2001).

[186] HRC Concluding Observations: Bolivia, U.N.DocCCPR/C/79/Add.74, ¶14 (1997).

[187] HRC Concluding Observations: Peru, U.N.Doc.CCPR/C/79/Add.67, ¶11 (1996).

[188] Clarifications, ¶1.

[189] Compromis, ¶1.

neutralization of that threat on October 21, 2014,[190] despite twice reissuing Terrorism Alerts.

c. The rights in question are non-derogable.

The rights not to be arbitrarily detained, to fair trial, and to be presumed innocent are non-derogable because they are fundamental rights[191] and because they are essential to protect the ICCPR's enumerated non-derogable rights.[192] Thus, while Riesland may be permitted to derogate from certain procedural components of these rights, it cannot derogate from the rights themselves.[193]

d. The derogation was not strictly required.

Even if some of Riesland's claimed derogations are lawful, they must comply with an objective standard of proportionality,[194] which "varies in proportion to the seriousness of the terrorist threat."[195] If derogation continues for longer than necessary or actions taken under ordinary laws would adequately address the threat, derogation becomes unlawful,[196] even in the

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[190] Compromis, ¶19.

[191] Paris Minimum Standards of Human Rights Norms in a State of Emergency, 79 AM. J. INT'L L. 1072, §§(C)(5)&(7) (1985); Universal Declaration on Human Rights, U.N.Doc.A/810 (1948), [hereinafter "UDHR"], arts. 9, 11; American Declaration on the Rights and Duties of Man (1948), Arts.18, 25, 26.

[192] HRC Gen. Comm. 29, ¶15; Siracusa Principles, Prin.70; Concluding Observations: Israel, CCPR/C/79/Add.93, ¶21 (1998); *Aksoy/Turkey*, [ECHR] 23 EHRR 553, ¶76 (1996).

[193] Clémentine Olivier, *Revisiting General Comment 29 of the UNHRC*, 17 LEIDEN J. INT'L L. 405, 414 (2004).

[194] Siracusa Principles, Prins.54, 57; Turku Declaration of Minimum Humanitarian Standards, U.N.Doc.E/CN.4/Sub.2/1991/55 (1990), Preamble; HRC Gen. Comm. 29, ¶6.

[195] ROSALYN HIGGINS & MAURICE FLORY, TERRORISM AND INTERNATIONAL LAW 229 (1997).

[196] Christopher Michaelsen, *Derogating from International Human Rights Norms in the 'War Against Terrorism'?*, 17 TERRORISM AND POL. VIOLENCE 131, 141 (2007).

wake of a catastrophic terrorist attack.[197] In light of the low severity of any threats posed by eco-terrorism against Riesland[198] and the importance of Kafker's right to personal liberty, Kafker's detention pursuant to unfair hearings was—or became, upon Riesland's second and third derogations—disproportionate.

e. Amestonia's allegations are unaffected by any claims regarding the existence of an armed conflict.

The ICCPR applies in times of war, subject to its usual derogation standards.[199] In any event, an armed conflict, characterized by the existence of organized armed groups engaged in fighting of some intensity,[200] is not in existence. Rieslandic police—if they were involved—are not an armed group[201] and did not clash with the disorganized membership of the anti-neonics movement. Opposition to neonics has consisted of "internal disturbances" that do not trigger the application of the Geneva Conventions.[202] Furthermore, a 70-year-old retiree engaging in political activism, who has not taken up arms or engaged in violence, cannot be said to have "taken active part in hostilities."[203]

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[197] *A and Others/Secretary of State for the Home Department*, 2004 UKHL 56, ¶43.

[198] *See supra* §III.A.3.b.

[199] *Nuclear Weapons Opinion*, 1996 I.C.J. 226, ¶25; HRC Gen. Comm. 35, ¶64.

[200] International Law Association, *Final Report on the Meaning of Armed Conflict in International Law* 2 (2010).

[201] DIETRICH SCHINDLER, THE DIFFERENT TYPES OF ARMED CONFLICTS ACCORDING TO THE GENEVA CONVENTIONS AND PROTOCOLS 147 (1979).

[202] Protocol II (1978), 1125 U.N.T.S. 609, Art.1(2).

[203] Fourth Geneva Convention (1949), 75 U.N.T.S. 287, Art.3.

B. Amestonia is entitled to Kafker's immediate release, disclosure of information which formed the basis of his apprehension, and compensation.

1. Amestonia is entitled to Kafker's immediate release.

The obligation to provide an effective remedy under Article 2(3) is non-derogable.[204] Reparation must restore the situation that would have existed but for the wrongful acts.[205] Release of a detainee is required when no other remedy could cure the ongoing harm.[206] Article 9(3) provides that detainees are entitled to trial within a reasonable time *or to release*. This Court has previously ordered the release of unlawfully detained persons.[207] Mere reconsideration would be inappropriate here, given that the detention itself—not a procedural error during an ongoing, lawful detention[208]—is unlawful. Kafker is therefore entitled to the "most important remedy" for victims of indefinite detention:[209] restoration of the personal liberty he would have enjoyed had he not been arbitrarily detained without a fair hearing.

2. Amestonia is entitled to disclosure of information which formed the basis of Kafker's apprehension.

An effective remedy for arbitrary detention includes the release of detailed information relating to the investigation of the detainee.[210] When detaining individuals for terrorism offenses, Riesland has an additional obligation to inform interested States Parties of "the circumstances

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[204] HRC Gen. Comm. 29, ¶14.

[205] *Factory at Chorzow (Ger./Pol.)*, Merits, 1928 P.C.I.J. (ser.A) No.17, 47.

[206] *Cagas/Philippines*, U.N.Doc.CCPR/C/73/D/788/1997, Individual Opinion of Quiroga and Posada, (c) (1996).

[207] *United States Diplomatic and Consular Staff in Tehran (U.S./Iran)*, Provisional Measures Order of December 15, 1979 I.C.J. 7, ¶47.

[208] Cf. *Avena*, ¶123.

[209] Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 IRRC 15, 34 (2005).

[210] *Aboufaied/Libya*, U.N.Doc.CCPR/C/104/D/1782/2008, ¶9 (2012).

which warrant that person's detention."[211] Amestonia is therefore entitled to any information justifying Kafker's detention under the Terrorism Act.

3. **Amestonia is entitled to compensation.**

Article 9(5) entitles victims of unlawful detentions to compensation. Non-material injury, including mental suffering and reputational harm, is compensable under international law;[212] it is an "inevitable consequence" of wrongful detention, specific proof of which is not required for the injured national's State to receive compensation on his behalf.[213] Amestonia is therefore entitled to receive compensation for the harm Kafker suffered from his unlawful detention.

IV. THE CYBER-ATTACKS AGAINST THE COMPUTER SYSTEMS OF *THE AMES POST* AND CHESTER & WALSINGHAM ARE ATTRIBUTABLE TO RIESLAND, AND CONSTITUTE AN INTERNATIONALLY WRONGFUL ACT FOR WHICH AMESTONIA IS ENTITLED TO COMPENSATION.

A. The cyber-attacks against the computer systems of *The Ames Post* and Chester & Walsingham are attributable to Riesland.

As President Hale commented in relation to the 22 March 2015 attacks: "all of the evidence points back to the Bureau and to Riesland."[214] To the extent that additional relevant evidence is under the exclusive control of Riesland, the Court may have "more liberal recourse to inferences of fact and circumstantial evidence."[215] The limited availability of evidence in cyber-attacks necessitates a particularly relaxed standard of proof.[216]

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[211] Convention for the Suppression of Terrorist Bombings (1998), 2149 U.N.T.S. 284, Art.9(6).

[212] *Lusitania Cases*, 7 R.I.A.A. 35, 40 (1923).

[213] *Diallo*, Merits, ¶21.

[214] Compromis, ¶39.

[215] *Corfu Channel*, 18.

[216] Nicholas Tsagourias, *Cyber Attacks, Self-Defence, and the Problem of Attribution*, 17 J. CONFLICT SEC. L. 229, 235 (2012).

1. **The attacks were carried out by the Rieslandic governments.**

The conduct of State organs are attributable to that State.[217] In the cyber context, an "identifying line of code" can serve the same evidentiary function as traditional markers of State authority.[218] The origination of a cyber-operation from a government's technology systems is "an indication that the State in question is associated with the operation."[219] Experts from the Amestonian Institute of Technology, a highly-regarded research institution specializing in computer science,[220] found that "significant segments of code" in the malware that brought down the computer systems were identical to the codes used by the Bureau in the Blaster program,[221] traceable to Rieslandic governmental computer infrastructures,[222] and unavailable to the general public,[223] strongly suggesting that Rieslandic government used its "world-renowned" IT capabilities[224] to carry out the attacks.

The Bureau had a compelling motive to engage once again in covert action within Amestonia. Leading up to the cyber-attacks, Frost's disclosures—facilitated and circulated by the victim companies—led to the exposure of confidential Bureau information, seizures of Bureau personnel and facilities, and Amestonia's provision of sanctuary to Frost, a former

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[217] Articles on the Responsibility of States for Internationally Wrongful Acts [ARSIWA], (I.L.C. Yearbook 2001-I) Pt. II, Art.4.

[218] Michael Gervais, *Cyber Attacks and the Laws of War*, 30 BERKELEY J. INT'L L. 525, 560 (2012).

[219] Tallinn Manual, Rule 7.

[220] Clarifications, ¶8.

[221] Compromis, ¶38.

[222] Clarifications, ¶9.

[223] Compromis, ¶38.

[224] Compromis, ¶1.

Bureau employee whom Amestonia had declined to extradite a mere eight days before the attack.[225] Rieslandic Attorney General Deloponte also pledged that Riesland would not "tolerate the publication of leaked confidential information, and that it [would] do whatever is in its power to disrupt any further threats to our national security."[226]

2. The attacks were carried out by a person or entity acting under the control of Riesland.

Even if the above evidence does not establish that the Bureau carried out the attacks, it is sufficient to prove that Riesland exercised control over the person or entity carrying out the attacks.[227] The standard of "overall control" articulated by the ICTY in the *Tadić* case would attribute a cyber-attack carried out by private actors to Riesland if it supplied technical and organizational support, "even if no specific involvement in the attack can be proven."[228] The Court should decline to follow the heightened "effective control" test articulated in the *Genocide* case,[229] which is unduly restrictive and not reflective of custom.[230]

B. Riesland's attacks constitute an internationally wrongful act.

1. The attacks constitute a violation of U.N. Charter Article 2(4).

Whether an act—including a cyber-operation—amounts to an unlawful use of force

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[225] Compromis, ¶35.

[226] *Id.*

[227] ARSIWA, Art.8.

[228] Tsagourias, 237.

[229] *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, ¶401.

[230] Antonio Cassese, *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EJIL 649, 651 (2007) (collecting cases).

depends on the act's scale and effects.[231] Destruction of life is not a prerequisite, provided that the computer-based operation results in damage that would be illegal if inflicted by military units.[232] The loss of an object's functionality constitutes damage if it requires replacement of physical components, and some scholars have observed that a "loss of usability" alone is sufficient.[233] The 22 March attacks against Amestonian targets caused tremendous damage of €45-50 million, resulting in data loss, disabling of "communication switches," and damage to "infrastructure,"[234] suggesting damage to the hardware's functionality[235] and other physical computing resources. Chester & Walsingham was unable to access its files for months and *The Ames Post* was non-operational for approximately three months.[236] These large-scale and serious effects would constitute an unlawful use of force if caused by military forces and thus are equally prohibited in the cyber context.

2. **The attacks constitute a violation of the principle of non-intervention.**

Customary international law prohibits coercive intervention in matters that the victim State is entitled to decide freely,[237] including the use of certain coercive economic measures.[238]

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[231] Tallinn Manual, Rule 11.

[232] Steven Ratner, *Self-Defense Against Terrorists: The Meaning of Armed Attack* in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER (van der Hink & Schrijver, eds. 2013), 18.

[233] Tallinn Manual, 108-09.

[234] Compromis, ¶38.

[235] Hardware is defined as "the physical components that comprise a computer system and cyber-infrastructure." Tallinn Manual, Glossary, 259.

[236] Compromis, ¶38.

[237] *Nicaragua*, ¶205.

[238] Final Act of the Conference on Security and Cooperation in Europe, Helsinki (1975), Prin.6;

International instruments,[239] State practice,[240] and scholarship[241] indicate that cyber-operations—and the provision of tools for use in such operations[242]—may qualify as coercive. Riesland undertook or supported a cyber-operation against *The Ames Post*, Amestonia's most widely-circulated newspaper,[243] in order to coerce Amestonia to submit to Riesland's demands in two matters Amestonia had decided—and was entitled to decide—freely: its refusal to extradite Frost under the political offense exception in the Extradition Treaty and its refusal to release documents held by *The Ames Post*.[244]

3. The attacks constitute violations of Riesland's human rights obligations.

In addition to ICCPR Article 17's protection against interference with correspondence, Article 19 recognizes the "freedom to seek, receive and impart information and ideas of all kinds." These rights apply to private businesses.[245] Cyber-attacks against private networks

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Declaration on the Inadmissibility of Intervention in Domestic Affairs of States and Protection of Independence and Sovereignty, U.N.Doc.A/Res/20/2131 (1965); Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention*, 22 LEIDEN J. INT'L LAW 345, 371 (2009); Lori Damrosch, *Politics Across Borders*, 83 AM. J. INT'L L. 1, 31-32 (1989).

[239] Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications, U.N.Doc.A/68/98 (2013), ¶23.

[240] Letter from government of Colombia, U.N.Doc.A/69/112 (23 May 2014), 4-7; Letter from government of Georgia, U.N.Doc.A/69/112 (30 May 2014); Letter from government of Germany, U.N.Doc.A/69/112 (30 May 2014); Letter from government of Korea, U.N.Doc.A/69/112/add.1 (30 June 2014), 4.

[241] Oona Hathaway, *The Law of Cyber Attack*, 100 CAL. L. REV. 817, 846 (2012); Russell Buchan, *Cyber Attacks*, 2 J. CONFLICT & SECURITY L. 221, 223-4 (2012).

[242] Tallinn Manual, 34, 44-45.

[243] Compromis, ¶21.

[244] Compromis, ¶35.

[245] *Niemietz/Germany*, [ECtHR] No.72/1991/324/396 (1992), ¶¶27-31.

constitute violations of these provisions,[246] which States have a "positive obligation" to prevent, investigate, and punish.[247] By interfering with—or failing to protect against interference with—the rights of Amestonian corporations to engage freely in both private and public correspondence, Riesland violated its obligations under the ICCPR.[248]

C. In any event, the attacks violated Riesland's obligation to prevent transboundary harm.

States are obligated to prevent activities within their jurisdictions that adversely affect other States.[249] Although the norm is applied primarily to tangible resources, sovereign jurisdiction includes computer infrastructures within a state's territory,[250] and the no-harm principle extends to adverse effects in the shared environment of cross-border computer networks.[251] Scholars have argued that Russia be held responsible for the 2007 cyber-attacks against Estonia, given Russia's tacit approval of the acts during an ongoing dispute with

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[246] Right to Privacy in the Digital Age (UNHCHR), ¶14; Gervais, 560.

[247] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N.Doc.A/HRC/17/27 (2011), ¶52.

[248] Riesland was bound by the I.C.C.P.R. with respect to cyber-activity in Riesland affecting or involving communications within Amestonia. *See supra* §I.B.1.a.

[249] Stockholm Declaration of the United Nations Conference in the Human Environment, U.N.Doc.A/CONF.48/14 (1972), Prin.21; *Trail Smelter (U.S./Canada)*, 3 R. Int'l Arb. Awards 1905, 1965 (1941); *Corfu Channel*, 22.

[250] Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, U.N.Doc.A/70/174, ¶¶3(c), 28(a) (2015); Tallinn Manual, Rule 2; Convention on Cybercrime (2001), E.T.S. 185, Art.22.

[251] International Code of Conduct for Information Security, U.N.Doc.A/69/723 (2015); Constitution of the International Telecommunication Union, Art.38(5); Jason Healy & Hannah Pitts, *Applying International Environmental Legal Norms to Cyber Statecraft*, 8 J. L. & POL. INFO. SOC. 356, 374 (2012); Michael Schmitt, *In Defense of Due Diligence in Cyberspace*, 2015 YALE LAW JOURNAL FORUM 68, 73; Thilo Marauhn, *Customary Rules of International Environmental Law* in PEACETIME REGIME, 472.

Estonia.[252] Statements by State representatives regarding operations originating in the territories of Kyrgyzstan, Israel, and China show that cyber-attacks are internationally-wrongful acts.[253] Riesland's refusal to respond to the attacks,[254] technological sophistication, extensive control over the "primary backbone" Amestonian communications,[255] and use of Rieslandic IP addresses and government software in the attacks show that Riesland failed to exercise due diligence in preventing or punishing operations launched from its soil.

D. The attacks are not justifiable under international law.

1. The attacks were not a valid exercise of the right to self-defense.

a. Self-defense cannot be exercised against non-State actors.

This Court[256] and scholars[257] have found that non-State actors cannot commit "armed attacks" under Article 51 of the U.N. Charter; thus, they may be targeted without the territorial State's consent only if their actions are attributable to that State. Even if an exception exists for self-defense within States "unable or unwilling" to prevent armed attacks,[258] that test is not met

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[252] Joanna Kulesza, *State Responsibility for Cyber-Attacks on International Peace and Security*, 29 POLISH Y.B. INT'L L. 131, 149-50 (2009); Jason Healey, *Beyond Attribution: A Vocabulary for National Responsibility for Cyber Attacks*, 18 BROWN J. WORLD AFF. 8 (2011).

[253] GEORG KERSCHISCHNIG, CYBERTHREATS AND INTERNATIONAL LAW 67-71 (2012).

[254] Compromis, ¶39.

[255] Compromis, ¶22.

[256] *Nicaragua*, ¶195; *Wall Case*, ¶139; *DRC/Uganda*, ¶¶146-47 (noting a possible exception for "large-scale attacks").

[257] IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 244-45 (1963); TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE U.N. CHARTER 485, 486-87 (2010); Antonio Cassese, *The International Community's 'Legal' Response to Terrorism*, 38 INT'L & COMP. L.Q. 589, 597 (1989).

[258] *See, e.g.*, Ashley Deeks, *"Unwilling or Unable:" Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483 (2012).

here. Following the arson attacks, President Hale announced a police investigation and emphasized that Amestonia would "not tolerate such provocations;"[259] Amestonian police later apprehended would-be attackers before they could cause any harm;[260] finally, no attacks have occurred in Amestonia or Riesland since the release of the Frost Files.

b. Riesland was not the victim of an armed attack.

An armed attack, distinct from "less grave" uses of force,[261] requires "infliction of substantial destruction upon important elements of the target State."[262] If non-State actors *can* commit armed attacks, a higher threshold for what constitutes an "armed attack" applies to them[263]—which does not include extraterritorial terrorist attacks against a State's nationals.[264] Arson committed on Amestonian soil, even if two Rieslandic nationals died from smoke inhalation, does not satisfy even the most expansive definition of an armed attack. Preventive self-defense is not recognized in international law, including against terrorist attacks.[265]

2. **The attacks were not valid countermeasures.**

Countermeasures that violate fundamental human rights obligations[266] and involve the use or threat of force[267] are unlawful.[268] Countermeasures must be necessary "to safeguard an

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[259] Compromis, ¶15.

[260] Compromis, ¶19.

[261] *Nicaragua*, ¶191.

[262] AVRA CONSTANTINOU, THE RIGHT OF SELF-DEFENCE UNDER CUSTOMARY INTERNATIONAL LAW AND ARTICLE 51 OF THE U.N. CHARTER 64 (2000).

[263] Leiden Policy Recommendations on Counter-Terrorism and International Law in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER (2013), Annex, ¶39.

[264] Ratner, 17; Ruys, 175.

[265] YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 208 (2005).

[266] *See supra* §IV.B.3.

essential interest against a grave and imminent peril"[269] and proportionate—including quantitatively equivalent[270]—in response to an internationally wrongful act. Amestonia's seizures of VoR personnel and property were lawful.[271] In any event, Riesland's rights under the Broadcasting Treaty are not an essential interest and could have been asserted without recourse to unilateral action. Finally, Amestonia seized property worth only €20 million that has not yet been sold;[272] by contrast, the Amestonian targets suffered €45-50 million in irreversible losses.

E. Amestonia is entitled to compensation for the attacks.

States are entitled to compensation for breaches of international law resulting in harm to property.[273] Amestonia is entitled to €45-50 million for the harm caused to the two Amestonian companies.[274]

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[267] *See supra* §IV.B.1.

[268] ARSIWA, Art.50(1)(a-b).

[269] ARSIWA, Art.25(1)(a); Thomas Franck, *On Proportionality of Countermeasures in International Law*, 102 AJIL 715, 741 (2008).

[270] Enzo Cannizzaro, *The Role of Proportionality in the Law of International Countermeasures*, 2001 EJIL 889, 906-07.

[271] See *supra* §II.

[272] Compromis, ¶40.

[273] *Corfu Channel*, 23.

[274] Compromis, ¶38.

PRAYER FOR RELIEF

The State of Amestonia respectfully requests this Court to declare:

I.

The *Ames Post* documents are admissible, Riesland's electronic surveillance programs violate international law, and Amestonia is entitled to their cessation and non-repetition; and

II.

Amestonia's VoR seizures and arrests were lawful; and

III.

Riesland's detention of Kafker violated international law, and Amestonia is entitled to his release, disclosure of relevant documents, and compensation; and

IV.

The cyber-attacks against Amestonian targets are attributable to Riesland and constitute a wrongful act for which Amestonia is entitled to compensation.

Respectfully submitted,

Agents of the Government of the State of Amestonia