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EDITOR'S NOTE

The *ILSA Journal of International & Comparative Law* publishes three issues every year. The Fall issue is typically a compilation of articles concerning emerging topics in international law. In the first issue published this year, Volume 23 Issue 1, calls for the promotion and development of international law in varying global challenges.

This Issue begins with "Post-Brexit: A Continuum for State Sovereignty" authored by Morad Eghbal and Dr. K.C. O'Rourke. The vote for the United Kingdom (U.K.) to leave the European Union (E.U.) reflected a deep sense of national sovereignty and pride, and a public suspicion of the costs of a E.U. partnership. In 2016, British citizens voted to exit the E.U. This has impacted global markets, including the British pound. In this piece, Eghbal and Dr. O'Rourke propose a typology that reflects a transition as the U.K. confronts its role as a sovereign State in the twenty-first century.

Student author, Christina Strompf, discusses the origins of organized crime and its impact on the global economy in the second piece—"Guilty Until Proven Innocent: A Comparative Analysis of Organized Crime Laws in the United States, Italy, Japan, and Ecuador". Ms. Strompf examines each country's laws to combat organized crime while noting the differences in the legislation, and makes an intriguing suggestion that could benefit each nation and its citizens' wellbeing.

"The Correlation Between Wiretapping and Terrorism: A Comparative Analysis of American and European Societal Views on Government Surveillance" authored by fellow student Lora Plemondon comments on wiretapping techniques and popularity as a result of terrorism prevention in the United States, Russia, Italy, and France.

Next, Professor Yuri Mantilla, urges for action to stop terrorist organizations like ISIS from further committing any more crimes against humanity. "ISIS Crimes Against Humanity and the Assyrian People: Religious Totalitarianism and the Protection of Fundamental Human Rights," is a powerful call to the global community to become involved and contribute in preventing and punishing these acts of horror against the human people.

International law is as necessary in domestic courts as it is in international courts. Author—Emeralda Colombo, stresses the need for international law in adjudicating environmental concerns affecting the Alaskan people of the Kivalina island in her award winning piece "Enforcing International Law in U.S. Courts: The Law of the Sea Convention at Play in Kivalina."

On behalf of the *Journal* I want to thank the authors for providing us with such great material, our Junior Staff and Senior Staff's work, the Editorial Board for its diligence, Professor Donoho for his great supervision,

and Marissa Doctrove for all her help and guidance through every obstacle we encountered.

Finally, I want to thank the 2016–2017 Executive Board for its hard work and commitment to the *Journal*. I am lucky to have worked with such intelligent and dedicated individuals. To my dear friends, my two sisters and my parents, thank you for your patience and support, I love you all very much.

Paola Palma
Editor-in-Chief 2016-2017

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POST-BREXIT: A CONTINUUM FOR STATE SOVEREIGNTY U.K.'S CHALLENGE TO BALANCE LEGITIMACY, CAPITAL DEVELOPMENT AND HUMAN NEEDS

Morad Eghbal[*] *and K.C. O'Rourke*[**]

I. INTRODUCTION

Both sides of the Brexit campaign were very nationalist in their outlook suggesting that profitable preservation of a capitalist economy was paramount based on a conservative sense of nationalism and sovereignty.[1]

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* Morad Eghbal, is a principal researcher at The Riess Institute and consultant in private praxis. In his previous academic career he served as Deputy Director of the Center for International and Comparative Law at the University of Baltimore and also as the inaugural director of the law school's graduate law program, the L.L.M. in the Law of the United States (L.L.M.-LOTUS); taught legal, ethical and historical studies, international management, organizational behavior, and principles of marketing, and international business transactions, international finance, comparative and comparative constitutional law at several universities and Trial Advocacy at Howard University School of Law. He holds BA and MA degrees from George Washington University, a Juris Doctorate from Howard University, an LL.M. in Transnational Business Practice from McGeorge School of Law and a number of graduate certificates from Inns of Court School of Law (U.K.), Paris-Lodron University in Salzburg (Austria) and Eotvos Lorand University in Budapest (Hungary).

** Dr. K.C. O'Rourke**,** JD, M. Div., LL.M.; holds a Doctorate of Juridical Science [SJD; The Crossroads of Globalization and Rule of Law] with dual Masters of Law [LL.M.; International Law and Business; Government Law & Regulation] from Washington College of Law, American University, Washington, DC., USA; O'Rourke has taught as adjunct faculty at Washington College of Law; holds a Juris Doctorate from Drake University Law School; and serves in the core executive leadership circle at The Bridging Institute in Maryland; Interdisciplinary comments are welcome and encouraged at e-mail: GeoNOMOS777@gmail.com.

1. John Browne, *U.K.'s Minister Commits to Successful Brexit,* TOWNHALL FINANCE (Aug. 5, 2016, 12:01 AM), http://finance.townhall.com/columnists/johnbrowne/2016/08/05/U.K.s-prime-minister-commits-to-successful-brexit-n2201876; *see also* Danica Kirka, *U.K. Central Bank Tries to Soften Brexit Shock on Economy,* AP: THE BIG STORY (Aug. 4, 2016, 1:24 PM), http://bigstory.ap.org/article/1f1f6bc759e945f0b366f5c7e4b74cdc/U.K.-central-bank-help-economy-through-brexit-stimulus.

> While cheaper money will help households and companies, the cost of loans is already very low and is not their primary concern right now, economists say. Businesses in particular are worried about whether to make investments or hire in

The ongoing debates concerning the United Kingdom's (U.K.) future relationship with the European Union (EU) continue amidst the rapid cabinet changes and the political rhetoric of newly appointed U.K. public officials.[2] The post-Brexit campaign analysis shows that both the Leave (Brexit) and Remain campaign relied on widespread publicly disseminated negative scare tactics rather than on positive arguments for solidarity or for sharing in support of each respective side on the actual issues. Both sides were rigidly nationalistic in their outlook, relentless in their agnosticism of the facts, and persistent in demonizing the opposition.

Analysis of voters' demographics and news-consuming habits offer potential clues as to why Brexit passed:[3] Those who supported Brexit were

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> Britain without knowing what the country's trade relationship with the EU will be.

Nives Dolsak & Aseem Prakash, *Here's What Many Journalists Missed When Covering the Brexit Vote*, WASH. POST (Aug. 4, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/04/heres-what-many-journalists-missed-when-covering-the-brexit-vote/ (Welfare states have policies that help free trade's losers. The political scientist John Ruggie called this system for cushioning blows from the international economic system "embedded liberalism" arguing that the interventionist domestic welfare state made possible today's liberal trade order. But these kind of policies are eroding. Winners aren't compensating losers. In fact, firms like Apple that have gained enormously from globalization are using complex financial arrangements to escape taxes. Wealthy individuals are doing the same. Economic inequality is increasing dramatically in a "winner-take-all" society. Mainstream media coverage that focuses on racism and xenophobia rather than economic loss and inequality may not be taking these shifts adequately into account. Larry Summers famously insisted in 2005 that financial markets cannot fail. Yet more recently he noted the Brexit vote should be a 'wake-up call for elites everywhere' on the need to 'design an approach, approaches to economic policy that hear the anger that's being expressed in this vote.'" The real issue in BREXIT was "what did the British average voter get, when and how from EU integration?").

2. *See United Kingdom,* NEW WORLD ENCYCLOPEDIA (last updated July 28, 2016) http://www.newworldencyclopedia.org/entry/United_Kingdom (explaining that the United Kingdom is constituted, or composed of four constituent governmental entities, England, Scotland, Wales and Northern Ireland which together make up the United Kingdom of Great Britain. With the Brexit vote now, this governance arrangement would continue as one nation State or if the arrangement would be discontinued for the U.K., internally as several sovereigns. This article presupposes this arrangement will continue. If it were discontinued, then it must be presumed that the United Kingdom would, as a unit of governance, have to dissolve into these constituent governmental entities which then, in turn, would either become independent nation-states in their own right and elect to join the EU, or else reconfigure a different and perhaps new arrangement with "Mother Britannia.").

3. Will Youmans, *The Brexit Vote and the Crisis of Sovereignty*, GULF NEWS (June 25, 2016, 5:19 PM), http://gulfnews.com/opinion/thinkers/the-brexit-vote-and-the-crisis-of-sovereignty-1.1852328

> (Brexit is a sort of martyrdom in the name of a restored state sovereignty. This is of course a matter of perception. How much sovereignty did Great Britain actually sacrifice? Euro-sceptics trotted out a litany of grievances, often to mock the over-specificity of EU regulations. It would be hard to accept that the U.K.'s fate was actually much worse or unable to navigate the global economy as a result of its belonging. Those mystified by the vote show contempt for the Brexit

older and as a general observation, less educated formally. Brexit voters tended to earn less money and where significant numbers appeared to work in non-skilled trades, many lacked formal job qualifications. In other words, these voters were not able to compete in a global economy that had "trickled down into" the U.K. over the last forty years.[4] According to some reports, these voters appeared to be reluctant to adapt to rapid social changes that integration into the global economy often requires as domestic markets shift rapidly.[5] Domestic labor markets and work opportunities

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decision. Some deride it as a demonstration of one of the major shortcomings of democracy, namely when uninformed electorates make crucial decisions which affect those to be governed. Referenda are among the most democratic means of direct, collective decision-making. There are rightful concerns that public deliberation beforehand was confused, media coverage was agnostic to facts, and mistrust of expertise was absent. Either way, Brexit produced a confused desire by the majority of Brits for fortifying state sovereignty. It will not fix the underlying problems of economic stratification, withered public safety nets and a national pride injured by its lost investments in imperialism and colonization. The State model in general has failed to address the increasingly transnational problems of the world today, including a growing global economic inequality, mass migration, climate change and the whimsical destruction wrought by the transnational finance networks. It is easy to pin these on the institutions like the EU, but many border-defying problems are the direct result of past State actions—the same powers of national sovereignty Brexit supporters seek to bolster.").

4. *Id.*

(the neoliberal premise of free trade bringing about wealth creation for all did not manifest. Ordinary working people are left to feel they paid the cost of U.K. national honor—of which the State is the protector—for questionable, partial, material benefits, which were disproportionately distributed to those who were already well-off. The riches of Brussels went to those who profit the most from trade, banking, finance and so on. Social and economic stratification has such reproductive tendencies, and only further cement resentment. The rising sense of national pride, one ridden by angst about the state of the changing world, might appear irrational. But it betrays the underlying reason. An observer might miss it if they value the outcome in economic terms and political outcomes alone).

5. S.A. Ramirez, *Taking Economic Rights Seriously After the Debt Crisis*, 42 LOY. U. CHI. L. REV. 713 (2011); *see generally* DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY (W.W. Norton & Co., Inc. 2011); MURRAY MILGATE & SHANNON C. STIMSON, AFTER ADAM SMITH: A CENTURY OF TRANSFORMATION IN POLITICS AND POLITICAL IDEOLOGY (Princeton Univ. Press 2009); PAUL KRUGMAN, TRADE AND WAGES RECONSIDERED (Princeton Univ. Press 2008); PHILLIP MCMICHAELS, DEVELOPMENT AND SOCIAL CHANGE (Sage Pub. 2008); PETER NOLAN, CAPITALISM AND FREEDOM: THE CONTRADICTORY CHARACTER OF GLOBALIZATION (Anthem Press 2008); INO ROSSI, FRONTIERS OF GLOBALIZATION RESEARCH: THEORETICAL AND METHODOLOGICAL APPROACHES (Springer Pub. 2008); RAWI ABDELAL, CAPITAL RULES: THE CONSTRUCTION OF GLOBAL FINANCE (Harvard Univ. Press 2009); RONALD FINDLAY & KEVIN O'ROURKE, POWER AND PLENTY: TRADE, WAR AND THE WORLD ECONOMY IN THE SECOND MILLENNIUM (Princeton Univ. Press 2009); BARRY K. GILLS & W. R. THOMPSON, GLOBALIZATION

change because of decisions made in corporate boardrooms rather than by national legislatures and in parliament through a democratic and public debate process. Brexit voters had concluded they were being left behind by both the economic pressures and the social ramifications (e.g., immigration mandates) of U.K.'s European Union membership.[6] Adding up these interconnected demographics, it is not difficult to understand that Brexit reflected a larger, more deep-seated citizen angst about the fragile state and legitimacy of U.K. sovereignty.

The public perceptions that influenced the urban Brexit voting patterns carried with it some immediate and interesting mandates, not the least of which will be substantive in terms of addressing U.K. security followed shortly thereafter by significant internal planning and parliamentary review of the U.K.'s sovereign obligations that accompany its global contractual partnerships, Common Market participation, international trade agreements, and international treaties on human rights.[7] Transition in how exactly the

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AND GLOBAL HISTORY (Routledge 2006); JOHN BOGLE, THE BATTLE FOR THE SOUL OF CAPITALISM (Yale Univ. Press 2005); CHAMSY EL-OJEILE & PATRICK HAYDEN, NEW CRITICAL THEORIES OF GLOBALIZATION (Palgrave MaCmillian 2006); JAN AART SCHOLTE, GLOBALIZATION: A CRITICAL INTRODUCTION (PALGRAVE MACMILLIAN 2005); JURGEN OSTERHAMMEL & NIELS PETERSSON, GLOBALIZATION: A SHORT HISTORY (DONA GEYER, TRANS.) (Princeton Univ. Press 2009); RICHARD H. ROBBINS, GLOBAL PROBLEMS AND THE CULTURE OF CAPITALISM (Pearson 3d ed. 2005); ROBBIE ROBERTSON, THE THREE WAVES OF GLOBALIZATION: A HISTORY OF DEVELOPING GLOBAL CONSCIOUSNESS (Zed Books 2002); BARRY SMART, ECONOMY, CULTURE, AND SOCIETY: A SOCIOLOGICAL CRITIQUE OF NEO-LIBERALISM (Open Univ. Press 2003); JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (Norton 2003); PETER A. HALL & DAVID W. SOSKICE, VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF CAPITALISM (Oxford Univ. Press 2001); MARTIN KOHR, RE-THINKING GLOBALIZATION: CRITICAL ISSUES AND POLICY CHOICES (Zed Books 2001); MOHAMMED A. BAMYEH, THE ENDS OF GLOBALIZATION (Univ. of Minnesota Press 2000); DEAN BAKER, GERALD EPSTEIN, & ROBERT POLLINS, GLOBALIZATION AND PROGRESSIVE ECONOMIC CHANGE (Cambridge Univ. Press 1998); CHRISTOPHER CHASE-DUNN, GLOBAL FORMATION: STRUCTURE OF THE WORLD ECONOMY (Rowman & Littlefield Pub. 1998); JOHN M. KEYNES, GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (Create Space Indep. Pub. Platform 2011).

6. Youmans, *supra* note 3.
(sovereignty is the passionate almost personal concern of nationalists, patriots and ordinary citizens everywhere. The notoriously irresponsible British tabloids agitated for such sentiments over the past four decades. Sovereignty, as the highest political authority, was a key word in the Brexit debate, especially for those calling for Leave votes. This is odd. What does national sovereignty mean for average people who have no command of the state's instruments and are not of an economic class to determine how the state works? This presumes a rational basis).

7. *Id.*
(the bargain underpinning the EU is that compromises in national sovereignty through accession to regulatory compliance will bring economic and social benefits. Creating a common economic market that could rival the American economy would be a boost to lift all boats. Yet while greater access to markets

U.K. plans to meet these global mandates will simultaneously raise considerable *domestic pressure* by U.K. citizens for more elected official transparency as the State reviews how it proposes to integrate its available *capital resources* (both public and private) once the U.K. begins to function outside its EU partnership.[8]

After almost a half-century of being part of a different vision, the U.K. now plunges into a new period of political transition, uncertainty, and public contestation. But now, the necessity of securing legitimacy with its own citizens, U.K. lawmakers and public officials are confronted with somehow redefining the operation of U.K.'s sovereignty while they simultaneously negotiate an amicable EU separation and divorce settlement under Article 50.[9] The operative mandates for this "re-legitimization"

> and labor migration accelerated within the EU, public austerity measures produced cutbacks in domestic-level social programs, education and health. These public austerity measures are now at the forefront of domestic political review. For many working people, the benefits of EU membership did not appear to outweigh the stagnation in quality of life they experienced, combined with the loss of security).

8. Steven Swinford, *Theresa May Pledges to Fight Injustice and Make Britain 'A Country That Works For Everyone' In Her First Speech as Prime Minister*, THE TELEGRAPH (July 13, 2016, 8:53 PM), http://www.telegraph.co.U.K./news/2016/07/13/theresa-mays-pledges-to-fight-injustice-and-make-britain-a-count/.

> (BREXIT supporters continually cited a number of reasons for leaving the EU including independence and injuries to British national pride that Brussels routinely imposed on the U.K. so much so that this over-regulation from outside the borders of Great Britain appeared to prioritize foreign corporate interests while forcing Britain to take particular refugees, especially from Syria and Eastern Europe, that created a general fear about cultural and religious disharmony).

(note that these essential capital resources are currently available to the U.K. as its rights and benefits of EU membership but will need to be analyzed and carefully discussed precisely because the public spectrum of Brexit citizen political demands are significant and dominantly focused on creating measurable and concrete *domestic-based solutions* that address access to education, employment and healthcare).

9. *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-European-union-and-comments/title-6-final-provisions/137-article-50.html [hereinafter Treaty of Lisbon] (noting that any Member State may decide to withdraw from the Union (EU) in accordance with its own constitutional requirements so long as the Member State notifies the European Council of its intention. This notice triggers a set of guidelines from the European Council to negotiate an agreement with that State for arrangements of the withdrawal and is to also take into account the framework for the future relationships of that State with the EU. The final agreement must have majority approval of the European Council members and the consent of the European Parliament. The Treaties between the parties cease from the date of entry of the negotiated agreement (Article 218(3) or failing an agreement, two years after Article 50 notification is given by the State, unless the European Council unanimously decides to extend this time period.); *see*

process is reflected in the Brexit vote by U.K. citizens who somehow felt that British sovereignty was manipulated, bruised, or perhaps even surrendered unnecessarily.

A brief glimpse into the political enormity of this transition for the U.K. appeared in the early statements by the new Prime Minister Theresa May. May essentially provided reassurances that she would heal the nation's divisions and build bridges to help the least privileged. She publicly stated that her government would deliver Brexit and refocus its priorities on people whose needs were greatest: "[w]hen we make the big calls we will think not of the powerful but you," she said. "When we pass new laws, we will listen not to the mighty but to you. When it comes to taxes, we will prioritize not the wealthy but you. When it comes to opportunity, we won't entrench the advantages of the fortunate few—we will do everything we can to help anybody, whatever your background, to go as far as your talents will take you."[10] Obviously, with the Brexit vote

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also Nick Barber, ET AL., *Pulling the Article 50 'Trigger': Parliament's Indispensable Role*, U.K. CONSTITUTIONAL LAW ASSOC. (June 27, 2016), https://U.K.constitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/
(arguing that the Prime Minister alone is unable to trigger withdrawal from the EU under TEU; Prime Minister must be authorized to do so by statute in order that the declaration is legally effective under domestic law and complies with the preconditions of triggering Article 50); Miranda Butler, *The Implications of Brexit: Who Is Sovereign Now?*, SOLICITORS JOURNAL (July 26, 2016), http://www.3harecourt.com/assets/asset-store/file//MBBrexitSJ.pdf (discussing what Brexit vote entails for U.K. parliamentary sovereignty and for U.K. influence in international issues; considers whether U.K. constitutional law requires not only government's use of 'crown prerogative' but also a parliamentary vote in favor of leaving EU; looks like increased participation of Scotland and Northern Ireland in U.K. decision making and future of U.K. as sovereign State in international law; citing case *R. v Secretary for the Home Department EX.P Fire Brigades Union* [1995] 2 A.C.513, Independent [April 6, 1995]).

10. Toby Helm, *Theresa May's First Pledge as PM Was for A "One-Nation Britain." Can She Deliver?*, THE GUARDIAN (July 16, 2016, 6:45 PM), http://www.theguardian.com/politics/2016/jul/16/theresa-may-one-nation-britain-prime-minister (suggesting that the core problem is that, as yet, no one in it (new British cabinet) knows what Brexit means, and what it will entail. May's cabinet is split between the likes of Hammond, who insists that whatever happens the U.K. must retain as much access to the single market as possible, and others, such as Davis and Johnson, who seem to believe the U.K. can thrive outside the single market if it has to, and this is the price the country has to pay to extricate itself from the EU's commitment to free movement of labor in order to control immigration); *see* Swinford, *supra* note 8 (noting that Theresa May has directly addressed working-class Britons who are "just managing" to cope with life as she vowed that her Government will not "entrench the advantages of the privileged few." In a searing speech outside Downing Street May pledged to "fight against the burning injustices" of poverty, race, class and health and give people back "control" of their lives; she vowed to "prioritise" tax cuts and legislation for working-class voters rather than the "mighty"; her speech, setting out her vision as a "One Nation conservative", marked a clear attempt to distance herself from David Cameron's premiership and appeal directly to disenchanted Labour voters. She said that for an "ordinary working class family" life is "much harder than many people in Westminster realise" as she sought to heal the national divide after the EU referendum. Her speech highlighted her clear intention to

behind her government, Theresa May will be in a unique position to foster a more structured plan that intentionally re-defines the role and function of State government within its overall domestic operation.[11]

Her early comments suggest there will be a quasi-public debate that takes a long view and will be framed by widespread domestic program development. May speaks of marshalling various capital resources and domestic programs around economic marketplace issues, social safety networks, labor issues, job creations, and individual capability development as the country strives to fight against burning social injustices. The balance espoused by Ms. May points to a much more deliberate approach in the State's development and utilization of economic capital,[12] social capital,[13]

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reach out to Labour voters who feel alienated by Jeremy Corbyn in a move which could put the Tories in power for a decade. After arriving in Downing Street, May said that her "mission" as Prime Minister will be to make Britain "a country that works for everyone." She also vowed to "forge a bold new positive role" for Britain outside the European Union).

11. *See* Karen A. Cecilia O'Rourke, The Crossroads of Globalization, Human Rights, and Rule of Law: Creating A Legal Culture of Human Rights Designing A Geonomos Model for the State (2012) (unpublished S.J.D. dissertation, Washing College of Law, American University) (on file with the American University Library system) (the irony of Brexit as a historical event, is that contrary to public anecdotal comments that Theresa May is a "new Thatcher", Prime Minister May is thankfully not Margaret Thatcher, and hopefully does not feel compelled to bear the Thatcher political standard. Recall that it was Margaret Thatcher (U.K.) and Ronald Reagan (U.S.A.) who created, embraced and implemented the neoliberal paradigm [c.1980-2010] for global capitalism [better known as "trickle-down economics" or The Washington Consensus] which has proven to be disastrous to State sovereignty, domestic program funding, and State oversight of the private sector capital movement both in domestic markets and in the global economy).

12. *See* Glyn Holton, *Economic Capital*, GLYN HOLTON (Aug. 11, 2016), https://www.glynholton.com/notes/economic_capital/. (economic capital is the quantum of risk capital, assessed on a real basis, which an enterprise requires to cover the risks that it is running or collecting as a going concern, such as market risk, credit risk, legal risk, and operational risk) (it is the amount of money which is needed to secure survival in a worst-case scenario. Firms and financial services regulators, i.e., representing the nation-state should then aim to hold risk capital of an amount equal at least to economic capital. Typically, economic capital can be calculated by determining the amount of capital that a firm needs to ensure that its realistic balance sheet stays solvent over a certain time period with a pre-specified probability. Therefore, economic capital is often calculated as value at risk. The balance sheet, in this case, would be prepared showing market value (rather than book value) of assets and liabilities and thus economic capital is distinguished in relation to other types of capital which may not necessarily reflect a monetary or exchange-value. These forms of capital include natural capital, cultural capital and social capital, the latter two represent a type of power or status that an individual can attain in capitalist society via a formal education or through social ties. O'Rourke, *supra* note 11, at 278–79).

13. *See* Paul S. Adler et al., *Social Capital: Prospects for a New Concept*, 27 THE ACAD. OF MGMT. REV., 17–40 (2002), http://www.csee.wvu.edu/~xinl/library/papers/social/social_capital.pdf (the term Social Capital generally refers to (a) resources, and the value of these resources, both tangible (public spaces, private property) and intangible ("actors," "human capital," persons and people) but is in the GeoNOMOS© to be distinguished from human capital, (b) the relationships among these resources,

and human capital[14]—three essential resources that every nation State including the U.K. already possesses. The post-Brexit appeal made by May seeks to shape a different foundation for the twenty-first century U.K. as she speaks about a social contract between government and those it seeks to govern that represents a more flexible *continuum for State sovereignty*—one that secures public decision-making, individual liberty, citizen opportunity and economic stability. Every one of these espoused efforts moves the public debate for defining the operative scope of British sovereignty on to a twenty-first century continuum—a continuum that is more relational in the domestic sector and more actively functional in the international sector. It is an effort that strives to meet the modern demands of the nation State without a retrenchment to an older view of an absolute sovereign autonomy of the Westphalian model of the nation State that prevailed before and after World War II. As a recognized global leader, the U.K. is in an unusual position in the next few years to design this new

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and (c) the impact that these relationships have on the resources involved in each relationship, and on larger groups. The focus of social capital is generally as a form of capital that produces public goods for a common good); *see also* P. BOURDIEAU, OUTLINE OF A THEORY OF PRAC. (Cambridge University Press, 1972); L.J. Hanifan, *The Rural School Community Center*, 67 ANNALS OF THE AM. ACAD. OF POL. AND SOCIAL SCIENCE 130–138 (Sage Publications, Inc., 1916); L.J. HANIFAN, THE COMMUNITY CENTER (Boston: Silver Burdett & Company, 1920); JANE JACOBS, THE DEATH AND LIFE OF GREAT AM. CITIES 138 (Random House Inc.,1961) (stating that "If self-government in the place is to work, underlying any float of population must be a continuity of people who have forged neighborhood networks. These networks are a city's irreplaceable social capital. Whenever the capital is lost, from whatever cause, the income from it disappears, never to return until and unless new capital is slowly and chancily accumulated."); James Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. OF SOCIOLOGY SUPPLEMENT S95–S120 (1988), http://courseweb.ischool.illinois.edu/~katewill/for-china/readings/coleman 1988 social capital.pdf; Barry Wellman & Scott Worley, *Different Strokes from Different Folks: Community Ties and Social Support*, 96 AM. J. OF SOCIOLOGY 558–88 (1990), http://www.bebr.ufl.edu/sites/default/files/Wellman%20and%20Wortley%20-%201990%20-%20Different%20Strokes%20from%20Different%20Folks%20Community%20.pdf; Samuel Bowles & Herbert Gintis, Social Capital and Community Governance, 112 THE ECON. J. 419–36, http://tuvalu.santafe.edu/~bowles/SocialCapital.pdf.

14. *See* Michael Spence, *Job Market Signaling*, 87(3) Q. J. OF ECON. 355–74 (1973), http://www.econ.yale.edu/~dirkb/teach/pdf/spence/1973%20job%20market%20signalling.pdf (human capital is a term popularized by Gary Becker, an economist from the University of Chicago, and Jacob Mincer that refers to the stock of knowledge, habits, social and personality attributes, including creativity, embodied in the ability to perform labor so as to produce economic value. In the alternative, human capital is understood as a collection of resources—all the knowledge, talents, skills, abilities, experience, intelligence, training, judgment, and wisdom possessed individually and collectively by individuals in a particular and defined population. Such resources are the total capacity of the people that represents a form of wealth which can be directed to accomplish the goals of the nation or state or a portion thereof); *see also* Michael Spence, *Signaling in retrospect and the Information Structure of Markets*, 92 AM. ECON. REV. 434–59 (2002), http://classes.maxwell.syr.edu/ecn611/spencenobel.pdf; Gary Becker, *Human Capital*, THE CONCISE ENCYCLOPEDIA OF ECON. (Sept. 29, 2016), http://www.econlib.org/library/Enc/HumanCapital.html.

continuum of sovereignty and to model its operation both domestically for its citizens and internationally with a more effective set of economic organizing principles that balance the ongoing global expansion of capitalism.

II. WHY A NEW TYPOLOGY FOR STATE SOVEREIGNTY?

The world in relation to the operation of sovereign States has changed dramatically in the last half of the twentieth century as demonstrated by the end of traditional colonialism—*de jure*, if not also *de facto*—and the sheer number of newly emerging nation States claiming and being accorded sovereignty.[15] Traditional notions of sovereignty established by the Treaty of Westphalia (1648)[16] are simply no longer fully applicable or realistic as the State legitimizes its function in the twenty-first century. States, including the U.K., have *voluntarily agreed* to cooperate in the interests of global capitalism, human rights, and world peace across a variety of global partnerships by signing charters, private and public sector investment contracts, and a wide variety of public treaty agreements.[17] As a result, a recognizable and functional international "community of States" has been established and the U.K. is fundamentally a part of that community in addition to its membership in the EU regional configuration of States; a community which it cannot "leave," no matter what, but a community which it may be able to influence and re-shape more productively and going forward in time through more active and engaged participation.

Furthermore, as global economic organizing principles have also changed over time, the ongoing function of State sovereignty was altered even into the early twenty-first century.[18] As part of this dynamic process, dominant States such as the U.K., continued to give up parts of the traditional scope of State sovereignty in exchange for what was perceived as the ongoing mutual benefits of these economic market partnerships in both the public and private international arena.[19]

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15. *See generally* O'Rourke, *supra* note 11.

16. *See Treaty of Westphalia*, YALE L. SCH. (Aug. 15, 2016), http://avalon.law.yale.edu/17th_century/westphal.asp (the Treaty of Westphalia originally was signed in 1648 to stop the religious wars of the seventeenth century by securing a domestic jurisdiction and a defined geographic boundary for emerging nations, thus offering protection for nation States); O'Rourke, *supra* note 12, at 236; Aloun A. Preece, *The Rise and Fall of National Sovereignty*, 8 INT'L TRADE AND BUSINESS L. REV. 229 (2003),http://www.austlii.edu.au/au/journals/IntTBLawRw/2003/9.html.

17. *See* O'Rourke, *supra* note 11, at 9, 11.

18. *See generally* O'Rourke, *supra* note 11, at 2.

19. *See Understanding the WTO Basics*, WORLD TRADE ORG. (Sept. 29, 2016), https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (the basis of a "common law of humanity" emerged after the end of the Cold War in the 1980s followed the emergence of independent

The idea that how sovereign States conduct themselves is a dynamic phenomenon in constant flux requires a parallel consideration that there will be another set of transitions required in this century as the defined role, legitimacy, responsibility and operational function of a sovereign State continues to change. The changing global realities of the last forty years point to the evolution of a *continuum of State sovereignty* for this century, one that coordinates cooperation both in addressing the legitimacy of its citizen's concerns and in designing a new global market paradigm.

As nation States entered the early twenty-first century, two predominant debates ensued. The first debate included a cadre of global politicians and world order scholars arguing that the dominance of international organizations and their scope of authority meant the nation State was "dead." World governance would soon become inevitable in a cosmopolitan sense of global political and legal evolution.[20] Traditional notions about State sovereignty would simply merge into a world governance model. Others suggested that State was not dead but would remain a viable architect of world order well into the twenty-first century.[21] The second debate presented new typologies for State sovereignty suggesting an evolution in the expression of State sovereignty was emerging. This second debate relied on State collaboration and interdependence that would require a more interactive and relational definition of how States expressed their sovereignty. New functional

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States in Eastern Europe who were active in the United Nations and demanded equity and fair access into the global marketplace and international finance as well. The World Trade Organization was created in 1995 as an evolution of the multilateral General Agreement on Tariff and Trade of 1948. These global trading contractual agreements between States coupled with many regional trade agreements in the late twentieth century continued to erode the Westphalian notion of an absolute form and unilateral expression of State sovereignty. However, while cooperative behavior increased between sovereign States and seemingly eroded the authoritarian and more traditional Westphalian model of sovereignty, the endorsement of equality among sovereign States is also foundational to the United Nations Charter and other global institutions such as the International Monetary Fund, the World Bank, and the World Trade Organization); *see* O'Rourke, *supra* note 11, at 82, 237.

20. *See* MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (Harvard University Press, 2000); *see also* Peter Hay, Supranational Organizations and United States Contract Law, 6 VA. J. INT'L L. 195 (1996); Patrick Tangrey, *The New Internationalism: The Cessation of Sovereign Competency to Super-national Organizations and Constitution Changes in U.S. and Germany*, 21 YALE J. INT'L L. 395 (1996); HAROLD JONES, INT'L MONETARY COOPERATION SINCE BRETTON WOODS (2000) (explaining how IMF as one international organization has loan terms requiring a country engage in trade liberalization under neoliberal paradigm as well as in various domestic budget and credit restraints); JEREMY RABKIN, LAW WITHOUT NATIONS?: WHY CONS. GOV'T REQUIRES SOVEREIGN STATES (Princeton University Press, 2005).

21. *See* O'Rourke, *supra* note 11, at 343, 410–11.

typologies for the State could no longer simply be based on a traditional Westphalian authoritarian exercise of unilateral power.[22]

In the last decades of the twentieth century, numerous recommendations for a new sovereign State typology were presented. Jack Donnelly proposed a new typology (a four sectioned rectangular box) that balanced State authority and State capabilities with sovereign rule and the State's scope of domination as it intersected effective components of formal sovereignty and material/normative weaknesses.[23] Francis Deng and Helen Stacey suggested two different typology arrangements for *sovereignty as responsibility*[24] and *relational sovereignty*.[25] Deng's typology analyzed a range of both internal and external State factors and then, correlated these factors with a new international standard of *responsible sovereignty as an irreversible process*.[26] Helen Stacey suggested that a new typology of *relational sovereignty* was emerging where the sovereign would be judged by how well and by what means the State concretely and continuously "cares" for its people.[27] A fourth typology by Julian Ku and John Yoo discussed a *popular sovereignty* based on the idea that people in a sovereign State govern themselves through Constitutional structures and institutions.[28]

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22. GIANLUIGI PALOMBELLA & N. WALKER, RELOCATING THE RULE OF L. (Hart, 2009); *see* Rebecca Bratspies, *Perspectives on the New Regulatory Era,* 51 ARIZ. L. REV. 575 (2009); *see also* Eric Engles, *Transformation of the International Legal Order,* 23 QUINNIPIAC L. REV. 23 (2007); James Rosenau, *Three Steps Toward a Viable Theory for Globalization, in* FRONTIERS OF GLOBALIZATION RESEARCH: THEORETICAL AND METHODOLOGICAL APPROACHES 307–15 (Inno Rossi ed., 2007); Elke Krahmann, *National Regional and Global Governance: One Phenomenon or Many?*, 9 GLOBAL GOVERNANCE 323 (2003), https://stackofideas.files.wordpress.com/2013/04/national-regional-and-global-governance-one-phenomenon-or-many-elke-krahmann.pdf; Brad Roth, *The Enduring Significance of State Sovereignty*, 56 FLA. L. REV. 1017 (2004); Paul Kahn, *The Question of Sovereignty*, 40 STAN J. INT'L L. 259, 260–68 (2004); PAUL KAHN, PUTTING LIBERALISM IN ITS PLACE (Princeton University Press 2005); Clair A. Cutler, *Critical Reflctions on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 REV. INT'L STUD. 133 (2001); MICHAEL FOWLER & JULIE BUNCK, LAW, POWER AND THE SOVEREIGN (Routledge 1995) (for historical notions of sovereignty); THOMAS HOBBES, LEVIATHAN: PARTS ONE AND TWO (Bobbs Merill Co., 18th ed. 1958); THOMAS HOBBES, LEVIATHAN (Penguin Books, 1st ed. 1968); JOHN LOCKE, SECOND TREATISE OF GOV'T (Prentice-Hall, 1st ed. 1953).

23. Jack Donnelly, State Sovereignty and Human Rights 3–4 (June 2004) (forthcoming paper prepared for working papers).

24. Francis Deng, *Frontiers of Sovereignty*, 8 LEIDEN J. INT'L L. 249 (1995).

25. Helen Stacey, Relational Sovereignty, 55 STANFORD L. REV. 210 (2009).

26. Deng, *supra* note 24, at 250–77.

27. Stacey, *supra* note 25, at 218–22.

28. Julian Ku & John Yoo, *Globalization and Sovereignty*, 31 BERKELEY J. INT'L L. 210, 211 (2013) (noting that sovereignty is in decline but the decline in national sovereignty is not desirable since State maintains decision-making and individual liberties. Suggesting a new form of popular sovereignty with shift away from Westphalian models to the right for people to govern themselves through

In this construct, the State can legitimately share sovereign power with its citizens without compromising the whole system.[29]

The typology presented in this article builds on concepts noted above and points to yet another evolution in how sovereign States function in this century. It is an interactive typology called a *continuum for sovereignty*, one that is based on a *framework of liberty* and ensures the State remains the primary architect of world order.[30] The GeoNOMOS© operates interactively on two levels as a State secures its legitimacy within a geographic boundary for the very people it is trying to govern and then, shapes the global market partnerships that it intentionally seeks to undertake. (See diagram below). This typology offers sovereign stability, operational flexibility and addresses the two primary functional components of any twenty-first century State, including the U.K.: (i) one component redefines how the sovereign State functions to create and sustain a civil society within its own *domestic sphere* (vertical axis) by addressing the specific needs of its populations who will live and work most of their lives within the geographic boundary of that State, and (ii) one component that seeks to redefine how the sovereign State functions and engages within its own *international sphere* (horizontal axis) by engaging with the public and private sector global marketplace and foreign investment sector, public sector international institutions, and an international community of States.[31]

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institutions of the Constitution and its structures. Popular sovereignty is flexible to maintain national sovereignty and assumes State can share sovereign power without giving up entire system; popular sovereignty can co-exist with globalization and governance issues in ways that the rigidity of Westphalian system could not. State turning automatically to international organizations inconsistent with reliance and continued power of nation States; by referring to structural provisions of Constitution, e.g, separation of powers, promotes state level democratic governance and incorporates the gains of international cooperation).

29. *Id.* at 218.

30. O'Rourke, *supra* note 11, at 212 (noting a continuum is referenced as the basis of this new typology for sovereignty because it represents a more flexible set of options given the range of possibilities in terms of how an individual State interacts with some sense of legitimacy on behalf of the people it is governing and interacts as a member of the international community of States; there is no limit to the possibilities offered as part of this proposal for a continuum of State sovereignty so long as it operates within a framework of liberty. See diagram and discussion detailed in this commentary. See definition of *continuum* at http://merriam-webster.com (last visited Oct. 15, 2016)).

31. *Id.* at 15 (stating without a doubt, the rapid and uncontrolled movement of private sector global capital and public sector capital and domestic finances in and out a State's legal boundaries also bear witness to these relational components of State sovereignty within the *international sphere* of the equation. The same flexibility of global movement never seemed to occur on the side of development or utilization of social and human capital. While economic capital was and remains highly mobile and unregulated, most human labor (human capital) is bound by State geographic boundaries and people's life circumstances and citizenship rights are dictated by those State boundaries. This is the *domestic re-balancing* that appears to be in demand as a result of Brexit vote in the U.K. and that is espoused by Theresa May's ideal of "one Nation conservative." There is an imbalance expressed and experienced by

Often the functional role and legitimacy of State sovereignty lies dormant until a conflict like Brexit emerges. Then the sovereign powers as well as State legitimacy or State authority arise, are challenged, and need to be redefined. As with the Brexit vote, these demands are now made not upon a set of elected individuals but upon the U.K. *in toto* and acting as a sovereign nation State. This legitimacy crisis cannot be ignored. In fact, given the charged atmosphere around the Brexit vote, there appears to be a growing sense of *citizen entitlement* just as the U.K. strives to determine the proper balance of sovereign accountability for building a different kind of civil society that May defines as "one Nation conservative" apart from the European Union. An expanded level of U.K. legitimacy will need to secure a new set of global market organizing principles that move beyond the neoliberal paradigm (c.1980–2010) notion of "trickle-down" global economics.

The typology for a *continuum of State sovereignty* presented here contributes to support this ongoing conversation concerning the post-Brexit dialogue and the U.K. secession process by suggesting the premise that the U.K. as a nation State must remain a primary architect in shaping not only its own civil society but also in modeling a new world order for this century. A civil society inspired by Prime Minister May will be more economically inclusive, one hopefully based on a new paradigm for global capitalism that does not leave large groups of U.K. citizens out of its intended benefits; one that supports a sense of equity in sharing tax burdens from all sectors within the State; and one that provides opportunity, access to education and advancement in jobs for all.[32]

Rodrik argues that the blind spot of the capitalist globalization process in the neoliberal era (c.1980–2010) consisted of deep and rapid integration

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the U.K. citizenry active in the Brexit campaign that the benefits of economic capital development have not *trickled down* to the social settings and human capital development in places where most U.K. citizens live every day).

32. *Id.* at 74–75 (this neoliberal paradigm (c.1980–2010) of global capitalism routinely required tremendous State reductions in domestic program development, public services, and public sector program funding as a calculated cost for continued access to global market development, foreign direct investment programs, and participation in world financial institutions that provide necessary access to public and private economic capital. Ms. May will be in a unique position to soften some of the past structural damage done domestically in the U.K. by this neoliberal paradigm (c.1980–2010) and has a citizen mandate to do so now as evidenced by the Brexit vote—by her own statements, May appears willing to address damages that have accumulated over time from the neoliberal economic paradigm of the 1980s, the benefits from which apparently have not "trickled down" to regular U.K citizens who in Brexit challenged State legitimacy and demanded broader State commitments to domestic concerns, programs, and citizen quality of life issues. The balance that needs to be struck between U.K.'s domestic program design and U.K.'s international obligations and global market participation is daunting but possible to address if the underlying basis of U.K. sovereignty can be re-configured prior to the completion of Article 50 negotiations on a transition agreement).

in the world economy coupled with the idea that the required institutional underpinnings could catch up later at the domestic level of the State.[33] With respect to how (in what manner) the U.K. might develop and utilize its considerable economic capital which is part of the proposed *continuum of State sovereignty*, Rodrik supports a basic principle that markets always require other social institutions (domestic level) to support legal arrangements and global market stabilizing functions so there can be fair redistribution, taxation, safety nets, and social insurance.[34] As the U.K. adjusts its legal arrangements and market functions in the post-Brexit period, careful review of several basic principles could be beneficial in several ways.

First, the singular neoliberal focus of the past era that relied on global market development to support concentrated economic growth and/or to secure private sector foreign direct investment inside the State should raise caution in the U.K. as well given the widespread documentation of the uneven implementation and results of the neoliberal paradigm (c.1980–2010) within the capitalist globalization process.[35] This issue is evidenced in the general dissatisfaction with notions of "trickle down" benefits to U.K. citizens that have not predictably or consistently occurred and is certainly one of the problems underlying the Brexit vote.

Second, Rodrik concludes a State has the right to protect its own institutions, social arrangements, and regulations so that *globalization becomes an instrument* for achieving the goals that a society seeks: prosperity, stability, freedom and quality of life.[36] It has been the uneven

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33. RODRIK, *supra* note 5, at 231–42, 245 (discussing a dominant role for the nation State in relation to the principles of democratic decision-making which is the foundation for the international economic architecture; noting that when States are not democratic this scaffolding collapses and one cannot presume a country's institutional arrangements reflect the preference of its citizens); *see generally* MILGATE, *supra* note 5.

34. RODRIK, *supra* note 5, at 240 (setting out a series of statements in support of a State's right to protect their own social arrangements, regulations and institutions; and suggesting that trade is a means to an end, not an end in itself so that globalization should be an instrument for achieving the goals that a society seeks: prosperity, stability, freedom and quality of life).

35. O'Rourke, *supra* note 11, at 1 (The legitimacy of the neoliberal paradigm (c.1980-2010) for the globalization process has increasingly been challenged as the 2008 global recession continues and as global financial institutions are still forced to wrestle with the regulatory boundaries of a global market, the growing/ongoing financial and political instability of State governments (Greece, Italy, Spain, Egypt, Ireland, Portugal and more), equity issues in the global political economy, and the growing demands to create a more humane paradigm for capitalist globalization.).

36. RODRIK, *supra* note 5, at 241 (setting out a series of statements in support of a State's right to protect their own social arrangements, regulations and institutions; and suggesting that trade is a means to an end, not an end in itself so that globalization should be an instrument for achieving the goals that a society seeks: prosperity, stability, freedom and quality of life); O'Rourke, *supra* note 11, at 279 (noting that when States are not democratic this scaffolding collapses and one cannot presume a

application of the neoliberal paradigm (c. 1980–2010) that has tragically limited State sovereignty in a variety of contexts as reflected in the U.K. Brexit vote, and now will require a re-balancing process in terms of global trade as a means to an end and not an end in and of itself.[37] This re-balancing process within the U.K. points directly to a debate on its domestic social arrangements and its use of globalization as a blunt tool to achieve prosperity, stability, freedom and quality of life. A structured but more transparent internal U.K. functional review could witness a major nation State prioritizing a new definition and role for State sovereignty in the twenty-first century—*a continuum for sovereignty* operating within a *framework of liberty*.

Third, the proposed GeoNOMOS© typology designs a *single core function* for the State both in relationship: a) to its citizens (vertical axis) from whom it seeks legitimacy in order to govern, and, b) to its engagement in the global marketplace (horizontal axis) from an intentionally crafted long term strategic and sustainability perspective. Applying the new typology proposed here suggests that the U.K. would be better positioned to develop a flexible Article 50 transition strategy and a new set of economic organizing principles that consistently balance all the three capital resources (economic, social and human capital) needed for the sustainability of the State's institutions, social arrangements, and State regulations.[38]

From the opening statements of Theresa May, it appears there will be significant future emphasis on "one nation for all" and not just the rich and

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country's institutional arrangements reflect the preference of its citizens; concluding that non-democratic States must play by a different, less permissive set of rules in the global marketplace).

37. RODRIK, *supra* note 5, at 241; *see generally* JOHN GRAY, FALSE DAWN: THE DELUSIONS OF CAPITALISM (1998) (providing a detailed step-by-step review and analysis from the State's perspective outlining how a neoliberal set of global economic organizing principles functioned to destroy domestic level public sector budgets by transferring assets wholesale to the private sector as a pre-condition for market access, locked out democratic legislative oversight through private sector contracts, and more. These dramatic restructuring to align neoliberal constructs shifted priorities for short term economic wealth not long term legal arrangements and market regulations that would support nation States goals of fair distributions, taxation, safety nets and social insurance. In other words, globalization was not a means to an end as Rodrik has suggested it should be, it was the end game—rule of law chased after globalization instead of the other way around—A new emphasis re-balancing process could design State level rule of law legal arrangements first, and out of that process, then position the State to design a new set of economic organizing principles).

38. Holton, *supra* note 12; Adler, *supra* note 13, at 17–40; BOURDIEAU, *supra* note 13; HANIFAN, *supra* note 13, at 138; JACOBS, *supra* note 13, at 138; Coleman, *supra* note 13, at S95─S120; Wellman, *supra* note 13, at 558–88; Bowles, *supra* note 13, at 419–36; Spence, *supra* note 14, at 355─74, 434─59 (forms of Capital, in this commentary for references and very brief definitions of three forms of capital noted in this new typology; this commentary suggests that every State has these three forms of capital and the differences in how States define their function is directly related to the amount of each form of capital that the State manages and oversees as a sovereignty entity).

powerful.[39] There will be public and private resources and opportunity to redefine how the State relates to its citizens in more concrete and practical ways.[40] It is the hypothesis of this article that all this, when and if it occurs, can only occur and be successful within that which the GeoNOMOS© seeks to describe below more fully and to define schematically. Embracing a *continuum of sovereignty* based on a *framework of liberty* while working to secure a *single core function* as the diagram outlines prior to completing Article 50 negotiations, would provide the U.K. with the flexibility to manage its political and economic risks within both its *domestic sphere* and *international sphere* where the U.K. must continue to operate in this century. This typology could embrace both the best of U.K. history and the challenges of a workable EU exit strategy.[41]

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39. *Theresa May's Tory leadership launch statement: full text*, INDEPENDENT (June 30, 2016), http://www.independent.co.U.K./news/U.K./politics/theresa-mays-tory-leadership-launch-statement-full-text-a7111026.html.

40. *Id.*; *see generally* O'Rourke, *supra* note 11 (in the tradition of political thought *sovereignty is conceived as a social contract.* In democratic states both parties, the state on the one side and its citizens on the other, are bound to this bargain. In return for giving up power to the State, as citizens, we are conferred rights, which prevent States from abusing this power that we have given them. This social contract, then, involves two parties—people the State seeks to govern and the State).

41. *See generally* ANATOLE KALETSKY, CAPITALISM 4.0: THE BIRTH OF A NEW ECON. IN THE AFTERMATH OF CRISIS (Public Affairs, 2010) (an extensive literature review has informed the development of the proposed continuum of State sovereignty including the State's single core functions as outlined and its direct partnership with its people as part of the radical transformation of the twenty-first century State. This cumulative literature search to support the creation of a continuum for State sovereignty includes but is not limited to the following work); *see* Steven Menashi, *Ethno-nationalism and Liberal Democracy*, 32 U. PA. J. INT'L L. 57 (2012); GIANLUIGI PALOMBELLA & NEIL WALKER, RELOCATING THE RULE OF LAW (Oxford Hart Publishing, 2009); Timothy William Waters, *The Momentous Gravity of the State of Things Now Obtaining: Annoying Westphalian Objections to the Idea of Global Governance*, 16 IND. J. GLOBAL LEGAL STUD. 25 (2009); Peer Zumbansen, *Law After the Welfare State Formalism, Functionalism and the Ironic Turn of Relexive Law* 56 AM. J. COMP. L. 796 (2008); IVAN MANOKHA, THE POLITICAL ECONOMY OF HUMAN RIGHTS ENFORCEMENT (Palgrave 2008); James Rosenau, *Three Steps Toward a Viable Theory for Globalization, in* FRONTIERS OF GLOBALIZATION RESEARCH: THEORETICAL AND METHODOLOGICAL APPROACHES (Inno Rossi ed., 2007); SASKIA SASSEN, A SOCIOLOGY OF GLOBALIZATION (W.W. NORTON, 2007); Eric Engles, *The Transformation of the International Legal Order,* 23 QUINNIPIAC L. REV. 23 (2007); John Alan Coahan, *Sovereignty in a Postmodern World,* 218 FLA. J. INT'L L., 907–08, 913 (2006); Tanja A. Borzel & Thomas Risse, *Public-Private Partnerships: Effective and Legitimate Tools of International Governance, in* EDGAR GRANDE & LOUIS W. PAULY, COMPLEX SOVEREIGNTY: RECONSTITUTING POLITICAL AUTHORITY IN THE TWENTY-FIRST CENTURY (University of Toronto, 2005); Paul Kahn, *The Question of Sovereignty*, 40 STANFORD J. INT'L L. 259, 260–68 (2004); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton University Press, 2004); Brad R. Roth, *The Enduring Significance of State Sovereignty,* 56 FLA. L. REV. 1017 (2004); Eric A. Engle, *The Transformation of the International Legal System: The Post-Westphalian World Order*, 23 W. L. R. 23 (2004); Krahmann, *supra* note 19, at 323; *see* Richard Falk, *Revisiting Westphalia, Discovering Post-Westphalia,* 6 J. ETHICS 311, 320–45 (2002); A. Clair Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and*

III. A CONTINUUM OF SOVEREIGNTY BASED ON LIBERTY

The GeoNOMOS© represents a graphic schematic depicting the next evolution for State sovereignty because it differentiates three important principles. One, it posits conceptually that for all human activity, enterprise and undertakings at the level of the State, liberty represents the outer boundary (dotted line box) of any and all such endeavors.[42] Beyond this *framework of liberty* nothing can, nor does exist, and all activity with the State falls within the four corners of this frame defined by liberty as the State's outer boundary. Two, the GeoNOMOS© distinguishes, in contrast to other models which seek to develop an economic/legal model, or some other models for nation States from times long past, that the nation State and the nation State alone can function as a legal guarantor. It alone can vouchsafe liberty both toward the individual and also toward other nation States and supranational organizations who operate with semi-governmental character. The nation State alone can hold supranational organizations accountable to some form of law and legal process. It is the nation State alone that can protect individual human rights against the onslaught of global commerce and the overreach of global international and inter-governmental networks. It is the nation State alone that can exercise jurisdiction legitimately. Three, the GeoNOMOS© remains dynamic and ever evolving through the intense interaction of three forms of capital (e.g., social capital, human capital and economic capital) as the *single core function* and purpose of the nation State. It is the State consistently functioning at the center of these three forms of capital that will secure a balance between these three essential resources to the benefit of the individual (those persons the State seeks to govern) as it stabilizes its *domestic function* (vertical axis) and its *international function* (horizontal axis). All of this activity occurs and is grounded within the *framework of liberty*.[43]

Organization: A Crisis of Legitimacy, 27 REV. INT'L LAW STUD. 133 (2001); STEPHEN KRASNER, COMPROMISING WESTPHALIA IN D. HELD & A MCGREW, THE GLOBAL TRANSFORMATION READER (Polity Press, 2000); Eric M. Ulsner, *Producing and Consuming Trust*, 115 POL. SCI. Q. 569 (2000); MICHAEL FOWLER & J.M. BUNCK, LAW, POWER, AND THE SOVEREIGN (Routledge, 1995); LESTER THUROW, THE FUTURE OF CAPITALISM (Brealey Pub, 1996); James S. Coleman, *Social Capital and the Creation of Human Capital*, AM. J. SOC. S. 95 (1988); Leo Gross, *The Peace of Westphalia*, 42 AM. J. INT'L L. 20 (1948); JEAN BODIN, THE SIX BOOKS OF THE COMMONWEALTH (1932).

42. O'Rourke, *supra* note 11, at 312 (to be distinguished as "freedom from" factors like oppression, slavery, prejudice and racism, and from "Liberty" as the quintessential element which enables where freedom does not).

43. *Id.* at 107 (in this typology, a failed nation-State can be described as a nation-station where the boundaries of the three forms of capital have become disconnected, i.e., the nation-state has been forced into one or the other circle, but cannot be in all three circles. More importantly, such a State has become unable to keep and preserve the necessary areas of overlap between these three forms of capital.

Liberty is that quintessential element necessary in human existence which is the fertile ground to allow the most productive, creative and mutually beneficial human endeavors and interactions to flourish and to bring benefits to all, and the absence of which tends to dampen the manifold expressions of all those truths people collectively hold to be self-evident. It is grounded in the rule of law, to be distinguished from freedom,[44] and requires a steadfast juxtaposition and weighing of individual and communal rights, benefits, obligations and privileges without which no human civil society can function. In the GeoNOMOS©, the existence of liberty further forms a steel-belt of support and reassurance to all of human community and its guarantor can only be the nation State, for both individuals and supra-national entities (international institutions and transnational corporations) lack the necessary legitimacy to guarantee liberty's existence.

There is no doubt that liberty in this framework will be a highly contested topic and hotly debated not unlike rule of law is, and it should be so both nationally, regionally and transnationally.[45] T.H. Green defines liberty as the capacity to do things, not the mere absence of restraint and, thus, liberty actively includes a moral value and certain social elements that are enjoyed in common with others.[46] While there is no agreement even among the many schools of republican legal thought, liberty here is defined primarily as non-domination by the State, and includes human rights, civic virtue and the creation of a common good.[47] These basic characteristics of a liberal republican theory are incorporated within the GeoNOMOS© as part of the participatory government, supported by an interventionist State whose *single core function* continuously reflects and balances the development and utilization of all its essential capital resources. This participatory function at the core of the State includes a rule of law that reflects the principles of mutual benefit, liberty and human dignity.

An exemplification of a more successful nation State would be reflected by a highly dynamic and ever evolving tri-circular area where the State exists at the core of these three overlap areas which it times grow and at times shrink, but always remain connected throughout the passage of time based on other socio-political and legal developments).

44. *Id.* at 312 (to be distinguished as "freedom from" factors like oppression, slavery, prejudice and racism, and from "Liberty" as the quintessential element which enables where freedom does not).

45. *Id.* at 365.

46. DAVID MILLER ET AL, THE LIBERTY READER, 23 (2006).

47. SAMANTHA BESSON & JOSE LUIS MARTI, LEGAL REPUBLICANISM, NATINAL & INT'L PERSPECTIVES 3 (2009); NEIL MACCORMICK, INSTITUTIONS OF LAW, AN ESSAY IN LEGAL THEORY (Oxford 2007); DAVID MILLER ET AL, THE LIBERTY READER, 224–25 (2006); ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY, FOUR ESSAYS ON LIBERTY, 121–22 (Oxford Univ. Press, 2002).

The proposed *continuum of sovereignty* reflects a social and highly interactional process based in part on the Law Merchant in a society of economic traders, and espouses that the 'rule of law' will have meaning only from within the social context reflected by the interaction of institutions, procedures, and values depicted at the core of the GeoNOMOS© where the *single core function* of the State is secured and secure.[48] The social context of a liberty framework is intentionally created to protect the *continuum of sovereignty* since there can be no State legitimacy and no State-related activity conducted outside the *framework of liberty*.

The manifestations or functioning of liberty are influenced by four cornerstones: choice, capability and resource development, justice, and equity, and by the constant and continuing interaction of three forms of capital: economic, social, and human capital. These forms of capital are found to exist in every form of human society, or human association, albeit to differing degrees and at different levels of development, but can be discerned and even measured to be present and functioning in a state of association and in a state of flux.

From within this global *framework of liberty* and moving along this *continuum of State sovereignty*, each State secures its *single core function* (sovereign capacity) to manage a wide range of possibilities because all domestic and international actors must also function within the State's framework of liberty.[49] The *framework of liberty* is anchored by four corners, two on the lower end of the diagram depicting equity and justice and two on the upper end of the diagram depicting elements that support the principle of human dignity—individual autonomy/choice and individual capability/resource development (see diagram). It depicts an actual relationship that can be measured along the continuum between the State and the people it seeks to govern. This exists because quantitative measurable outcomes for the qualitative work the State undertakes at its *single core function* designs a more accountable and transparent expression of its State sovereignty.

The *continuum for sovereignty* depicted systematically as the GeoNOMOS© shows the U.K. at its *single core function* of the State consistently balancing the essential three capital resources. The U.K. already has possession of all these capital resources and it has the authority and stability to engage with the integrated vision espoused by Prime Minister May. The operational components of a *continuum of sovereignty* align with the driving force behind the Brexit vote and point to a public

48. *See generally* O'Rourke, *supra* note 11.

49. *Id.* at 331.

citizen mandate for the U.K. to secure "one Nation conservative" as Theresa May has proposed.

The U.K. initiates this dynamic process with a thorough, hard-nosed, and unvarnished review of all of its capital resources and the various stages of development and utilization. It begins to secure an integrated *single core function* for the State by subsequently combining with the principles of liberty and human dignity to form a new typology which the GeoNOMOS© represents. The *continuum for sovereignty* is designed to reflect more accurately the nature, needed flexibility and new functionality for the U.K. as it seeks to balance consistently its domestic role and its international role within its Article 50 transition. The opportunity for the U.K. in modeling this continuum of State sovereignty places emphasis on upholding the rule of law so that economic and global market participation follow the law and not the other way around where law chases after and reacts to economic organizing principles.

The *continuum for sovereignty* proposed above also follows Rodrik's insight by suggesting that the State must simultaneously integrate and balance all three forms of its essential capital resources as its single core function as a matter of legitimacy.[50] Functioning from within a *framework of liberty*, the State operates along a vertical axis (representing U.K.'s domestic function) and along a horizontal axis (representing U.K.s international function) (see diagram). The U.K. is in a position to design and implement a strategy for the post-neoliberalism era that supports its domestic stability (vertical function) and its international market participation (horizontal function).

In this manner, the U.K.'s *single core function* engages at the center of three overlapping circles (three forms of capital) and the center of the intersection of a vertical axis and a horizontal axis inside the GeoNOMOS© Model.[51] (See diagram attached). This *single core function* incorporates three essential building blocks that belong to every nation State—economic capital, social capital, and human capital—all of which must remain inter-connected and continuously balanced in order for the State to maintain legitimacy as sovereign as to its function.

A very brief explanation follows on these three essential building blocks that form the State *single core function*. Economic capital can be defined as the amount of risk capital assessed on a realistic basis which a nation State requires in order to remain solvent over a period of time. Economic capital can be calculated.[52] It is an open question whether rigorous risk analysis is or can be a necessary and required function of

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50. Rodrik, *supra* note 5, at 242.

51. Julian Ku & John Yoo, *supra* note 28, at 210–11.

52 . *Id.* at 278.

government. Yet, it can be reasonably presumed that it is part and parcel of any and all economic and commercial enterprise.[52] Governments have no business to function and act as commercial enterprises just as much as business and commercial enterprises lack and perhaps should lack the legitimacy and authority to act and function as a government (quasi-government).

Social capital is understood as a stock of resources that *an individual* can control by how they invest their time in community organizations, educational institutions, religious organizations and neighborhood networks.[53] It represents a *form of trust and reciprocity* that is developed within social networks in any given culture. Economic capital and human capital are also forms of capital but they are generally more fungible in the sense that these two forms of capital are linked to private goods. Social capital which has an individual characteristic tends to aggregate and represents a *collective or public good* as part of a civil society. Human capital is a hybrid consisting of both quantitative and qualitative aspects. Human capital in this schematic focuses first and foremost on the individual and, then, on how that individual reaches maximum levels of capabilities/resource development and individual autonomy in order to contribute to society in ways that the individual actually can choose to develop his or her human capital.

If a State disconnects the economic capital function from the core function of the development and utilization of human capital or social capital, the State essentially implodes; it fails.[54] Likewise, if a State concentrates only on human capital development without a balanced program for economic capital development and utilization, it is out of balance and more likely than not, will also fail. The key parameter here is balancing the forms of capital within the *framework of liberty* because the four corners of the liberty framework as described anchor the State in perpetuity.

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52. *See generally* O'Rourke *supra* note 11.

53. *See generally* Bratspies, *supra* note 22; RICHARD SANDBROOK ET AL., SOCIAL DEMOCRACY IN THE GLOBAL PERIPHERY: ORIGINS, CHALLENGES, PROSPECTS (Cambridge University Press 2006); PAUL COLLIER, THE BOTTOM BILLION, WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT, 52–61(Oxford University Press 2007); James Q. Wilson, *Bowling with Others, Commentary Magazine* (last visited Oct. 15, 2016), https://www.commentarymagazine.com/articles/bowling-with-others/; Janos Berok, *Managing Conflicts of Interest in the Public Sector*, 64–70 ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD] (2005); ERIC M. USLANER, THE MORAL FOUNDATIONS OF TRUST (Cambridge University Press 2002); Joel Sobel, *Can We Trust Social Capital*, 15 J. OF ECON. LITERATURE 139, 139–45 (2002); ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (Simon & Schuster 2000); PIERRE BOURDIEU, THE FORMS OF CAPITAL, 47 (W.W. Norton, 1986).

54. O'Rourke *supra* note 11, at 283.

What might take place in conditions when all the three forms of capital become disjointed and lose connection, instead of remaining interconnected as the GeoNOMOS© model suggests that they are? In essence, we are describing failure of a nation-State, although it is conceivable that, at times, one form of capital may separate from the other two forms (even if temporarily, and for a short or extended period of time).

When social capital dis-associates, the nation State ceases to function as nation State, waste and attrition in every form tend to increase because of a decrease in a common and shared consciousness for a collective or public good. Such conditions tend to push human existence and with it the human condition to the very fringes of human association (or, in this case, *disassociation*) and all human activities whether driven by Individual Choice, Capability and Resources, Justice, or Equity (all four corners which are proposed as anchors for the *framework of liberty*) of the GeoNOMOS© tend to be severely challenged and strained.

When economic capital disassociates, such *dis*association usually occurs at costs which can be quantified and measured, and the metrics compared. Economic capital tends to be risk averse, but also risk-dependent. When stress and strain bring about conditions of risk such that a disassociation of economic capital occurs, we tend to speak of capital flight, and because the entire global market place has evolved financially in a global network also, money quietly can move at a blink of the eye and with relative ease.[55] The absence of money and economic capital tends to cause markets to contract and the impact of heightened, unsustainable risk tends to cause unrest, shortages and deprivation of every kind within a nation State—such developments push the nation-State rather quickly to the brink of complete, societal collapse beyond the framework designed to protect liberty, choice, capability/resource development, justice, and equity.

Human capital is the realm where *dis*association is perhaps felt the most as the decline and absence of both quantitative and qualitative aspects of this form of capital tend to cause humans to flee from strife, war, and civil unrest to seek a chance at opportunity. It also affects citizens in States who seek to re-define liberty and to re-establish a measure of functional stability, to find job opportunities or new job skills through education, and to re-build and sustain communities and social networks.

By definition, all three forms of capital as understood against the backdrop of liberty are co-equal in value which can result in communal activities from an aggregation of distinct individual pursuits. But without community and social networks, the context for such activity fails and such activity tends to become fragmented, opportunistic and focused inward at a time when its focus ought to be outward, directed toward community and to

55. *See* O'Rourke, *supra* note 11.

giving shape to such community for the benefit of protecting individual rights.

The intentional and consistent integration and balance between all forms of capital is required so State level public sector institutional development and utilization reflects strong economic capital but also simultaneously addresses aspects of social capital such as trust, mutual benefit and reciprocity. This integration creates the *continuum for State sovereignty*. The integration at the *single core function* of the State operates in tandem with human capital and with mandates for individual choice as well as individual capability/resource development, e.g., employment, education, human rights, and opportunity. All these interrelated factors are functionally and politically tied to the four anchors of the *framework of liberty*.[56]

As noted earlier in this text, the neoliberal paradigm (c. 1980–2010) developed so rapidly that it left many domestic level institutions unable to maintain their functioning much less adapt to the rapid and crushing changes that occurred in the global marketplace and in their domestic economy. The *continuum for sovereignty* secures the operational role of the State and from within its *single core function*, all capital resources remain interrelated and interactive as well. Ongoing decision-making processes made from within the core function of the State reflect issues from within the domestic and international spheres (intersecting axis) of State activity but are also secured within the *framework of liberty* in support of a rule of law that secures justice, equity, and the principles of human dignity [individual choice as well as capability/resource development]—the very principles that Prime Minister May espouses in the Brexit transition.

The four anchors on the *framework of liberty* reflect a standard of conduct that together support the principles of human dignity, reciprocity, and mutual benefit. (See diagram attached). Finally, since it is axiomatic in this Model that nothing can exist outside the framework of liberty, the U.K. is in a very unique position in history to redefine how actors from private and public sectors intersect with its national interests. In this *continuum of sovereignty*, all actors, whether domestic or international, private or public, must function from within the *framework of liberty*, and all State and non-State actors must function in accordance with the conduct standards that support the *framework of liberty*.

IV. CONCLUSION

Now that Pandora's Box has been opened, two dominant questions have surfaced related to the post- Brexit aftermath:[57] (i) What new form of

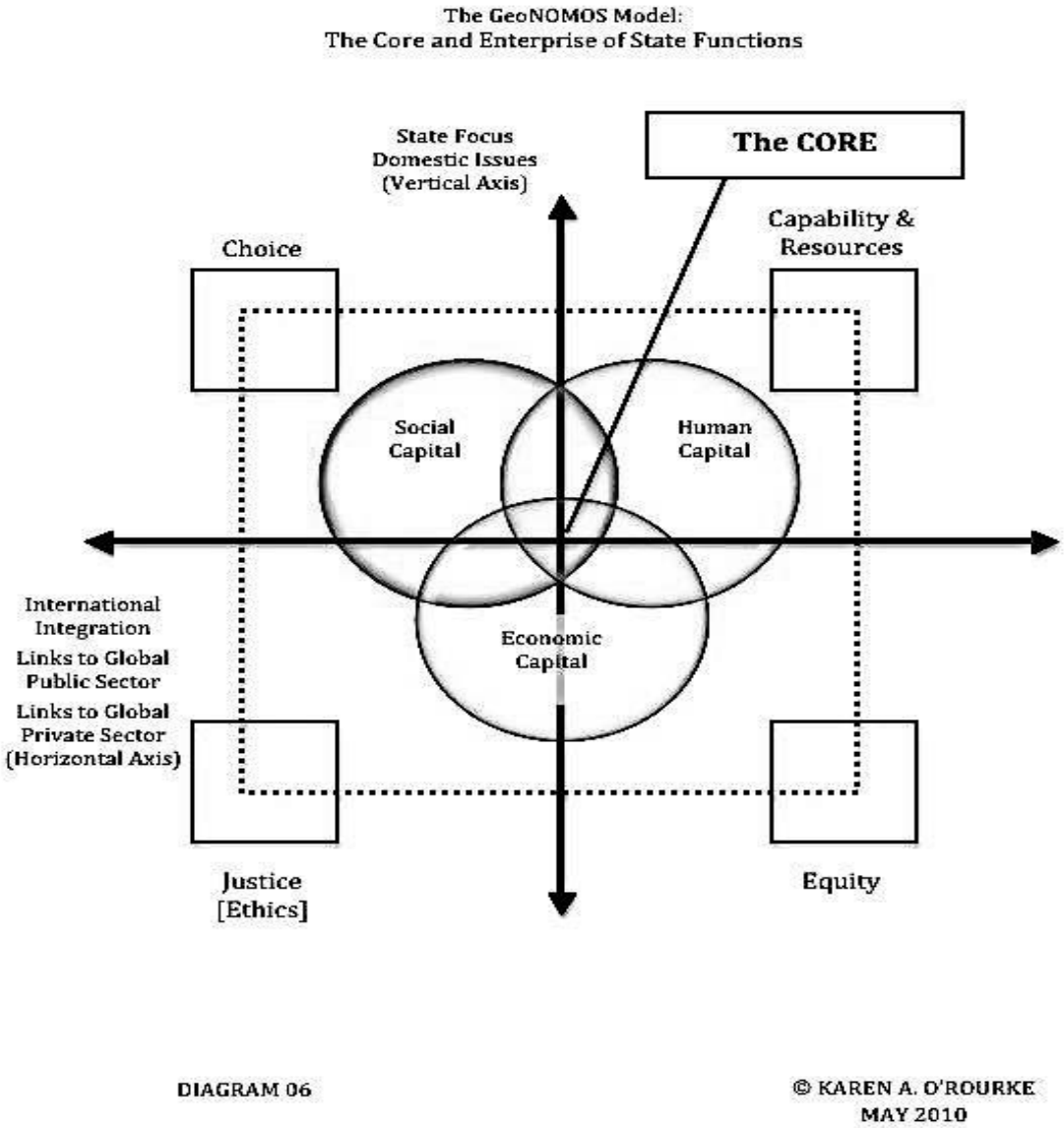
56. *Id.*

57. *Id.*

British sovereignty will be redefined, recreated, resurrected under its negotiated Article 50 transition; and, (ii) What market form of economic organizing principles for global capitalism will be advanced under the banner of U.K.'s new form of sovereignty? In the U.K., where a nation State seeks to address new levels of citizen frustration, public disapproval, and civic engagement, the operational definitions from the 1940–1990s regarding the legitimacy and the expression of national sovereignty are outdated and perhaps no longer adequate for how the State must function in the twenty-first century.

The complexity of U.K. inaugurating the actual secession process through the invocation of Article 50 would hopefully reflect matters of best practices and follow a structured period where a more transparent but internal dialogue process, cost-benefit analysis, and necessary political contestation had already occurred. The Brexit campaign itself cannot alone fulfill this domestic-level dialogue process and planning obligation since it was conducted mostly on the perceptions of people with a general agnosticism of the facts. This interim transition period cannot merely be about the shift in political parties at Downing Street either. It will need to be a well-reasoned and detailed fleshing out of a political-legal and socio-economic vision, one that is mapped out long before the secession agreement package is negotiated by the U.K. and presented to the European Council and European Parliament for approval.

If there is a positive light at the end of this tunnel for U.K. transition under Article 50, it is the realization that the post-Brexit context is ripe for the creation of a new twenty-first century *continuum for State sovereignty*. The U.K. could choose not to fall back on the out-dated, but persistent Westphalian notions of how a nation State "ought" to organize and operate in the world today and step onto a *continuum for State sovereignty* based on using all of its core capital resources to secure liberty. The U.K. could intentionally move beyond the neoliberal paradigm (c.1980–2010) of global capitalism by defining a more "humanizing" paradigm based on a new set of economic organizing principles akin to those proposed by Rodrik and others. In doing so, the U.K. steps forward as a world leader espousing a *framework of liberty* that redefines and secures the *single core function* of the nation State in the twenty-first century: to ensure participatory democracy and individual rights.


The GeoNOMOS Model:
The Core and Enterprise of State Functions
State Focus
Domestic Issues
(Vertical Axis)
The CORE
Capability &
Resources
Choice
Social
Capital
Human
Capital
Economic
Capital
International
Integration
Links to Global
Public Sector
Links to Global
Private Sector
(Horizontal Axis)
Justice
[Ethics]
Equity
DIAGRAM 06
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GUILTY UNTIL PROVEN INNOCENT: A COMPARATIVE ANALYSIS OF ORGANIZED CRIME LAWS IN THE UNITED STATES, ITALY, JAPAN, AND ECUADOR

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I. INTRODUCTION

"[T]he 'relative power' of criminal networks will continue to rise, and some countries could even be taken over and run by these networks."[1] The Federal Bureau of Investigation (FBI) defines "organized crime" as "any group having some manner of formalized structure and whose primary objective is to obtain money through illegal activities."[2] The FBI believes that even if key individuals within these organizations are removed, "the depth and financial strength of the[se] organization[s] often allow it to continue."[3]

When people think of organized crime, usually, they have an image of Marlon Brando sitting in a dark room at a large desk portraying Vito Corleone in the movie "The Godfather."[4] In "The Godfather", Corleone is a notorious mob boss who orders "hits" on people and the members of his "family" participate in carrying out these hits as well as various other illegal activities.[5] Throughout the film, Corleone speaks at length about family, friendship, business, and loyalty and shows the true influence the mafia has on society and the stigma that is associated with mafia affiliations.[6] One of Corleone's famous quotes illustrates this point: "[i]t's true I have a lot of friends in politics, but they wouldn't be so friendly if they knew my business was drugs instead of gambling which they consider a harmless vice. But drugs, that's a dirty business."[7] This image, although not far from the truth, portrays a problem that society has faced since the

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1. KRISTIN M. FINKLEA, CONG. RES. SERV., R40525, ORGANIZED CRIME IN THE UNITED STATES: TRENDS AND ISSUES FOR CONGRESS 15 (2010).

2. *Organized Crime,* FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/investigate/organized-crime (last visited Oct. 15, 2016) [hereinafter FED. BUREAU OF INVESTIGATION].

3. *Id.*

4. *Biography for Don Vito,* INT'L MOVIE DATABASE, http://www.imdb.com/character/ch0000791/bio (last visited Oct. 15, 2016).

5. *The Godfather Plot Summary,* INT'L MOVIE DATABASE, http://www.imdb.com/title/tt0068646/plotsummary?ref_=tt_stry_pl (last visited Oct. 15, 2016).

6. *Id.*

7. *The Godfather Quotes,* ROTTEN TOMATOES, https://www.rottentomatoes.com/m/godfather/quotes/ (last visited Oct 15, 2016).

nineteenth century.[8] Organized crime groups have both a local and global presence through use of the Internet and other technology.[9]

When analyzing different countries around the world, it is important to note that although the United States, Italy, Japan, and Ecuador have similarly structured governments, the laws that are in place to combat organized crime vary greatly.[10] Interestingly, only Italy, Japan, and Ecuador have recently codified changes to their organized crime laws while the United States has simply broadened the scope of existing laws.[11] Nevertheless, these laws have a major impact on the citizens that call each country "home."

A. The Roots of Organized Crime and the Mafia

1. Japan

The origins of the Mafia date as far back as 1612.[12] Surprisingly, these roots are not from Italy but rather Japan.[13] The Japanese Mafia, today known as the "Yakuza", trace its origin to the "Kabuki-mono."[14] The Kabuki-mono was a group of rogue samurai who would terrorize citizens for fun.[15] Although the Kabuki-mono was the first formalized organized crime group in Japan, the Yakuza drew its direct ancestry from the Machi-

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8. *Origins of the Mafia,* HISTORY (2009), http://www.history.com/topics/origins-of-the-mafia.

9. FED. BUREAU OF INVESTIGATION, *supra* note 2.

10. *See generally* North America: United States, *The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/us.html (last visited Oct. 15, 2016); *See generally* South America: Ecuador, *The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-worldfactbook/geos/ec.html (last visited Oct. 15, 2016); *see generally* Europe: Italy, *The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/it.html (last visited Oct. 15, 2016); *See generally* East & Southeast Asia: Japan, *The World Factbook*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html (last visited Oct. 15, 2016).

11. *See* William L. Anderson & Candice E. Jackson, *Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law*, THE INDEP. REV. (2004), http://www.independent.org/publications/tir/article.asp?a=215.

12. Adam Johnson, *Yakuza: Past and Present*, ORGANIZED CRIME REGISTRY (1998), http://orgcrime.tripod.com/yakuzahistory.htm.

13. *Id.*

14. *Id.*

15. *Id.*

yokko.[16] The Machi-yokko, skilled gamblers and Japanese citizens, took up arms to defend their villages against the Kabuki-mono.[17]

"Yakuza" is a blanket term used to describe "Japanese gangsters."[18] Within the Yakuza there are approximately 3,200 organized crime groups.[19] Approximately 1,400 of those groups are affiliated with one of the three main organized crime groups in Japan.[20] Today's Yakuza have undergone periods of restoration, occupation, and modernization and are still the predominant organized crime group in Japan.[21]

2. Italy

Until the mid-nineteenth century, numerous foreign invaders controlled Sicily, a Region of Italy.[22] After years of foreign rulers, Sicilians joined together to form the "Mafioso" to protect themselves from another foreign invasion.[23] During its original formation, there was no criminal intent associated with being a member of the "Mafioso."[24] It was not until the end of the nineteenth-century that the "mafie" [sic] emerged.[25] This "mafie" is synonymous with the criminal organization people are familiar with today, the Sicilian Mafia.[26]

3. The United States

Stemming from these Italian roots, the American Mafia rose to power in the 1920s due to Prohibition and mass immigration into the United States from Italy.[27] Small criminal organizations existed before Prohibition, but the enforcement of Prohibition legislation "facilitated the consolidation of

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16. *Id.*

17. Johnson, *supra* note 12.

18. Ben Bullock, *What is the Origin of Yakuza*, SCI.LANG.JAPAN, http://www.sljfaq.org/afaq/yakuza.html (last visited Oct. 15, 2016).

19. JAPAN SUBCULTURE RESEARCH CTR., http://www.japansubculture.com/resources/yakuza-organisations/ (last visited Oct. 15, 2016).

20. *Id.*

21. Johnson, *supra* note 12.

22. *Origins of the Mafia*, *supra* note 8.

23. *Id*.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Organized Crime,* UNITED STATES HISTORY, http://www.u-s-history.com/pages/h1596.html (last visited Oct. 15, 2016).

the power of criminal organizations."[28] With the rise of federal enforcement of Prohibition laws, the American Mafia organized bootlegging operations both nationally and internationally.[29] These organizations were typically found in neighborhoods that were specifically ethnically dense.[30] This occurred because immigrant populations tended to settle in neighborhoods with fellow immigrants from the same place since they all spoke the same or similar language.[31]

4. Ecuador

Unlike Japan, Italy, and the United States, Ecuador's plight with organized crime is fairly new.[32] Due to political instability and porous borders, Ecuador has become vulnerable to the influence of organized crime networks primarily from Peru and Colombia.[33] This influence impacts Ecuador's economy nationally as well as globally due to the import and export of drugs.[34]

B. Relevance of Organized Crime Today

The topic of organized crime laws is particularly important because the FBI reports that the global economic impact of organized crime's influence in all sectors of the economy is around one trillion dollars annually.[35] In 2009 alone, it was estimated that organized crime generated $870 billion in profits.[36] In order to make money, the mafia participates in various illegal activities.[37]

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28. *Organized Crime—History*, LAW LIBR. AM. L. & LEGAL INFO., http://law.jrank.org/pages/1624/Organized-Crime-History.html (last visited Oct. 15, 2016).

29. *Organized Crime*, *supra* note 27.

30. *Organized Crime—History*, *supra* note 28.

31. *Id.*

32. Cristina Chuquimarca Mosquera & Bertha García Gallegos, *Ecuador*, INT'L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE, ILLICIT NETWORKS AND POLITICS IN LATIN AMERICA 161 (2014).

33. *Id.*

34. *Id.*; U. N. OFF. ON DRUGS & CRIME, *Transnational Organized Crime: The Globalized Illegal Economy*, UNODC, https://www.unodc.org/toc/en/crimes/organized-crime.html (last visited Oct. 15, 2016) [hereinafter UNODC].

35. FED. BUREAU OF INVESTIGATION, *supra* note 2.

36. UNODC, *supra* note 34.

37. FED. BUREAU OF INVESTIGATION, *supra* note 2.

> Organized crime rings manipulate and monopolize financial markets, traditional institutions like labor unions, and legitimate industries like construction and trash hauling. They bring drugs into our cities and raise the level of violence in our communities by buying off corrupt officials and using graft, extortion, intimidation, and murder to maintain their operations. Their underground businesses—including prostitution and human trafficking—sow misery nationally and globally.[38]

Contrary to media depictions and stigma associated with mafia participation, it can be argued that if used correctly, the mafia could work in conjunction with the government to shut down underground terrorist cells.[39] Organized crime groups are seemingly the right individuals to defeat terrorist groups because they show no reverence for laws and can financially afford to hire well-trained soldiers.[40] These groups can do what the government cannot because "[d]emocracies are trammeled by too many laws and rules safeguarding individual rights."[41]

The idea of using the mafia to aid governmental forces is not far fetched. There have been instances, both past and present, of the United States Government using the Italian-American Mafia for assistance in combating foreign and domestic terror.[42] For example, during World War II, the United States government worked with Charles "Lucky" Luciano, an infamous Italian-born American mobster based in New York who is credited for engineering the structure of modern organized crime in the United States.[43] During his incarceration for extortion and prostitution, Luciano offered to help in the war effort by using his criminal connections in Italy to advance the Allies' cause.[44]

The head of the Counter Intelligence Section, Captain Wallace S. Wharton, asked for members of the New York mafia with ties to Italy so the government could use formal connections that mafia members established in Italy to ensure that the United States military would not be

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38. *Id.*

39. Ross Hinds, *The One-Eyed Mafia Boss who could Help Defeat ISIS*, GRINBERG NEWS, (Nov. 2015), http://www.grinbergnews.com/the-one-eyed-mafia-boss-who-can-help-us-crush-islamic-state/.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Lucky Luciano Biography*, BIO. http://www.biography.com/people/lucky-luciano-9388350#criminal-exploits (last visited Oct. 15, 2016).

44. *Id.*

met with violence.[45] Luciano suggested that the government send him to Sicily to speak with the natives in the event that the Allies decided to invade Sicily.[46] The goal with sending Luciano to Sicily was to win over the support of the Sicilian natives so that instead of fighting the United States, they would support U.S. war efforts.[47]

Not only did Luciano travel to Sicily to calm the natives, he also helped the United States military leaders with developing the most effective attack plan.[48] By using Luciano's plan, the United States casualty rate was far lower than that of the British who did not follow Luciano's attack plan.[49]

Another example of cooperation between the United States government and the mafia occurred when ISIS threatened New York City. Giovanni Gambino, the son of John Gambino a prominent Mafia figure from "La Cosa Nostra", fired back by stating that the mafia was ready to fight ISIS.[50] Gambino stated, "the rise of global terrorism gives the Mafia a chance to show its good side."[51] Gambino goes further to state that "[t]he Mafia has a bad reputation, but much of that's undeserved."[52] Sources within the mafia stated that they are "better-positioned to provide security than federal agencies like the FBI and [the] Department of Homeland Security."[53]

The purpose of this article is to discuss the different laws in place in the United States, Italy, Japan, and Ecuador to combat organized crime and how organized crime impacts the national and global economy. This article will be broken down and analyzed by country. It will first discuss the type of government each county has in place. It will then discuss the specific types of both legal and illegal activities that each country's organized crime group participates in. There will then be a discussion of the laws in place to combat organized crime and how these laws have changed over time to

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45. Tim Newark, *Lucky Luciano and WWII's Operation Husky*, ST. MARTIN'S PRESS (July 9, 2011), http://www.thehistoryreader.com/modern-history/lucky-luciano-wwiis-operation-husky/.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Clark Mindock, *NYC Islamic State Plot: Italian Mafia Warns ISIS to Stay Away from New York*, INT'L. BUS. TIMES (Nov. 23, 2015), http://www.ibtimes.com/nyc-islamic-state-plot-italian-mafia-warns-isis-stay-away-new-york-2196169.

51. Joe Tacopino, *Mobster's son: Tell us Where ISIS is and fuhgeddaboutit*, N.Y. POST (Nov. 23, 2015), http://nypost.com/2015/11/23/the-mafia-is-prepared-to-protect-new-york-city-from-isis/.

52. Mindock, *supra* note 50.

53. *Id.*

adapt to the growing number of people involved in organized crime. Often times, the type of organized crime a country's people participate in dictates the laws that are in place. Then, there will be a discussion of the overall impact that the laws are having on participation in organized crime. Due to the underground nature of organized crime, determining the impact of a law is often difficult to measure because the number of individuals actively participating in organized crime is not publicized. There will then be a brief discussion of the impact organized crime has on the global economy and its implications on international business. Lastly, there will be a brief conclusion and opinion about what steps countries should take to remedy this issue.

II. A BRIEF OVERVIEW OF RELEVANT ORGANIZED CRIME LAWS

A. The United States

1. Government

The United States has a federal presidential republic form of government with a President at the helm.[54] The President is up for election every four years and cannot hold office for more than two consecutive terms.[55] The government is made up of three branches: the Executive, Legislative, and Judicial.[56] The Executive Branch is administered by the President where (s)he enforces the laws that Congress makes.[57] The Legislative Branch consists of members of Congress who make the laws.[58] The Judicial Branch, headed by nine Supreme Court Justices, interprets the laws according to the United States Constitution.[59]

2. Organized Crime Groups

Because the United States has become so diverse, there are different organized crime groups from around the world carrying out illegal activities there.[60] Each group participates in different types of organized crime.[61]

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54. North America: United States, *supra* note 10; South America: Ecuador, *supra* note 10; Europe: Italy, *supra* note 10; East & Southeast Asia: Japan, *supra* note 10.

55. *Id.*

56. *Id.*

57. HARRY S. TRUMAN LIBR. & MUSEUM, https://www.trumanlibrary.org/whistlestop/teacher_lessons/3branches/1.htm (last visited Oct. 15, 2016) [hereinafter TRUMAN LIBR.].

58. *Id.*

59. *Id.*

60. FINKLEA, *supra* note 1, at 15–16.

The primary groups are: Eurasian/Russian, Asian, Italian, and Balkan.[62] The less popular groups include Middle Eastern and African.[63]

Eurasian and Russian groups participate in extortion, abduction, human smuggling, prostitution, drug trafficking, theft, money laundering and various types of fraud.[64]

Asian groups participate in drug trafficking (heroin) and human trafficking.[65] They are also involved in: money laundering; counterfeiting; fraud; kidnapping; automobile, software, and clothing theft.[66]

Italian groups primarily deal in gambling, loan sharking, drug trafficking, and money laundering.[67]

The Balkans participate in gambling, extortion, robbery, counterfeiting currency, drug trafficking, human smuggling, real estate fraud, money laundering, witness intimidation, and murder.[68]

Although they are less prominent, the Middle Eastern and African groups are still participants in organized crime in the United States.[69] The Middle Eastern group participates in organized theft, financial fraud, money laundering, and cigarette smuggling.[70]

The African group, particularly people of Nigerian decent who participate in organized crime, participate in heroin trafficking, money laundering, and various types of fraud, including: insurance; bank; auto; healthcare; identity; and document fraud.[71]

3. Law and its Changes

In 1978, the United States Congress enacted the Racketeer Influenced and Corrupt Organizations Act, or RICO statute.[72]

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61. *See id.* at 17–20.

62. *Id.* at 16.

63. *Id.* at 20.

64. *Id.* at 17.

65. FINKLEA, *supra* note 1, at 18.

66. *Id.*

67. *Id.* at 19.

68. *Id.* at 19–20.

69. *Id.* at 20.

70. FINKLEA, *supra* note 1, at 20.

71. *Id.*

72. *Racketeering/RICO*, FINDLAW, http://criminal.findlaw.com/criminal-charges/racketeering-rico.html (last visited Oct. 15, 2016).

RICO focuses on:

> [P]rohibit[ing] conducting the affairs of any 'enterprise' (defined broadly to include just about any form of human endeavor) through 'a pattern of racketeering activity' (defined as two or more criminal acts from an extremely broad list, that are related to each other, that [persist] or threaten to persist over a period of time).[73]

The RICO statute has a procedural effect rather than a deterrent effect because the statute was not put into place to deter organized crime activity but rather to assist prosecutors in charging individuals with RICO violations.[74] By defining the commission of a series of distinct crimes as a single offense, RICO avoids "a variety of traditional, procedural, evidentiary, and jurisdictional rules that tend to discourage prosecuting separate offenses together."[75]

An example of RICO's procedural effect is how the statute "includes as 'predicate acts' . . . such crimes as murder, robbery, bribery, and arson, which normally are violations only of state law, thus permitting them to be investigated and prosecuted by federal officials in federal court." [76] Wording the statute this way also impacts organized crime groups that operate in multiple states.[77] Normally, these offenses would have to be prosecuted separately in the state that they occurred.[78] However, because the RICO statute defines these offenses as "'part of a single pattern' the entire pattern can be prosecuted together as a single crime in any federal district where one of the predicate acts occurred."[79]

The penalties for violation of the RICO statute are fairly harsh. There is both a fine and imprisonment if an individual is found guilty of a RICO violation.[80] The maximum punishment that a person can be sentenced for on a single RICO charge is "imprisonment for twenty years (life if any of

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73. Gerard E. Lynch, *Rico*, ENCYCLOPEDIA.COM (2002), http://www.encyclopedia.com/history/united-states-and-canada/us-history/rico#3403000224.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Lynch, *supra* note 73.

79. *Id.*

80. *Id.*

the predicate acts charged, such as murder, would permit such punishment), and a fine of $250,000.00 or twice the proceeds of the offense."[81]

In addition to a fine and imprisonment, there is also a punishment of "forfeiture of property."[82] This means that there is a "mandatory penalty . . . of not only any proceeds or property derived from the proceeds of the crime but also of any interest the defendant holds in the enterprise or any property of any kind that provides a source of influence over the enterprise."[83] The mandatory forfeiture has a significant impact on a defendant's case because RICO allows the government to get a restraining order *before* trial begins to freeze the defendant's assets that are subject to the forfeiture.[84]

Title 18 Section 1963 of the United States Code Annotated states:

> A temporary restraining order under this subsection [18 U.S.C.A. §1963 (2)] may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this subsection and that provision of notice will jeopardize the availability of the property for forfeiture. . . .[85]

Mandatory forfeiture causes issues for defendants because it could hamper the defendant's use of property to obtain adequate legal counsel.[86] In a 2003 case, *U.S. v. Saccoccia*, Saccoccia's criminal defense attorneys were required to turn over the attorney's fees Saccoccia paid them because "the fees [were] property subject to forfeiture."[87] The district court granted the United States' motion to compel to retain the attorney's fees and the attorneys appealed.[88]

The Court of Appeals vacated the forfeiture award against the attorneys and remanded the case because defendants must forfeit "tainted" property defined as property that is "(i) acquired by committing the

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81. *Id.*

82. *Id.*

83. Lynch, *supra* note 73.

84. *Id.*

85. 18 U.S.C. § 1963.

86. Lynch, *supra* note 73.

87. United States v. Saccoccia, 354 F.3d 9, 11 (2003).

88. *Id.* at 9, 11.

offense, and (ii) constituting, or derived from, any proceeds obtained, directly or indirectly from its commission."[89] "In the event that tainted property is unavailable for forfeiture (as when it has been transferred to a third party), the government may recover 'substitute' property."[90]

Because the language of the statute is worded as such, it "does not afford an avenue through which the government may reach a third party's untainted assets as a substitute for tainted assets which the third party has already transferred prior to the date of forfeiture."[91] The forfeiture, however, "relates back" to the time that the property was obtained by the violation and is not only recoverable from the defendant but also from anyone else that the defendant gave that property to even if it was a bona fide payment for legitimate goods or services.[92]

Unlike Italy, Japan and Ecuador, the United States is the only country that has not codified any changes to the law since it was passed in the 1970s.[93] The only aspect of the law that has changed, in practice, is the statute's expanded use to include not only organized crime participants but also business owners.[94] "For every John Gotti who is brought down by RICO, many obscure business owners and managers are also successfully prosecuted under this law."[95]

Business owners can be charged with a RICO violation if the federal government decides to target them and charge them under RICO.[96] This expanded use began with former mayor of New York, Rudy Guiliani's prosecution of Michael Milken and other Wall Street figures in the 1980s.[97] Because of this, today, federal prosecutors use RICO to win "easy convictions and prison terms" for people who "run afoul of federal regulations" during the ordinary course of business.[98]

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89. *Id.* at 12.

90. *Id.*

91. *Id.* at 13.

92. Lynch, *supra* note 73.

93. Anderson & Jackson, *supra* note 11.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Anderson & Jackson, *supra* note 11.

4. Impact of the Law

Critics of RICO argue that the statute has "little to no effect on stopping or inhibiting crimes" but rather allows federal prosecutors to "circumvent the constitutional separation of powers between the national and the state governments."[99] Some critics also call for RICO to be repealed because it is not "serv[ing] as a shield for the innocent . . . [and] . . . adds nothing of value in terms of new prohibitions of truly criminal behavior, [but rather] . . . adds powerful weapons to the prosecutors' arsenal."[100]

A. Italy

1. Government

Italy's government is a Democratic Republic that is headed by a President who is independent from all three branches of the government.[101] The President is elected every seven years by a college comprised of the parliament and three representatives from each region of Italy.[102] The President serves as a "focal point between the three branches of government: he is elected by the lawmakers, he appoints the executive, and is the President of the Judiciary."[103] The President is responsible for appointing a Prime Minister and the Council of Ministers.[104] The Prime Minister and the Council of Ministers hold all executive power.[105] Italy's Parliament is made up of two houses: the Senate of the Republic and the Chamber of Deputies.[106] These two houses perform identical functions due to "full bicameralism."[107] The houses make the laws of the country and establish the political guidelines that the Executive has to follow.[108]

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99. *Id.*

100. *Id.*

101. *Italian Politics–Government*, UNDERSTANDING ITALY, http://www.understandingitaly.com/profile-content/government.html (last visited Oct. 15, 2016).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Italian Politics*, *supra* note 101.

107. *Parliament*, SENATO DELLA REPUBBLICA, https://www.senato.it/3801 (last visited Oct, 15, 2016).

108. *Id.*

2. Organized Crime Groups

Italy has a number of crime families.[109] A study done in 2013 by Università Cattolica and the Joint Research Centre [sic] on Transnational Crime "estimated that mafia activities generate revenue of $33 billion, mostly divided among Italy's four major mafia gangs."[110] These families participate primarily in sex exploitation; firearms trafficking; drug sales; counterfeiting; gambling; usury (loansharking); and extortion.[111] The Camorra, one of Italy's wealthiest organized crime families, has been in existence since the nineteenth-century.[112] It is estimated that its revenue is around $4.9 billion.[113]

The 'Ndrangheta mafia is also one of Italy's prominent organized crime groups.[114] According to a study by the Demoskopika Research Institute, in 2013, the 'Ndrangheta made more than $48 billion through drug trafficking and illegal garbage disposal.[115] This is more money than Deutsche Bank and McDonald's combined and 3.5 percent of Italy's Gross Domestic Product (GDP).[116] The issue of organized crime is becoming so severe in Italy that Pope Francis, the leader of the Catholic Church, called on Italy's mafia groups to "stop doing evil . . . [and] relinquish their blood-stained money . . .."[117]

3. Law and its Changes

In response to recommendations from international organizations as well as the high number of corruption scandals in recent years, Italy has devoted

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109. Chris Matthews, *Fortune 5: The Biggest Organized Crime Groups in the World*, FORTUNE, (Sept. 14, 2014), http://fortune.com/2014/09/14/biggest-organized-crime-groups-in-the-world/.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* Agnes France, *'Ndrangheta Mafia 'Made More Last Year than McDonald's and Deutsche Bank'*, THE GUARDIAN, (Mar. 26, 2014, 3:21pm), https://www.theguardian.com/world/2014/mar/26/ndrangheta-mafia-mcdonalds-deutsche-bank-study.

115. *Id.*

116. *Id.*

117. *Id.*

significant efforts to deal with its rampant corruption issues.[118] In 2014, Italy codified Law No. 114 of 11 August 2014.[119] This law

> [i]ntroduced, in the context of contracts for certain listed services particularly exposed to the risk of mafia infiltration . . . a general duty for public administrations and public entities to obtain from the service providers a declaration of non-involvement in criminal proceedings for serious violations, including the crime of mafia organization.[120]

In 2015, Italy again codified changes to its Criminal Code.[121] On June 14, 2015, Italy enacted "Provisions on Crimes Against the Public Administration, Mafia—Type Associations and False Accounting" otherwise known as Law No. 69 of May 6, 2015.[122] Italy's major change was to increase the scope of the statute that was already in place rather than crafting an entirely new statute.[123] The changes apply to "criminal conduct against the state, organized crime activities, and false accounting reporting."[124]

This change increased the prison terms upon conviction for crimes against the "public administration."[125] These crimes include: "embezzlement; corruption in the exercise of a public function; corruption constituting an act contrary to official duty; corruption associated with judicial acts; and undue inducement to give or promise a profit."[126] The change also increased prison sentences for individuals found guilty of participating in organized crime.[127]

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118. Marilena Hyeraci & Francesca Petronio, *A Strengthening of Anti-Corruption Legislation in Italy*, ETHIC INTELLIGENCE (2009) http://www.ethic-intelligence.com/experts/9105-strengthening-anti-corruption-legislation-italy/ (last visited October 15, 2016).

119. *Id.*

120. *Id.*

121. Dante Figueroa, *Italy: New Legislation Against Public Corruption & Organized Crime*, THE LAW LIBR. OF CONG. (June 25, 2015), http://www.loc.gov/law/foreign-news/article/italy-new-legislation-against-public-corruption-and-organized-crime/.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Figueroa, *supra* note 121.

127. *Id.*

There was also a major change in the way courts grant parole.[128] Now, in order for a criminal defendant to qualify for parole, the criminal defendant must: "deposit with the court an amount equivalent to the profit generated by the crime or the amount unduly received by the public official charged with the crime, without prejudice to the payment of further compensation for damage caused to the public administration."[129]

Additionally, the new law enforces a monetary fine against defendants that is equivalent to the amount improperly obtained to the benefit of the aggrieved public entity.[130] Lastly, the changed law increased prison sentences for "organized crime activities carried out by three or more persons when, among other situations, force or intimidation or weapons or explosive materials are used."[131]

4. Impact of the Law

It is too soon to determine if the changes in the law have impacted Italy's rate of participation in organized crime activities. According to the Organization for Economic Co-operation and Development's (OECD) Economic Survey on Italy, "reducing corruption and improving trust must remain a priority."[132] It further reported that "Italy's Prosecutors and Judges are doing their best to prosecute bribery offenses, including those of legal entities."[133] Because of this, it is believed that although there are still obstacles facing Italy when dealing with organized crime, they can be overcome.[134]

A. Japan

1. Government

Japan's government is made up of three branches: the Cabinet (executive), the Diet (legislative), and the Courts (judicial).[135] The Prime Minister is the head of the Japanese government and (s)he is appointed by

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128. *Id.*

129. *Id.*

130. *Id.*

131. Figueroa, *supra* note 121.

132. ETHIC INTELLIGENCE, *supra* note 118.

133. *Id.*

134. *Id.*

135. KIDS WEB JAPAN, http://web-japan.org/kidsweb/explore/government/ (last visited July 7, 2016).

the Emperor, who is the ceremonial head of state, through nomination by the Diet.[136] The Diet is bicameral, consisting of the House of Representatives and the House of Councillors [sic], which are responsible for all legislative matters.[137] The Supreme Court of Japan consists of fourteen judges that determine the constitutionality of laws.[138] Most of the money in organized crime comes from drug trafficking.[139] The second most lucrative source comes from gambling and extortion.[140] Last, is "dispute resolution."[141]

2. Organized Crime Group

Japan's "mafia" is known as the "Yakuza."[142] In Japan, there are twenty-one major Yakuza groups that comprise more than 53,000 members.[143] The three largest groups are: the "Yamaguchi-gumi", the "Inagawa-kai", and the "Sumiyoshi-kai."[144] These groups make their money through both illegal activities as well as legitimate businesses.[145] The Yakuza groups claim that they are humanitarian groups because they keep order in Japan.[146] These groups are so well known and revered in Japan that they have office buildings, business cards, fan magazines, and comic books that detail their exploits.[147]

The Yakuza has control over Japan's entertainment industry as well as influence in construction, real estate, currency exchange, labor dispatch, Internet technology, and financial industry.[148] They are also involved in blackmailing company executives, politicians, and bureaucrats to maximize

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136. Asian for Educators, *The Government of Modern Japan: The Branches and Their Functions*, COLUMBIA UNIV., http://afe.easia.columbia.edu/special/japan_1950_govt.htm.

137. *Id.*

138. *Id.*

139. Matthews, *supra* note 109.

140. *Id.*

141. *Id.*

142. Jake Adelstein, *The yakuza: Inside Japan's murky criminal underworld*, CNN (Dec. 16, 2015, 3:46 AM), http://www.cnn.com/2015/09/15/asia/yakuza-yamaguchi-gumi-explainer/ [hereinafter CNN].

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Adelstein, *supra* note 142.

148. *Id.*

profits in their interest areas.[149] "The United States Treasury Department has labeled the Yamaguchi-gumi a transcontinental organized crime group and even placed sanction on the second tier group that rules them" because "[i]n order to conduct its criminal activities, the Yakuza has relationships with criminal affiliates in Asia, Europe, and the Americas."[150]

The Yakuza however, is not all bad.[151] Examples of the Yakuza's humanitarian side came after the 1995 Kobe earthquake and the 2011 Tohoku tsunami.[152] After these natural disasters, the Yakuza were the first to provide aid by using their "gang connections and efficiency to move supplies to unaffected areas to the people in need of food, blankets, and medicine."[153] They also opened up offices and facilities to people affected and rented a helicopter for faster relief.[154]

3. Law and its Changes

Japan first enacted a law in 1991 to combat organized crime known as the "Anti-Boryokudan Law."[155] In Japanese, "Boryokudan" means "violence groups."[156] This law was put in place to regulate Yakuza activity.[157] The Diet stated that in order for a group to be considered "Boryokudan", the group needed to meet three criteria.[158] The first is "regardless of the group's purpose, it must allow members to take advantage of the gang's influence in order to maintain their daily lives, accumulate wealth or execute their business."[159] The second is "a certain percentage of the gang members must have criminal records."[160] Lastly,

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149. *Id.*

150. *Id.*

151. Justin Velgus, *Yakuza: Kind-hearted Criminals or Monsters in Suits?*, GAIJINPOT (Oct. 4, 2012), https://injapan.gaijinpot.com/play/culture/2012/10/04/the-yakuza-kind-hearted-criminals-or-monsters-in-suits/.

152. *Id.*

153. *Id.*

154. *Id.*

155. Edward F. Riley Jr., *Criminalizing Yakuza Membership: A Comparative Study of the Anti-Boryokudan Law*, 13 GEO. WASH. GLOBAL STUD. L. REV. 801, 807 (2014).

156. *Id.* at 808.

157. *Id.* at 807.

158. *Id.*

159. *Id.*

160. Riley, *supra* note 155 at 808.

"the gang must be hierarchically organized under the control of an individual representing the gang."[161]

Even if all three of these criteria are met, the Commission that reviews each group must hold a hearing so that members of the group, as well as a "panel of witnesses" (lawyers), can make statements on the group's behalf before officially designating a group "Boryokudan."[162] The initial enactment of this law had minimal impact on the Yakuza or its membership.[163] In fact, it may have done more harm than good because instead of the Yakuza operating in plain sight, this pushed the Yakuza operations underground.[164]

In 2007, the Diet again made changes to the law.[165] The 2007 changes addressed "Yakuza rituals and the hierarchal nature of the Yakuza organization."[166] This change criminalized certain Yakuza recruitment methods such as "finger-cutting" and "coerced tattooing" as well as providing governmental support for individuals who were attempting to leave the Yakuza.[167] During this revision, the government did not revise any of the penal provisions.[168] The government believes that because of this change in the law, Yakuza membership has decreased.[169] It appears however, that the Yakuza may have just made themselves less visible and only reveal their Yakuza status when it is advantageous to do so.[170]

The most notable change occurred on July 26, 2012 when Japan codified "Revisions of the Organized Crime Group Countermeasures Law."[171] This revision allows police to designate organized crime groups as "extremely dangerous" and then arrest any member of that group without issuing a cease and desist order, if he (or she) makes unreasonable or illegal demands towards an ordinary citizen.[172] The changes in the law also allow

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161. *Id.*

162. *Id.* at 809.

163. *Id.* at 810.

164. *Id.* at 811.

165. Riley, *supra* note 155 at 813.

166. *Id.*

167. *Id.*

168. *Id.* at 814.

169. *Id.* at 815.

170. Riley, *supra* note 155 at 816.

171. Jake Adelstein, *Japan's Newest Anti-Yakuza Laws Allow Instant Arrests*, WIRE, (July 30, 2012, 12:54 PM), http://www.thewire.com/global/2012/07/japans-newest-anti-yakuza-laws-allow-instant-arrests/55198/.

172. *Id.*

the Prefectural Centers under the Elimination of Organized Crime to start legal procedures to forbid the Yakuza from using business offices if they are deemed to be "extremely dangerous."[173]

This change in the law comes as no surprise to the Japanese populous. In addition to changes in the law, the Japanese Diet set up these "Prefectural Centers" in order to "eliminate" the Yakuza.[174] This reaction was a direct result of a public outcry to rid Japan of the Yakuza after an escalation of gang wars between various Yakuza factions.[175]

4. Impact of the Law

Although changes to the law were codified to make participation in Yakuza more challenging, in 2015, the largest group of Yakuza, the Yamaguchi-gumi, split into two main factions: the "Yamaguchi-gumi" and the "Kobe Yamaguchi-gumi".[176] This split is incredibly dangerous because it could create a gang war involving all twenty-one designated crime groups in Japan.[177] The new faction has already set up alliances with other organized crime groups.[178] The last Yakuza split was in 1984 and caused "several years of epic warfare marked with assassinations, attempted bombings and gun battles . . . ."[179]

A. Ecuador

1. Government

Ecuador has a Representative Democracy system of government.[180] This government is comprised of three branches: Executive, Legislative, and Judicial.[181] The President serves as both the head of the state and head of the government and is elected every four years.[182] The Executive Branch

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173. *Id.*

174. *Id.*

175. *Id.*

176. Adelstein, *supra* note 142.

177. *Id.*

178. *Id.*

179. *Id.*

180. Jason Halberstadt, *Ecuador Government Overview & History*, ECUADOREXPLORER.COM, http://www.ecuadorexplorer.com./html/government_and_economy.html (last visited Oct. 15, 2016).

181. *Id.*

182. MICHIGAN STATE U., *Ecuador: Government*, GLOBALEDGE, http://globaledge.msu.edu/countries/ecuador/government (last visited Oct. 15, 2016).

includes twenty-eight ministries.[183] The Legislative Branch consists of the national assembly and has the power to pass laws.[184] The Judicial Branch is Ecuador's Supreme Court and is independent of the Executive and Legislative Branches.[185] The Supreme Court consists of the National Court of Justice and the Constitutional Court of Judges.[186] There is an autonomous electoral agency called the Tribunal Supremo Electoral.[187] Ecuador had a Congress until 2008 when President Rafael Correa dissolved it.[188] Upon dissolving the Congress, Correa convened a "special constitutional assembly" which wrote a new Ecuadorian Constitution.[189]

2. Organized Crime Group

Unlike the United States, Italy, and Japan, Ecuador's organized crime problem is fairly new.[190] Although there is no exact date when organized crime began in Ecuador, government figures show that in 2010, violence of all crimes rose 15 percent in one year.[191] Murders alone have doubled "over the last twenty years to nearly 19 per 100,000 residents."[192] Much of this violence is attributed to the extensive issue of drug trafficking.[193]

Roughly a decade ago, drug trafficking in Ecuador was a "relatively small law enforcement problem."[194] Due to Ecuador's geographic location, between Colombia and Peru, Ecuador has become the site of illegal drug trafficking for international distribution.[195] "Mexican, Russian, Chinese, and Korean drug mafia members regularly visit to arrange deals . . . [and] . . . [g]rowing amounts of cocaine paste are brought [to Ecuador] to be processed because of the Colombian government's crackdown on illicit

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Halberstadt, *supra* note 180.

188. *Id.*

189. *Id.*

190. Chris Kraul, *Drug Trafficking on the Rise Through Ecuador*, L.A. TIMES, (June 26, 2011), http://articles.latimes.com/2011/jun/26/world/la-fg-ecuador-drugs-20110626.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. U.S. Dep't of State, Bureau of Int'l Narcotics & Law Enforcement Affairs, Country Report: Ecuador 158 (2014).

labs."[196] Ecuador is "vulnerable to transnational organized crime due to weak public institutions, porous borders, and corruption."[197] It is estimated that " 200 tons of cocaine, or one-quarter of all that's manufactured yearly in Colombia and Peru, transits through Ecuador."[198] Ecuador also traffics the chemical precursors for drugs other than cocaine or heroin.[199] Chemical precursors are compounds that are needed in the "synthetic or extraction process of drug production."[200]

3. Law and its Changes

Ecuador's 2008 Constitution categorized drug abuse as a "public health problem."[201] Because of the rise in addicts in Ecuador, on December 17, 2013, the Ecuadorian National Assembly passed a new Ecuadorian criminal code.[202] The National Council for Narcotic and Psychotropic Substances announced a new scale in order to differentiate between drug users, micro-traffickers, and large-scale traffickers.[203] This was done in order to identify the level a person was considered and to control prison sentences.[204] The National Council for Narcotic and Psychotropic Substances is an administrative institution that was set up to exclusively "take charge of drug control."[205]

Before the change in the law, "possession of anything up to one gram of heroin and fifty grams of cocaine were considered 'minimum' and essentially decriminalized. . . ."[206] Now, these quantities are considered

196. Kraul, *supra* note 190.

197. U.S. Dep't of State, *supra* note 195.

198. Kraul, *supra* note 190.

199. U.S. Dep't of State, *supra* note 195.

200. *Precursor Chemical*, THEFREEDICTIONARY.COM, http://www.thefreedictionary.com/precursor+chemical (last visited Oct. 15, 2016).

201. U.S. Dep't of State, *supra* note 195.

202. *Id.*

203. Aaron Daugherty, *Ecuador Toughens Drugs Laws, Muddles Policy*, INSIGHT CRIME (Sept. 10, 2015), http://www.insightcrime.org/news-briefs/ecuador-president-proposes-tougher-punishment-for-microtraffickers.

204. *Id.*

205. *Ecuador*, TNI DRUGS & DEMOCRACY, http://www.undrugcontrol.info/en/countryinformation/latinamerica/ecuador/item/204ecuador?pop=1&tmpl=component&print=1(last visited Oct. 15, 2016).

206. Daugherty, *supra* note 203.

"high" and come with a prison sentence.[207] This was done to have a more uniform system of sentencing.[208]

Surprisingly, in 2014, Ecuador released "500 drug mules or low-level traffickers in a move aimed [at] alleviat[ing] prison crowding."[209] Initially, Ecuador treated addiction like it was a health problem rather than a crime.[210] Recently however, the government appears to be recriminalizing drug use.[211] This is in opposition with the work Correra did in 2014.[212] Because of the new push to criminalize low-level drug offenders in 2015 by Correa, Ecuador's issue of prison overcrowding will continue to rise.[213]

4. Impact of the Law

Because the issue of organized crime and the recently codified laws in Ecuador are so recent, there is not a wealth of information on the impact of these laws. In 2016, Ecuadorian authorities "lashed out" against a recently published drug report conducted by the United States State Department.[214] The State Department's 2016 International Narcotics Control Strategy Report, which discusses drug trafficking trends around the world, labeled Ecuador as a "major transit country" and noted the "continuing presence of transnational organized crime groups . . . [such as] . . . the Zetas, the Sinaloa Cartel, the Gulf Cartel, and the Revolutionary Armed Forces of Colombia . . . ."[215] Ecuador's Chief of Police stated that although this study has been "accurate" in prior years, "recent police investigations had found 'no links to such cartels.'"[216] Ecuadorian officials also stated that in 2015, the government seized eighty-tons of drugs and over 400-tons in the last eight years.[217] Although both governments may be reporting accurate statistics, there is speculation that due to recent tension between Ecuador and the United States, these reports could be somewhat exaggerated to

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207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Ecuador*, *supra* note 205.

212. Daugherty, *supra* note 203.

213. *Id.*

214. Lucia Bird, *Ecuador Rejects US Drug Trafficking Report Findings*, INSIGHT CRIME (Mar. 8, 2016), http://www.insightcrime.org/news-briefs/ecuador-rejects-us-drug-trafficking-report-findings.

215. U.S. Dep't of State, *supra* note 195; Bird, *supra* note 214.

216. Bird, *supra* note 214.

217. *Id.*

benefit each side's point of view.[218] The passage of this new Criminal Code does provide law enforcement with new tools for surveillance and operations however, the "lack of regimented investigative training hinders the ability to successfully prosecute transnational crime."[219]

III. GLOBAL ECONOMY & TRANSNATIONAL ORGANIZED CRIME

"Transnational organized crime is big business. In 2009 it was estimated to generate $870 billion—an amount equal to 1.5 percent of global GDP. That is . . . the equivalent of close to 7 percent of the world's exports of merchandise."[220]

In 2009, the General Assembly of the United Nations estimated that the "value of illicit trade around the globe was estimated at $1.3 trillion and is increasing."[221] For criminal acts to be considered "transnational", the criminal actions must be "profit-motivated" and be "of an international nature where more than one country is involved."[222]

According to the United Nations Office on Drugs and Crime, the most lucrative types of transnational organized crime are: drug trafficking; human trafficking; smuggling of migrants; illicit trading in firearms; trafficking in natural resources; illegal trade in wildlife; sale of fraudulent medicines; and cybercrime.[223] Almost all of these crimes bring in over one billion dollars of revenue annually.[224] A breakdown of the types of crimes based on the estimated annual value they bring shows that drug trafficking continues to bring in the most money annually.[225] In 2009, it was reported that the total value for drug

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218. *Id.*

219. U.S. Dep't of State, *supra* note 195.

220. UNODC, *supra* note 34.

221. General Assembly of the United Nations, *Thematic Debate of the 66th session of the U.N. General Assembly on Drugs & Crime as a Threat to Development on the Occasion of the U.N. International Day against Drug Abuse & Illicit Trafficking* (June 26, 2012) [hereinafter U.N.G.A.]. All Permanent Rep. and Permanent Observers to the U.N., Letter dated June 15, 2012 from All Permanent Rep. and Permanent Observers to the United Nations addressed to the President of the General Assembly (June 26, 2012) [hereinafter U.N. GAOR.].

222. UNODC, *supra* note 34.

223. *Id.*

224. *Id.*

225. *Id.*

trafficking was a staggering $320 billion.[226] Calculated in that $320 billion is the $85 billion in the global sale of cocaine.[227]

This issue is not, however, only an economic one because transnational organized crime also has a major impact on the local governments and people living in these areas.[228] Giving these criminal groups such large sums of money allows them to have a "direct impact on governance."[229] This allows for corruption and the "buying of elections."[230] It also "destabilizes countries and entire regions, thereby undermining development assistance in those areas."[231]

These organizations "undermine development by eroding social and human capital."[232] This means that in areas where there is a large organized crime presence, skilled laborers are likely to leave work and those seeking educational opportunities will be impeded from gaining access to schooling.[233] The presence of organized crime in a location will also drive away both "foreign and domestic investors [because they] see crime as a sign of social instability, and crime drives up the cost of doing business."[234]

Transnational organized crime also impacts legitimate businesses when illegal goods displace the original products, because they are made and sold at a much lower price.[235] The impact of transnational counterfeiting in the United States alone is astounding. "It is estimated that 7 percent of our annual world trade—$600 billion worth—is counterfeit or pirated; that fakes are believed to be directly responsible for the loss of more than 750,000 American jobs . . . ."[236] This does not mean that just a few fake handbags are making their way around the world.

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226. *Id.*

227. UNODC, *supra* note 34.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. U.N.G.A., GAOR, *supra* note 221.

233. *Id.*

234. *Id.*

235. *See* Dana Thomas, *The Fight Against Fakes*, HARPERS BAZAAR, (Jan. 8, 2009), http://www.harpersbazaar.com/culture/features/a359/the-.

236. *Id.*

> [E]verything from baby formula to medicine is counterfeited, with tragic results; . . . counterfeiters and the crime syndicates they work with deal in human trafficking, child labor, and gang warfare; and . . . counterfeiting is used to launder money, and the money has been linked to truly sinister deeds such as terrorism.[237]

The issue of transnational organized crime groups manufacturing and selling counterfeit designer goods is becoming such an issue that major fashion houses have attempted to bring down these syndicates.[238] Some organized crime groups used online retail giant, eBay, to sell counterfeit designer handbags.[239] As a result, Louis Vuitton sued eBay and was successful because it showed that "ninety-percent of the Vuitton and Dior items offered on eBay in the first half of 2006 were counterfeits."[240] Although there are measures in place to protect these retailers from these large-scale operations, these organized crime groups are now shipping in "generic items" and then having people within the United States finish them domestically.[241] This will prevent border agents from detecting counterfeit goods.[242] Because of transnational organized crime, both local and federal governments choose to increase public spending for security and policing rather than putting that money toward helping their citizens.[243]

IV. COMPARISONS

While most of the United States, Japan, and Italy appear to be getting increasingly stricter with their organized crime laws, Ecuador has decriminalized possession of certain drugs like cocaine and heroin.[244] This is significant because Ecuador's organized crime issue is emerging while the other three countries have a history with organized crime. This would lead someone to believe that Ecuador would be able to control its emerging organized crime issue by enforcing stricter laws and not letting individuals with minor drug offenses out of prison. Italy and Japan have increased the

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237. *Id.*

238. *See id.*

239. *Id.*

240. Thomas, *supra* note 235.

241. *Id.*

242. *Id.*

243. *Id.*

244. Arron Daugherty, *Ecuador Toughens Drugs Laws, Muddles Policy,* INSIGHT CRIME (Sept. 10, 2015), http://www.insightcrime.org/news-briefs/ecuador-president-proposes-tougher-punishment-for-microtraffickers.

strictness of their laws by codifying changes and enforcing them while the United States has just used the vagueness of the RICO statute to prosecute more individuals not directly involved in organized crime.[245]

V. CONCLUSION

Through education, policing and legislation, the United States, Italy, Japan, and Ecuador can continue to combat the issue of organized crime. The United States needs to clearly define the RICO statute to provide prosecutors with more definitive parameters. This would decrease the amount of individuals that are being prosecuted under the statute for offenses not related to organized crime. Clarifying the statute may, however, cause an increase in organized crime behavior because prosecutors are using ambiguities in the statute to indict and convict more individuals. The legislature should also remove the clause in the RICO statute that allows for mandatory forfeitures of property before someone under RICO has been found guilty. Although the mandatory forfeiture is of property obtained *during* the alleged illegal conduct, having this clause in the statue deprives a defendant an equal right to competent legal representation because their ability to find suitable counsel is thwarted due to a lack of finances.

The United States should also look to the historic and present day examples of successful cooperation between organized crime groups and the government in order to utilize the mafia to combat terrorist cells that threaten the United States. This may give organized crime participants positive avenues to protect their country. It could also provide increased information between crime organizations and the government to combat planned attacks before they are carried out. This would decrease government spending because non-governmental groups are using their resources to combat terrorist groups.

Increasing prison terms appears to be a positive step to decrease organized crime in Italy. However, the fact that people are incarcerated longer does not necessarily mean that participation will decrease. The mafia is an idea that is so ingrained in the Italian culture that it will be difficult to rewrite history. Instead of codifying more laws, Italy's government should attempt to deal with the stigma, whether positive or negative, associated with the mafia. One way to achieve this goal could be to launch a campaign to discuss the impact of the mafia and to inform

245. Lynch, *supra* note 73; Figueroa, *supra* note 121; Riley, *supra* note 155 at 813–15.

citizens of the actual damage being done to Italy's economy. Italians may band together against the mafia and participation may decrease.

Japan's recent change to its law has quite possibly done more harm than good because this approach forced the Yakuza to move underground and reorganize. Having the Yakuza underground could cause them to become more dangerous because the government has less opportunity to monitor Yakuza activity. If the Yakuza have offices, the government could conduct searches of these locations and get a better handle on the activities they conduct. It is also important for the government to watch Yakuza groups due to the faction that just occurred. This faction could cause a dangerous gang war in Japan. This gang war would threaten the safety of not only the Japanese citizens, but also the economy because the Yakuza are so entrenched in Japanese business.

The rise of drug use and sale in Ecuador is being exacerbated because instead of increasing prison terms for drug use and distribution, Ecuador is decriminalizing drug possession. Instead of decriminalizing drug possession, Ecuador should become stricter in its enforcement and prosecution of drug offenders. Ecuador should also attempt to increase border security to quell the import/export of drugs in and out of the country and the countries around it. Ecuador should continue to work with the United States, rather than against it, to manage the drug trade before it spreads to other industries as well. Having a rampant drug trade tends to increase crime and poverty. Ecuador needs to get this issue under control before its citizens and economy suffer grave consequences.

THE CORRELATION BETWEEN WIRETAPPING AND TERRORISM: A COMPARATIVE ANALYSIS OF AMERICAN AND EUROPEAN SOCIETAL VIEWS ON GOVERNMENT SURVEILLANCE

Lora A. Esau[*]

I. INTRODUCTION

As the former Federal Bureau of Investigation (FBI) Director Louis Freeh once said, "[a]sk the American public if they want an FBI wiretap and they'll say, 'No'. If you ask them do they want a feature on their phone that helps the FBI find their missing child they'll say, 'Yes'."[1] According to reports, 2014 was the deadliest year of the twenty-first century as it pertained to deaths from a direct result of terrorism with a total of 32,658 deaths; an increase of eighty percent from 2013.[2] Wiretapping is defined as, "a form of electronic eavesdropping accomplished by seizing or

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1. *Quote from Louis Freeh*, LIBERTY-TREE.CA, http://quotes.liberty-tree.ca/quote_blog/Louis.Freeh.Quote.4006 (last visited on Sept. 23, 2016) [hereinafter *Louis Freeh*].

2. Daniel Costa-Roberts, *4 surprising facts from the 2015 Global Terrorism Index*, PBS.ORG (Nov. 23, 2015, 2:30 PM), http://www.pbs.org/newshour/rundown/4-surprising-facts-from-the-2015-global-terrorism-index/.

overhearing communications by means of a concealed recording or listening device connected to the transmission line."[3] Wiretapping is one of the many tools used to conduct surveillance. This surveillance is conducted domestically, as well as internationally; therefore, a citizen of a specific country is not warranted from that country eavesdropping on his or her conversations.[4]

Terrorism has increased, and has continued to do so over the last fifteen years. Patterns have shown, that when tragedies occur, more domestic and international surveillance occurs. Some of this surveillance is conducted through wiretapping. Although there are laws in place for wiretapping, the laws are not strict enough and tend to infringe on the privacy of many individuals living within that country.

This article will focus on raising awareness and attention to domestic surveillance, specifically wiretapping, the ease of obtaining a warrant for such surveillance, as well as how the United States' laws and frequent wiretapping compare to other countries in Europe especially during times of terror.

First, this article will give a brief overview of the structure of the United States government, followed by an explanation of the laws used and procedures in place to allow wiretapping. Next, this article will contain background information about the structure of the three European countries' type of government—Russia, Italy, and France—followed by an explanation of the laws and procedures in place for wiretapping to occur. Additionally, this article will compare the four countries and applicable laws, and discuss the correlation between terrorism occurrences and domestic surveillance, with a focus on wiretapping. Then, this article will discuss society's opinion regarding whether they agree or disagree with the government watching them. This article concludes with a brief recap of the information shared on wiretapping and changes that should be made to the wiretapping laws and domestic surveillance as a whole.

II. LAWS AND EVENTS IN DIFFERENT COUNTRIES

A. The United States

The most alarming statistic released from the United States Courts in 2015 stated, "[n]o wiretap applications were reported as denied in 2015."[5]

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3. THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/Wiretapping (last visited Sept. 23, 2016).

4. *How the NSA's Domestic Spying Program Works*, EFF.COM, https://www.eff.org/nsa-spying/how-it-works (last visited Sept. 23, 2016).

5. *Wiretap Report 2015*, U.S. CTS. (Dec. 31, 2015), http://www.uscourts.gov/statistics-reports/wiretap-report-2015.

This statistic is alarming because it shows that it is extremely easy to obtain a warrant to wiretap and that judges generally will not deny such request.

Wiretapping in the United States began in 1857 when the telegraph was invented, and furthered upon the invention of the telephone.[6]

The United States is a federal presidential republic.[7] As such, the powers of the federal government are limited, therefore allowing the states to retain a degree of sovereignty, and giving the citizens the power to vote and choose the individuals that will represent their government.[8] The Congress is a bicameral legislature, thus dividing the legislators into two branches or houses—the Senate and the House of Representatives—and giving each state the same number of seats regardless of population to ensure equal representation in Congress of the smaller less-populated states.[9] The legislative branch enacts legislation and the executive branch is charged with enforcing the law and carrying it out.[10] The President of the United States is the head of the executive branch.[11] This article was written during the final days of President Barack Obama's second and last term.

In January of 2016, the estimated population in the United States was 322,762,018.[12] While there may not have been nearly as many people living in the United States when wiretapping first began, by 1934, Congress realized it was time to pass the first federal wiretapping law upon rise of multiple challenges pertaining to the admissibility of wiretap evidence as being violations of the Fourth Amendment.[13] The Fourth Amendment establishes:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon

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6. Howard J. Kaplan et al., *The History and Law of Wiretapping*, A.B.A. SEC. OF LITIG. 1, 2 (2012), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/29-1_history_and_law_of_wiretapping.authcheckdam.pdf.

7. *The World Factbook*, C.I.A., https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html?fieldkey=2128&term=Government%20type (last visited Sept. 23, 2016).

8. *Id.*

9. *Senate Legislative Process*, SENATE.GOV, http://www.senate.gov/legislative/common/briefing/Senate_legislative_process.htm (last visited Sept. 23, 2016).

10. *Branches of Government*, USA.GOV, https://www.usa.gov/branches-of-government (last visited Sept. 23, 2016).

11. *Id.*

12. Robert Schlesinger, *The Size of the U.S. and the World in 2016*, U.S. NEWS: THOMAS JEFFERSON STREET (Jan. 5, 2016, 4:05 PM), http://www.usnews.com/opinion/blogs/robert-schlesinger/articles/2016-01-05/us-population-in-2016-according-to-census-estimates-322-762-018.

13. Kaplan et al., *supra* note 6, at 2–3.

> probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[14]

The Communications Act of 1934 made wiretapping a criminal offense and inadmissible in court.[15] However, this law only lasted until 1960, when the government was unable to enforce laws that were in place due to a large amount of criminal activity.[16] The case that changed everything was *Katz v. United States*. In *Katz v. United States*, the police had placed an eavesdropping device on a public payphone to record the telephone conversations of an illegal gambling operation which led to Katz ultimately being arrested and convicted.[17] On appeal, the Supreme Court of the United States ruled seven-to-one that police action in this situation violated the Fourth Amendment. The Court determined that Katz's expectation of privacy was reasonable under the circumstances; thus, changing the original requirement of a "physical trespass," previously established in *Olmstead v. United States*.[18] In *Olmstead*, the Supreme Court held that the government did not violate Olmstead's privacy because the wiretaps were placed in the street, and therefore, did not trespass onto Olmstead's property and did not constitute a "search" under the Fourth Amendment.[19]

Today, constitutional challenges are limited because of 18 U.S.C. § 2518 which outlines in depth the procedure that a federal prosecutor must take to intercept wire, oral, or electronic communications.[20] To obtain an order authorizing or approving the interception of a wire, oral, or electronic communication, an application must be made under oath or affirmation to a judge with jurisdiction over the matter, and include the following:

> (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application; (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be

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14. U.S. CONST. amend. IV.

15. Kaplan et al., *supra* note 6, at 3.

16. *Id.*

17. Katz v. United States, 389 U.S. 347, 348–49 (1967); *see also* Kaplan et al., *supra* note 6, at 3.

18. *Katz*, 389 U.S. at 353; *see also* Kaplan et al., *supra* note 6, at 3.

19. *Katz*, 389 U.S. at 353; *see also* Olmstead v. United States, 277 U.S. 438, 457, 466 (1928).

20. Kaplan et al., *supra* note 6, at 3.

> committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted; (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous; (d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; (e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and (f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.[21]

Although there were procedures in place that require the federal prosecutor to obtain a court order prior to intercepting wire, oral, or electronic communication, in 2001—shortly after the September 11th terrorist attacks, the U.S.A. Patriot Act (Patriot Act) was passed. The purpose of the Patriot Act was to expand and aid the government's power in anti-terrorism investigations while streamlining the process to obtain the necessary warrants to wiretap. Unfortunately, this proved to be insufficient.[22]

In 2002, former President George W. Bush, expanded the authority by approving wiretaps without warrants by authorizing a domestic spying program designed to help prevent future attacks by conducting surveillance amongst citizens' phone calls, e-mails, and other forms of

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21. 18 U.S.C. §§ 2518(1)(a–f) (2012).

22. S*ee also* Alex Markels, *Timeline: Wiretaps' Use and Abuse*, NPR.ORG (Dec. 20, 2005, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=5061834; s*ee generally* Larry Abramson & Maria Godoy, *The Patriot Act: Key Controversies*, NPR.ORG (Feb. 14, 2006), http://www.npr.org/news/specials/patriotact/patriotactprovisions.html.

communications.[23] This law is still currently in place sans a few provisions that have been removed.[24] The first provision removed was section 215 which allowed the National Security Agency (NSA) to collect metadata on millions of Americans and store the information for five years.[25] Metadata is defined as data which describes other data by providing information pertaining to a certain item's content.[26] The second provision removed was the law enforcement officer's ability to have a roving tap, which means an order that is continuous even if the suspect frequently changes communication devices.[27] As a result, law enforcement officers are now required to get a new court order.[28] Lastly, the government is no longer allowed to use national security tools against "lone-wolf" terror suspects if there is no connection found to a foreign terror group.[29]

There is no doubt, that when terrorism strikes, there is an increase in domestic surveillance. The Paris attacks which occurred in November of 2015, triggered a plan from the FBI to increase domestic surveillance of suspected ISIS sympathizers as a way to protect against potential threats in the United States.[30] Further, the Federal Communications Commission (FCC) chairman had suggested to expand wiretap laws.[31] Inaccurate news reports on the Paris attacks stated that the attackers communicated via a game console, PlayStation 4, which was not defined under the 1994 Communications Assistance for Law Enforcement Act (CALEA).[32] The CALEA requires telecom companies, internet providers, and some online voice services to build their networks in ways that allow simpler access for authorities when it is necessary to lawfully intercept a suspect's telephone and online communication.[33] The PlayStation 4 was not something that

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23. Markels, *supra* note 22.

24. Jeremy Diamond, *Patriot Act provisions have expired: What happens now?* CNN.COM (June 1, 2015, 10:48 AM), http://www.cnn.com/2015/05/30/politics/what-happens-if-the-patriot-act-provisions-expire/.

25. *Id.*

26. *Metadata*, TECHTERMS, http://techterms.com/definition/metadata (last visited Sept. 23, 2016).

27. Diamond, *supra* note 24.

28. *Id.*

29. *Id.*

30. Evan Perez, *After Paris: More wiretaps of U.S.-based suspects*, CNN (Nov. 15, 2015, 3:03 PM), http://www.cnn.com/2015/11/15/politics/paris-attacks-us-wiretaps.

31. Brian Fung & Andrea Peterson, *FCC chairman suggests expanded wiretap laws in response to the Paris attacks*, WASH. POST (Nov. 17, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/11/17/the-fcc-suggests-expanded-wiretap-laws-in-response-to-the-paris-attacks/.

32. *Id.*

33. *Id.*

was considered in 1994, and while the reports of communication via the gaming console are allegedly untrue, the FCC chairman believes this is something worth looking into in the event something were to take place in the future.[34]

The 2016 shooting at Pulse Nightclub in Orlando, Florida has become "the deadliest shooting rampage in U.S. history."[35] A recent interview that was transcribed took place between FRESH AIR contributor Dave Davies and Eric Lichtblau, who is a winner of the Pulitzer Prize for national reporting for breaking the story of President Bush's administration's warrantless wiretapping program, in which they discussed the Orlando attack.[36] This is an excerpt of the conversation which took place:

> DAVIES: Let's start by talking about Omar Mateen, the shooter in the massacre in Orlando. The FBI, we know, did investigate him. What drew their attention to Omar Mateen?
> LICHTBLAU: Right. They actually looked at him twice . . . . They used an undercover informant to try and see whether he was really planning anything. They did surveillance. They did wiretapping. They interviewed the co-workers, obviously. They extended the investigation past the six months that they were originally allowed to go. And after about [ten] months, they closed it down. They said they did not have enough evidence to indicate that he was supporting terrorism or planned to act on his earlier comments. And the FBI kind of threw up its hands and closed the investigation.[37]

This is one example of where wiretaps were used domestically to thwart potential terrorism and even though they investigated this person twice, an attack was still successfully carried out years later.

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34. *Id.*

35. CNN LIBRARY, *Deadliest Mass Shootings in U.S. History Fast Facts,* CNN (June 13, 2016, 8:27 AM), http://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/.

36. *How The FBI's Wiretaps And Sting Operation Failed To Stop The Orlando Shooter*, NPR (June 29, 2016, 1:13 PM), http://www.npr.org/2016/06/29/484006952/how-the-fbis-wiretaps-and-sting-operation-failed-to-stop-the-orlando-shooter.

37. *Id.*

B. European Countries

1. Russia

Russia, formally a part of the Soviet Union, became independent in 1991 when the Soviet Union dissolved.[38] Russia is currently a federal multiparty republic with a bicameral legislative body.[39] This means that Russia is made up of a federal state with a constitution and other units that are self-governed.[40] The government consists of two bodies the Federation Council and the State Duma.[41] The Federation Council currently has 170 seats and the State Duma currently has 450 seats.[42] Russia has a head of state which is the president as well as a head of government which is the prime minister.[43] The current president is Vladimir Putin and the prime minister is Dmitry Medvedev.[44] The estimated population of Russia in 2015 was 146.3 million people.[45]

Russia's national system of lawful interception of all electronic communication is The System of Operative-Investigative Measures (SORM).[46] There are a total of seven Russian investigative and security agencies that have been granted the legal right to intercept phone calls and emails; however, it is the Federal Security Service (FSB) who defines the procedures that take place to intercept electronic communications.[47] As bizarre as this sounds, the FSB must obtain a court order prior to intercepting the oral communications but they do not have to provide it to any telecom providers.[48] This means, that the FSB can obtain the court order and immediately tap right into an individual's line.[49] The FSB

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38. ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/Russia (last visited July 22, 2016) [hereinafter *About Russia*].

39. *Id.*

40. DICTIONARY.COM, http://www.dictionary.com/browse/federal-republic (last visited July 22, 2016).

41. *About Russia*, *supra* note 38.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Russia Population*, TRADING ECON., http://www.tradingeconomics.com/russia/population (last visited July 22, 2016).

46. Andrei Soldatov et al., *Russia's Surveillance State*, WORLD POL'Y J., Fall 2013, at 23 [hereinafter WORLD POL'Y].

47. *Id.* at 24.

48. *Id.* at 25.

49. *Id.*

requires telecom providers to pay for the SORM equipment and its installation while having no access to the surveillance boxes.[50]

On August 12, 1995, a law was passed on operative searches and seizures which gave the right to the FSB to carry some investigative activities without prior judicial approval.[51] Some of the activities included were wiretapping telephones and monitoring other forms of communication.[52] The FSB was allowed to engage in these activities if there was an emergency and serious crime was going to be committed, or if Russia's political, military, economic or environmental security were threatened.[53] A judge must be notified within twenty-four hours of any action taken and within forty-eight hours either cease the surveillance or have the appropriate court order to continue.[54] The biggest flaw found in this act, is the definition of what constitutes "security" and "emergency" because without a fine line, it becomes subjective.[55]

In December 2010, a federal law was passed expanding the legal grounds for wiretapping domestically in Russia.[56] Receiving a report that an individual is preparing to commit a crime is sufficient; they do not need to back up those allegations.[57] The transcript of the conversation will remain even if the allegations hold no merit and may turn up later in another criminal case in the future.[58] Andrei Soldatov, who is a leading security expert stated, "telephone and e-mail intercepts and recordings have risen from 265,000 in 2007 to 466,000 in 2011 and that it is still on the rise."[59] He also stated, "there is a lack of parliament oversight and it is almost impossible to establish who is carrying out these wiretap operations, even against opposition leaders."[60] In 2011, only 3554 wiretap requests, or

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50. *Id.*

51. *FSB Legislative Authority*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/intell/world/russia/fsb-legis.htm (last visited July 21, 2016).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Irina Borogan & Andrei Soldatov, *The Kremlin Is All Ears*, MOSCOW TIMES (Dec. 28, 2012, 20:17), http://www.themoscowtimes.com/opinion/article/the-kremlin-is-all-ears/473703.html.

57. *Id.*

58. *Id.*

59. Tom Balmforth, *Spy vs. Spy: Wiretapping On The Increase In Russia*, RADIO FREE EUR. (July 16, 2012), http://www.rferl.org/content/spy-wiretapping-on-increase-russia-rival-security-services/24647019.html.

60. *Id.*

one percent out of 466,152 were rejected.[61] One of those wiretaps conducted were of the Boston Marathon bombing suspect, Tamerlan Tsarnaev.[62] In 2011, Russia secretly recorded a telephone conversation with his mother vaguely discussing jihad.[63] There was another telephone conversation recorded of the mother speaking to someone in Southern Russia who is under FBI investigation for an unrelated case.[64] The Russian government allegedly told the FBI these individuals were religious extremists.[65] Lastly, by way of domestic surveillance, the Moscow Times have reported that in January of 2016, Moscow has thwarted Islamic State terrorist attacks in Russia as they had "operational control" over them from the beginning.[66]

2. Italy

"In Italy, you're nobody if your phone isn't tapped."[67] Italy's leading political provocateur and blogger Beppe Grillo stated, "this is a nation where if you cannot be blackmailed, you will never get ahead."[68] Once a monarchy government being ran by a king was replaced shortly after World War II, on June 2, 1946, when the Italians voted in a referendum to replace the monarchy.[69] Today, Italy is now a republic government made up of two legislative houses, the senate and the chamber of deputies.[70] This means that this government is ruled by representatives of the citizen body.[71] Italy has a head of state which is the president and a head of government which is the prime minister. The current president is Sergio Mattarella and the

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61. *Wiretapping Doubles in Russia Since 2007*, SPUTNIK INT'L (Apr. 6, 2012, 18:27), http://sputniknews.com/russia/20120604/173843249.html [hereinafter Sputnik Int'l].

62. *Russia had wiretap on Boston Marathon bombing suspect, US officials say*, FOXNEWS.COM (Apr. 27, 2013), http://www.foxnews.com/us/2013/04/27/russia-had-wiretap-on-boston-marathon-bombing-suspect-us-officials-say.html.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Moscow Says It Thwarted IS Terror Attacks in Russia*, MOSCOW TIMES (Jan. 29, 2016, 19:02), http://www.themoscowtimes.com/news/moscow-says-it-thwarted-is-terror-attacks-in-russia-51648.

67. Rachel Donadio, *An Untapped Phone Call in Italy? It's Possible*, N.Y. TIMES (May 30, 2010), http://www.nytimes.com/2010/05/31/world/europe/31italy.html?_r=0.

68. *Id.*

69. Marino Berengo et al., *Italy: Government and society*, ENCYCLOPEDIA BRITANNICA (Aug. 12, 2016), https://www.britannica.com/place/Italy/Government-and-society [hereinafter *About Italy*].

70. *Id.*

71. André Munro, *Republic*, ENCYCLOPEDIA BRITANNICA (June 22, 2016), https://www.britannica.com/topic/republic-government.

prime minister is Matteo Renzi.[72] The Senate has 322 seats currently which includes seven non-elective seats; five of which are presidential appointees and two former presidents serving.[73] The Chamber of Deputies has 630 seats currently and are popularly elected through a system of proportional representation and are considered the lower chamber.[74] In 2015 the Italian population was estimated at 60.8 million people.[75]

Article 15 of the Italian Constitution states, "[t]he freedom and secrecy of correspondence and of every other form of communication is inviolable,"[76] but yet many individuals' privacy is still being intruded on despite this constitutional guarantee. Article 266 of the Italian Code of Criminal Procedure states:

> the interception of a telephone conversation or communication and other forms of telecommunications is allowed in proceedings relating to the following offenses: a) intentional crimes for which is provided for life imprisonment or imprisonment for a maximum of five years; determined in accordance with Article 4; b) crimes against the public administration for which is planned the penalty of imprisonment of not less than five years determined in accordance with Article 4; c) offenses relating to narcotic drugs and psychotropic substances; d) offenses relating to weapons and explosives; e) smuggling offenses; f) crimes of abuse, threats, usury, illegal financial activities, insider trading, market manipulation, harassment or annoyance to persons by means of telephone.[77]

To obtain permission to wiretap in Italy the officer needs to ask the judge for preliminary investigations and obtain authorization for serious crimes as outlined above and essential for the continuation of the investigation.[78] In cases where serious harm to the investigation may occur the officer may move forward with the interception of communication so long as the court is notified not later than twenty-four hours.[79] The court, within forty-eight hours will render a decision on whether they will allow

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72. *About Italy*, *supra* note 69.

73. *Id.*

74. *Id.*

75. *Italy Population*, TRADING ECON., http://www.tradingeconomics.com/italy/population (last visited July 22, 2016).

76. Art. 15 Costituzione [Cost.] (It.).

77. C.p.p. art. 266 (It.).

78. *Id.* at art. 267.

79. *Id.*

the intercepting of communications to continue or cease and if it is not validated, the interception must cease and the evidence collected cannot be used.[80] After the September 11, 2001 terrorist attacks, Italy has allowed anticipatory wiretapping even without any ongoing investigation.[81]

Italy is infamous for wiretapping.[82] Wiretapping is such a common practice in Italy that even former Secretary of State, and current Presidential Candidate, Hillary Clinton, and Pope Benedict XVI when they were speaking with the head of Italy's civil protection agency, Guido Bertolaso, were wiretapped as he was being wiretapped as part of an investigation.[83] In 2006, the Max Planck Institute calculated that seventy-six out of every 100,000 Italians had their phones tapped.[84] Further, in 2008 as reported by the ministry of justice, 124,326 phones were tapped.[85] With the increase of terrorism in Europe, the Russian Today reported that Italy had recently stopped potential ISIS attacks on the Israeli embassy in Rome as well as on the Vatican by intercepting communications.[86] Despite the great news, "Italy is the eavesdropping centre of Europe," putting many Italians' privacy expectations at risk.[87]

3. France

France is a republic government with two legislative houses.[88] The two houses of the French parliament consist of the Senate and the National Assembly.[89] The Senate has 348 seats currently and the National Assembly currently has 577 seats.[90] France also has a head of state which is the

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80. *Id.*

81. Elizabeth F. Defeis, *Italy--Journalists, Privacy and A Right To Information*, 20 DIG., NAT'L ITALIAN A.B.A. L.J. 41, 42 (2012).

82. *See* Donadio, *supra* note 67.

83. Nick Squires, *Silvio Berlusconi wiretap victory in confidence vote*, THE TELEGRAPH (June 10, 2010, 5:46 PM), http://www.telegraph.co.uk/news/worldnews/europe/italy/7818509/Silvio-Berlusconi-wiretap-victory-in-confidence-vote.html.

84. *Italian bill to limit wiretaps draws fire*, BBC NEWS (June 11, 2010), http://www.bbc.com/news/10279312 [hereinafter *Italian bill*].

85. *Id.*

86. *Italy busts ISIS supporters cell mulling attacks on Vatican & Israeli embassy in Rome*, RT NEWS (Apr. 29, 2016, 00:10), https://www.rt.com/news/341304-italy-arrests-isis-supporers/.

87. *Italian bill*, *supra* note 84.

88. T.N. Bisson, et al., *France: The role of the president*, ENCYCLOPEDIA BRITANNICA (July 15, 2016), https://www.britannica.com/place/France/The-role-of-the-president.

89. *Id.*

90. *Id.*

president and a head of government which is the prime minister.[91] The current president is François Hollande, and the current prime minister is Manuel Valls.[92] Currently, France's estimated population is 66.6 million people.[93]

On July 10, 1991 France passed the 1991 Wiretapping Act which gave freedom of telecommunications from being intruded on without a court order.[94] The only ones that can intrude were police officers without magistrate approval or for national security purposes which did not require magistrate approval.[95] If the reason for intruding telecommunications was for national security purposes it only had to be approved by the current prime minister who in turn was required to tell an independent three-member commission of two legislators and of a chair who would be named by the courts.[96]

On January 7, 2015 terror struck in France and was considered one of the "worst security crises in decades."[97] After the attacks, France passed a new law allowing domestic surveillance of anyone linked to a "terrorist inquiry" by intelligence agencies without prior approval.[98] The new law allows the intelligence agencies to collect metadata which will be subject to analysis for any potential suspicious behavior, place cameras and recording devices in private homes, and install key logger devices which record every key stroke on a computer that is bugged in actual live time.[99] Initially, the metadata collected is anonymous but if necessary with follow-up requests, the agencies could reveal the identity.[100] Metadata is stored for five years and recordings only one month.[101] The law also allows the use of IMSI catchers, which is something flown over a specific area that collects data and records all types of conversations whether it is via phone, internet, or

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91. *Id.*

92. *Id.*

93. *France Population*, TRADING ECON., http://www.tradingeconomics.com/france/population (last visited July 22, 2016).

94. Edward A. Tomlinson, *The Saga of Wiretapping in France: What It Tells Us About the French Criminal Justice System*, 53 LA. L. REV. 1091, 1091–92 (1993).

95. *Id.* at 1092.

96. *Id.*

97. *Charlie Hebdo attack: Three days of terror*, BBC NEWS (Jan. 14, 2015), http://www.bbc.com/news/world-europe-30708237.

98. Angelique Chrisafis, *France passes new surveillance law in wake of Charlie Hebdo attack*, THE GUARDIAN (May 5, 2015, 19:00), https://www.theguardian.com/world/2015/may/05/france-passes-new-surveillance-law-in-wake-of-charlie-hebdo-attack.

99. *Id.*

100. *Id.*

101. *Id.*

text-messaging within a specific area.[102] Current Prime Minister, Manuel Valls, backed the bill and said it was "necessary and proportionate."[103] Valls also stated that "previous French law on wiretapping dated back to 1991, 'when there were no mobile phones or internet,' and the new bill was crucial in the face of extremist threats."[104] The law also gained more support after a "jihadist killing spree" as well as when police stopped the attack on a church in April of 2015.[105]

III. COMPARATIVE ANALYSIS OF LAW

A. Differences

While there are differences between the United States and European countries, these differences are not too drastic. While the Patriot Act still stands today, things such as metadata collection and storing it for five years, roving wiretaps, and the use of national security tools on lone-wolf suspects are no longer allowed.[106] This is a recent change as of 2015.[107]

Unlike the United States, France, the very same year, passed a law which allowed the metadata collection the United States no longer allows as well as other intrusive surveillance tools.[108] Further, while the United States has to show a court order to telecom providers to conduct a legal wiretap that falls outside of the scope of the Patriot Act, the FSB in Russia does not. All the FSB simply has to do is obtain permission and conduct the wiretap because they require any telecom provider to pay for the SORM equipment and installation giving them no access to the surveillance boxes either.[109]

The telecom providers would never know if a wiretap was being conducted.[110] Also, in Russia, merely receiving a report that an individual

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102. *French court approves sweeping new surveillance powers*, FR. 24 (July 24, 2015), http://www.france24.com/en/20150724-france-surveillance-law-approved-phone-taps-internet-hollande-terrorism) [hereinafter *French Court*].

103. Chrisafis, *supra* note 98.

104. *Id.*

105. *France politician approve sweeping new spying powers months after Paris attacks*, TELEGRAPH (May 5, 2015, 9:46 PM), http://www.telegraph.co.uk/news/worldnews/europe/france/11584786/French-politicians-approve-sweeping-new-spying-powers-months-after-Paris-terror-attacks.html [hereinafter *French Politicians*].

106. Diamond, *supra* note 24.

107. *Id.*

108. Chrisafis, *supra* note 98.

109. Soldatov et al., *supra* note 45, at 25.

110. *Id.*

is preparing to commit a crime is sufficient grounds for a wiretap, the allegations do not even have to be backed up with hard facts.[111] This differs from the United States because 18 U.S.C. §§ 2518(1)(a)–(f) outlines detailed requirements to obtain a court order to intercept any type of communication, backed up facts being one of the many requirements.[112]

Lastly, Italy allows preemptive wiretapping of its citizens without an ongoing investigation[113] whereas the United States, even with the Patriot Act, requires a warrant if it is seeking to intercept communications between two United States citizens on American soil.[114] While the concept and the goals are the same, to avoid terrorism and prevent crime; the process, requirements, and information collected are what most differs the most from the countries.

B. Similarities

France, Italy, Russia, and the United States have more in common than one would think. Wiretapping has become a "norm" in these countries. Specifically, the statistics show that "[n]o wiretap applications were reported as denied in 2015" in the United States.[115] Comparably in 2011, out of 466,152 wiretap applications, only one percent were rejected in Russia.[116]

Whenever there is a terrorist attack, there is a push for heightened security measures and an increase in surveillance and the countries know no end when expanding their powers of domestic surveillance.[117] In Italy, shortly after the terrorist attacks on September 11, 2001 in the United States, Italy allowed preemptive wiretapping which expanded its powers.[118] Further, after the terrorist attacks, former President Bush passed the Patriot Act and a domestic surveillance spying program.[119] Likewise, shortly after the 2015 France terrorist attacks, France passed a new law that allows domestic surveillance of anyone linked to a "terrorist inquiry" by

111. Borogan & Soldatov, *supra* note 56.

112. 18 U.S.C. §§ 2518(1)(a–f) (1998).

113. Defeis, *supra* note 81.

114. *NSA Warrantless Wiretapping Timeline*, N.Y. C.L. UNION, http://www.nyclu.org/nsa_spying_timeline.html (last visited Sept. 23, 2016).

115. *Wiretap Report 2015*, *supra* note 5.

116. Balmforth, *supra* note 59.

117. *See* Defeis, *supra* note 81; *see also* Abramson & Godoy, *supra* note 22; Chrisafis, *supra* note 97; *French court*, *supra* note 102; Markels, *supra* note 22.

118. Defeis, *supra* note 81.

119. *See* Markels, *supra* note 22.

intelligence agencies without prior approval.[120] France's Prime Minister Manuel Valls' heavily disapproved of the comparison of the two laws.[121]

Further, after the 2015 France terrorist attacks, the FBI increased the amount of wiretaps and surveillance against those who were "ISIS sympathizers."[122] The laws of France and the United States are strikingly similar because of the data that is allowed to be collected such as the metadata that was once allowed in the Patriot Act.[123] Lastly, the frequency of wiretapping being conducted in Russia, Italy, and the United States are practically identical because the request for a wiretap is hardly denied leading to many wiretaps being conducted.[124]

IV. SOCIETY'S VIEW AROUND THE GLOBE

A. The United States

Research shows that results of the polls conducted were somewhat dependent on the survey's phrasing and the way the person completing the survey perceived it.[125] There was a "controlled study" done by CBS News/New York Times with two separate versions of the same poll, version "A" and "B".[126]

> Version A: After 9/11, President Bush authorized government wiretaps on some phone calls in the U.S. without getting court warrants, saying this was necessary in order to reduce the threat of terrorism. Do you approve or disapprove of the president doing this?
> Version B: After 9/11, George W. Bush authorized government wiretaps on some phone calls in the U.S. without getting court warrants. Do you approve or disapprove of George W. Bush doing this?[127]

When the random sample of people took the poll in version "A" the results were the following; fifty-three percent approved the president doing

120. Chrisafis, *supra* note 98.

121. *Id.*

122. Perez, *supra* note 30.

123. *See* Chrisafis, *supra* note 97; *see also* Diamond, *supra* note 24.

124. *See Italian bill*, *supra* note 84; *see also* Sputnik Int'l, *supra* note 61; *Wiretap Report 2015*, *supra* note 5.

125. Frank Newport, *Where Do Americans Stand on the Wiretapping Issue*, GALLUP.COM (Feb. 24, 2006), http://www.gallup.com/poll/21628/where-americans-stand-wiretapping-issue.aspx.

126. *Id.*

127. *Id.*

this, forty-six percent disapproved, and one percent was unsure.[128] When the remainder of the random sample of people took the poll in version "B", the results flipped.[129] In version "B", forty-six percent approved the president doing this, fifty percent disapproved, and four percent was unsure.[130] The versions varied in language, but the results remained split despite the wording.[131] When the poll stated that it was "necessary," there was a seven percent increase in approval rather than disapproval.[132] There was also a seven percent decrease when former President George W. Bush was referred to as "George W. Bush" by itself rather than version "A" which stated, "President Bush."[133] As previously mentioned, "[a]sk the American public if they want an FBI wiretap and they'll say, 'No'. If you ask them do they want a feature on their phone that helps the FBI find their missing child they'll say, 'Yes'."[134] Essentially, this is same. American citizens do not want the FBI wiretapping their phones but at the same time, want to provide the FBI with information so that in the event their child goes missing, the FBI can track them.[135] This is a double standard amongst American citizens.

The Pew Research Center conducted a research experiment amongst registered voters from February 1, 2006 through February 5, 2006.[136] The survey stated the following: "[d]o you think it is generally right or generally wrong for the government to monitor telephone and e-mail communications of Americans suspected of having terrorist ties without first obtaining permission from the courts?"[137] Here, forty percent of registered voters were against it and fifty-four percent of registered voters were for it.[138]

A little over nine years later, and only two years later from the Edward Snowden whistle blowing incident, the Pew Research Center released

128. *Id.*

129. *Id.*

130. Newport, *supra* note 125.

131. *Id.*

132. *Id.*

133. *Id.*

134. Louis Freeh, *supra* note 1.

135. *Id.*

136. Newport, *supra* note 125.

137. *Id.*

138. *Id.*

another study.[139] One survey response yielded the following result from a spring 2014 question; seventy-four percent of people said "they should not give up privacy and freedom for the sake of safety" and twenty-two percent felt the total opposite.[140] However, a narrower question such as the percentage of those that disapproved of the United States government's collection of telephone and internet data as part of anti-terrorism efforts yielded the following results; fifty-four percent disapproved and forty-two percent approved of this action.[141] Not much has changed over the years in the eyes of American citizens as the results are still demonstrating a large split of people that are for and against domestic surveillance tools, such as wiretapping, and these results are likely going to stay constant over the upcoming years.

B. European Countries

Europe's views on wiretapping and domestic surveillance as a whole differs some from the United States. In 2013,[142] the Pew Research Center released the following question that was asked globally, "[a]ccording to news reports, the American government has been monitoring communications, such as emails and phone calls, in the United States and many other countries. In your opinion, is it acceptable or unacceptable for the American government to monitor communications from American [c]itizens?"[143] Sixty-seven percent of the Russian respondents said that this was unacceptable and twenty-eight percent of the Russian respondents found it acceptable.[144] The Italians responded as well with sixty-three percent finding that this behavior was unacceptable and thirty-one percent finding that it was acceptable.[145] The French responded with an overwhelming percentage of disapproval.[146] Specifically, eighty-two percent of people found it unacceptable to do this while only eighteen

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139. George Gao, *What Americans think about NSA surveillance, national security and privacy*, PEW RES. CTR. (May 29, 2015), http://www.pewresearch.org/fact-tank/2015/05/29/what-americans-think-about-nsa-surveillance-national-security-and-privacy/.

140. *Id.*

141. *Id.*

142. Corinne Purtill, *France's embrace of harsh anti-terror laws that go far beyond America's Patriot Act*, THE WEEK (Feb. 8, 2015), http://theweek.com/articles/536453/frances-embrace-harsh-antiterror-laws-that-far-beyond-americas-patriot-act.

143. *Global Opinions of U.S. Surveillance*, PEW RES. CTR., http://www.pewglobal.org/2014/07/14/nsa-opinion/country/russia/ (last visited Sept. 23, 2016).

144. *Id.*

145. PEW RES. CTR. *supra* note 143.

146. *Id.*

percent found it acceptable.[147] The United States is split on this issue whereas Italy, Russia, and France find it mostly unacceptable conduct by the American government.

A couple years later, when terror struck in France on January 7, 2015, it changed the minds of many French citizens. Three months after the January attacks, the CSA poll, via the Atlantico news website was released, which demonstrated that the majority of French people were favoring the "restrictions on their freedoms in the name of fighting extremism" and only thirty-two percent were opposed to freedoms being reduced.[148] While large majorities of the French people are now accepting of the 2015 law that passed, many human rights organizations are against the law as it reduces freedom and infringes upon civil liberties.[149]

C. Comparison of Views

The views of European citizens differ amongst each other as well as from the United States. While citizens of Russia and Italy heavily disapproved of the American government conducting domestic surveillance, France's latest opinion is that they would rather have their rights reduced so that the government can conduct its surveillance and thwart potential terrorists.[150] Fear plays a role in helping shape the views of the citizens of a specific country, because when the French law first came about in 2015 allowing wiretaps without prior approval, there was heavy criticism, but when there were more killings and terror plots occurring, the new law gained much needed support.[151] Over the last nine years however, American citizens have remained consistent in their views.[152] With everything going on around the world, American citizens still have very split opinions on whether they agree or disagree with domestic surveillance.[153] With terrorism attacks occurring more and more it will be interesting to see how the polls change over the next few years and whether American citizens tip the scales and become overwhelmingly in favor of domestic surveillance.

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147. *Id.*

148. TELEGRAPH, *supra* note 105.

149. Kateryna Khinkulova, *Surveillance: Who's Watching What, and Why?*, EURONEWS.COM (June 5, 2015), http://www.euronews.com/2015/05/06/surveillance-who-s-watching-what-and-why.

150. TELEGRAPH, *supra* note 105.

151. Purtill, *supra* note 142.

152. *See* Gao, *supra* note 139; *see* Newport, *supra* note 125.

153. Gao, *supra* note 139.

V. CONCLUSION

As demonstrated, there are alleged safeguards and laws in place for wiretapping to ensure that society's privacy is not being intruded upon; however, this is not always the case. As the saying goes, "safety may come with a price." Even if safety may come with a price, society should have more requirements in place and warrantless wiretapping should come to an end. If the government has a reasonable belief that an individual poses a threat to United States soil, and there are concrete facts that support this threat, then that person should be investigated through the domestic surveillance tools necessary, including wiretapping with an appropriate warrant to do so. However, wiretapping should only be used for this one specific reason only to prevent terrorism.

Also, there should be stricter guidelines on what is necessary to obtain a warrant to wiretap. The fact that there were zero applications denied in 2015, meaning a total of 4148 warrants approved, is alarming because the judges are reluctant to deny them and/or it is too easy to obtain.[154] This does not even include the wiretaps that were obtained without warrants. According to Albert Gidari, a top privacy law attorney, there are way more wiretaps being conducted without our knowledge. Albert Gidari stated the following:

> Since the Snowden revelations, more and more companies have started publishing "transparency reports" about the number and nature of government demands to access their users' data. AT&T, Verizon, and Sprint published data for 2014 earlier this year and T-Mobile published its first transparency report on the same day the AO released the Wiretap Report. In aggregate, the four companies state that they implemented 10,712 wiretaps, a threefold difference over the total number reported by the AO. Note that the 10,712 number is only for the four companies listed above and does not reflect wiretap orders received by other telephone carriers or online providers, so the discrepancy actually is larger.[155]

This poses the question: what is the Government not saying? Who is being listened to now? Wiretapping is a powerful surveillance tool and should only be used for issues related to terrorism, not drug related offenses which happens very frequently as it was the most common type of criminal

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154. *Wiretap Report 2015*, *supra* note 5.

155. David Kravets, *US government's reported numbers of wiretaps don't add up*, ARS TECHNICA (July 10, 2015, 3:20 PM), http://arstechnica.com/tech-policy/2015/07/us-governments-reported-number-of-wiretaps-dont-add-up/.

offense investigated with a wiretap in 2015.[156] With the latest terrorist attacks occurring around the world, citizens should be prepared for an expansion of the use of wiretapping, rather than a decrease, because the research has shown that there is a link between terrorism and domestic surveillance. A large percentage of society has little knowledge about the Patriot Act.[157] It is important to educate society about its rights starting from a young age because the more the government is allowed to intrude into society's privacy, the easier it will be for the government to do so.

Justice Potter Stewart said it best:

> The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as invisible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the intruding ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen.[158]

American citizens should not have to deal with the "intruding ear,"—the government.[159] That is the court rationale that should be followed to protect society's privacy. Current legislation that is going to the Senate for consideration is H.R. 699: Email Privacy Act.[160] The proposed bill will eliminate the "loophole" by requiring government agencies to seek warrants for digital communications 180 days or older.[161] Warrants require probable cause, versus what is being used now, subpoenas, which do not.[162] This is a great bill to ensure more privacy to American citizens because it will increase the difficulty to obtain such information by government agencies. This is the type of legislation—ways of making wiretapping more difficult—needed to be enacted or it will be difficult to draw a distinct line of where domestic surveillance ends. Benjamin Franklin once said, "[t]hose who would give up essential liberty to purchase a little temporary

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156. *Wiretap Report 2015*, *supra* note 5.

157. *The Patriot Act: What Is the Proper Balance Between National Security and Individual Rights?* CONST. RTS. FOUND. http://www.crf-usa.org/america-responds-to-terrorism/the-patriot-act.html (last visited Sep. 23, 2016) [hereinafter *The Patriot Act*].

158. *Katz*, 389 U.S. at 352.

159. *Id.*

160. Email Privacy Act, H.R. 699, 114th Cong. §§ 2–4 (2015); *Summaries for the Email Privacy Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/114/hr699/summary (last visited Sept. 23, 2016) [hereinafter *Email Privacy Act*].

161. *Id.*

162. *Id.*

safety deserve neither liberty nor safety."[163] This founding father would definitely be disappointed in today's society for allowing such intrusion into its privacy.

163. *The Patriot Act*, *supra* note 157.

ISIS'S CRIMES AGAINST HUMANITY AND THE ASSYRIAN PEOPLE: RELIGIOUS TOTALITARIANISM AND THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS

*Yuri Mantilla, Ph.D., LL.M., LL.B.**

I. INTRODUCTION

Despite great technological progress, increasing free trade, instant access to international communications, and other positive aspects of globalization, the world is still characterized by systematic and widespread violations of human dignity. For example, it is difficult to express in words the shocking actions of terrorist organizations such as the "Islamic State of Iraq and Syria" (ISIS). In the 21st century, the systematic killing of innocent human beings, slavery, torture, and other violations of human dignity should not happen. The widespread killing of ethnic and religious minorities and other atrocities, committed in territories controlled by ISIS,

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show the reality of the existence of extreme political evil and the importance of confronting crimes against humanity by all means.

According to Malcolm Nance, leading expert on global terrorism,

> The Islamic State of Iraq and Syria—"ISIS" or "the caliphate of the Islamic State"—has become the single most dangerous threat to global security since al-Qaeda. It is more than just a threat to America and the West, because it also poses an existential threat to Islam: its goal is to coopt or enslave 1.8 billion Muslims.[1]

ISIS's terrorist actions are global in scope. However, to properly understand the nature of ISIS's international crimes and why a normative response is necessary to end its actions, it is essential to focus on its activities in a concrete historical setting and against specific people.

This article focuses on crimes against humanity in the context of ISIS's violations of fundamental human rights of the Assyrian people. Crimes against humanity are very closely related to international human rights law, just as war crimes are closely related to international humanitarian law.[2] The concept of crimes against humanity was first used by George Washington Williams to describe Belgium's practices in the Congo in the 1890s,[3] and again in 1915 to describe the widespread massacre of the Armenian people by the Ottoman Empire.[4] It is important to remember that the Assyrian people were also victims of Ottoman actions during the 19th and 20th centuries.[5] Therefore, the concept of crimes against humanity, in that historical context, should also be applicable to the crimes against Assyrians.

Today, Assyrians are once again victims of one of the most extreme forms of political evil, defined by international law as "crimes against humanity."[6] Those crimes include widespread murder, torture and persecution. Assyrian Christians are one of the main victims of the

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1. MALCOLM NANCE, DEFEATING ISIS 19 (2016).

2. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 64–65 (3rd ed. 2013).

3. ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA 111 (1999).

4. *Id.* at 117.

5. David Gaunt, *The Assyrian Genocide of 1915*, ASSYRIAN INFORMATION MANAGEMENT (Apr. 25, 2014 4:35 PM), http://www.atour.com/history/1900/20140424a.html.

6. *See* Assyrian Universal Alliance, *Australia Recognizes Crimes Committed By ISIS Against Assyrians As Genocide*, ASSYRIAN INTERNATIONAL NEWS AGENCY (May 2, 2016 6:25 GMT), http://aina.org/news/20160502022530.htm; *see also* Chris Bowen MP, *It's Important that the House Recognizes the Genocide of the Assyrian People in Syria and Iraq*,YOUTUBE (May 1, 2006), https://www.youtube.com/watch?v=Oh4DTRYZeWE&feature=youtu.be.

criminal actions of ISIS.[7] As a distinct minority ethnic and religious group, they were the victims of systematic human rights violations during Saddam Hussein's regime in Iraq, and during other oppressive regimes.[8] In the current historical context, those violations have become more extreme in territories controlled by ISIS. Assyrians have been targeted because of their ethnic and religious identity.[9] They have been systematically murdered, tortured and enslaved by ISIS's militants, and Assyrian women have been raped and forced into sexual slavery.[10]

International law is one of the most powerful discourses to analyze and provide answers to ISIS's actions against the Assyrian people and other ethnic and religious groups. To properly understand the place of international law, in situations such as the crimes against humanity committed by ISIS, it is necessary to consider not only the applicable international legal norms, but also philosophical, historical, and cultural issues that influence the process of creation and implementation of legal principles and norms.

II. WHO ARE THE ASSYRIAN PEOPLE?

The Assyrian people are an ethnic and religious group which has a rich historical and cultural heritage. They have inhabited the territory of what is now Iraq for thousands of years. They speak Syriac, which is a language derived from Aramaic.[11] Assyrians were among the first people groups to convert to Christianity, in the first to third centuries, and they spread their religious beliefs across the Middle East in the following centuries.[12]

The Assyrian church has a theology which is similar to the Catholic faith.[13] Assyrians believe in Jesus Christ as the Son of God, they believe in the death and resurrection of Jesus, and they accept the Bible as being

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7. *Id.*

8. MINDY BELZ, THEY SAY WE ARE INFIDELS xviii (2016).

9. AMNESTY INT'L, ETHNIC CLEANSING ON A HISTORIC SCALE: ISLAMIC STATE'S SYSTEMATIC TARGETING OF MINORITIES IN NORTHERN IRAQ 4 (2004).

10. *Id.* at 16.

11. Hannibal Travis, *The Cultural and Intellectual Property Interests of the Indigenous Peoples of Turkey and Iraq*, 15 TEX. WESLEYAN L. REV. 415, 434 (2009).

12. Christine Chaillot, *The Ancient Oriental Churches*, *in* THE OXFORD HISTORY OF CHRISTIAN WORSHIP 131, 161 (Geoffrey Wainwright & Karen Westerfield Tucker eds., 2006); WILLIAM BAUM & DIETMAR WINKLER, THE CHURCH OF THE EAST: A CONCISE HISTORY 7–12 (2000); A.J. MACLEAN, *SYRIAN CHRISTIANS*, 12 ENCYCLOPEDIA OF RELIGION AND ETHICS 167, 170 (James Hastings ed., 1920).

13. *See* W.A. WIGRAM, M.A., D.D. AN INTRODUCTION TO THE HISTORY OF THE ASSYRIAN CHURCH 1909, http://www.aina.org/books/itthotac/itthotac.htm.

inspired by God.[14] According to the "Profession of the Orthodox Faith of the Holy Apostolic Catholic Assyrian Church of the East," Assyrian Christians adhere to seven tenets of faith: priesthood, holy baptism, oil of chrism, Holy Qurbana (Eucharist), absolution of sins, Holy Heaven, and the sign of the life-giving cross.[15] Unlike ISIS's followers, Assyrian Christians have a missional history; however, they do not believe in forcing others to conform to their religious beliefs.

Some authors hold the view that the term "Assyrian Christians" has more of an ethnic connotation than it does a religious one.[16] The Assyrian people are seeking to have their own land in the Nineveh region where they can be politically independent to protect their status as a people group.[17]

When the Arab people invaded and conquered the region, the Assyrians were subjected to religious and cultural discrimination and persecution.[18] They were often treated as second-class citizens, and did not have the same political and social rights as others.[19] In the 19th and 20th centuries, the Assyrians were repeatedly massacred and persecuted by the Ottoman Empire, which viewed them as a potential threat. During World War I, the "Assyrian Genocide" claimed between 175,000 and 250,000 lives at the hands of the Ottoman Empire.[20]

In 1932, the Assyrian people refused to become part of the state of Iraq, instead, choosing to be recognized as a "nation within a nation."[21] Assyrian Christians enjoyed a short period of peace from the 1940s until 1963, but have been persecuted by both Iraqi and Syrian Islamic extremists

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14. *Id.*

15. *Profession of the Orthodox Faith of the Holy Apostolic Catholic Assyrian Church of the East*, MAR YOSIP PARISH, http://www.maryosipparish.org/aboutus.aspx?TID=2 (last visited Sept. 30, 2016).

16. Jeremy Courtney, *What Everyone Gets Wrong About the Persecution of Christians in Iraq*, THE WEEK (Apr. 10, 2015), http://theweek.com/articles/548138/what-everyone-gets-wrong-about-persecution-christians-iraq.

17. *See* Romsin McQuade, *Iraq's Persecuted Christians Are In Limbo*, THE TELEGRAPH (July 30, 2014, 12:05 PM), http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/11000168/Iraqs-persecuted-Assyrian-Christians-are-in-limbo.html.

18. *See* CLINTON BENNETT, MUSLIMS AND MODERNITY: AN INTRODUCTION TO THE ISSUES AND DEBATES 163 (2005).

19. Travis, *supra* note 11, at 436.

20. *Id.* at 437.

21. *See* Phillip Zane & Waleeta Canon, *The League of Nations and the Quest for an Assyrian Homeland*, ASSYRIAN INTERNATIONAL NEWS AGENCY, http://www.aina.org/articles/lfnaqfah.htm (last updated Sept. 30, 2016 07:34 GMT).

since then.[22] Between 2003 and 2009, "over 350,000 Iraqi Christians have fled (at least one-third of the Iraqi Christian population)."[23]

In recent years, the Assyrian people have found themselves the target of further discrimination and persecution at the hands of ISIS terrorists.[24] ISIS justifies its international crimes—against religious and ethnic minority groups—by using a totalitarian religious discourse which dehumanizes anybody who has a different worldview.

III. ISIS'S IDEOLOGICAL SOURCES OF JUSTIFICATION FOR CRIMES AGAINST HUMANITY

For Malcolm Nance, a leading expert on ISIS, "[t]he global jihad movement is arguably the most wealthy, influential, and violent terror cult in the history of humankind."[25]

ISIS is an insurgent and terrorist organization which has the objective of establishing an Islamic Caliphate.[26] *The Management of Savagery* is a document which serves as a foundation for ISIS's ideology and actions. Regarding this document, journalist Jessica Sterns writes:

> Al Naji wrote of the necessity of violence, in all its "crudeness and coarseness," in order to awaken potential recruits to the reality of the jihadis' war and to intimidate enemies by showing the price they would pay for their involvement.[27]

The ideology of ISIS is often expressed in audio and video messages. One of those messages reflects the complete disregard of any view which opposes them. Al Adnani, an ISIS spokesperson, believes that all fundamental ideas which originated in the West, including Christianity, secularism and democracy, should be rejected by Muslim believers and they should embrace Jihad against non-Muslims.[28] This is consistent with the Salafist perspective of Islam which is a fundamental tenant of ISIS's ideology. Salafism is a theological interpretation of Sunni Islam which

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22. Travis, *supra* note 11, at 448 n.43 (citing Annia Ciezadlo, *Iraq's Christians Consider Fleeing as Attacks on Them Rise*, Christian Sci. Monitor, 7 (July 13, 2004); Stephen Franklin, *They Dream of Survival*, Chi. Trib., 1 (Apr. 1, 2004)).

23. Michael Youash, *Iraq's Minority Crisis and U.S. National Security: Protecting Minority Rights in Iraq*, 24 AM. U. INT'L L. REV. 341, 343 (2008).

24. Paul Isaac, *The Urgent Reawakening of the Assyrian Question in an Emerging Iraqi Federalism: The Self-Determination of the Assyrian People*, 29 N. ILL. U. L. REV. 209, 212 (2008).

25. NANCE, *supra* note 1, at 189.

26. *See* JESSICA STERN & J.M. BERGER, ISIS: THE STATE OF TERROR 1 (2015).

27. *Id.* at 114–15.

28. *Id.* at 117.

seeks to eliminate idolatry.[29] Salafism holds the view that they are the only true Muslims.[30] Shi'a Muslims, and the ones who embrace democratic values, are apostates.[31]

Another key aspect of ISIS's ideology is an aggressive extreme form of jihad. Regarding this, Cole Bunzel, a leading expert on ISIS, says: "[t]he Islamic State also emphasizes the offensive form of jihad, which in the Wahhabi tradition is premised on the uprooting of shirk, idolatry, wherever it is found. . . ."[32]

ISIS's ideology seeks the destruction of religious and political symbols of whoever opposes its views. This terrorist methodology serves to promote widespread violence and sectarian wars between Sunni and Shiite Muslims.[33] Malcolm Nance synthesizes ISIS's ideology as follows:

> In the interpretation of ISIS, their ideology commits them to work solely in the belief that all God wishes, is prayer and devotion to God and commitment to the literal words of the Qur'an and the events it predicts. . . . They believe the only way to convince 1.8 billion Muslims that God is pleased with the beheading of children and the rape of women is to characterize those acts as a form of worship. This is the interpretation of ISIS that defines their cultism. All mass murder, subjugation, slavery, death and more death is the highest form of worship to God. They are his instrument and absent direct orders they accept that they are fulfilling the events of the Qur'an's book of Tribulation.[34]

ISIS's ideology promotes the view that its members who die in suicide attacks, are expressing their greatest faith in God, which insure them a place in Paradise.[35] Secretary of State John Kerry stated that ISIS's "entire worldview is based on eliminating those who do not subscribe to its

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29. Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State*, 7 (Mar. 2015), https://www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State.pdf.

30. *Id.*

31. *Id.* at 8.

32. *Id.* at 10.

33. Maj. Aaron L. Jackson, *Hunting Down Terrorists "Wherever They Exist": ISIL in Syria and the Legal Argument for United States Military Operations Within the Territory of a Non-Consenting Nation-State,* 74 A.F. L. REV. 133, 138 (2015) (quoting Charles River Editors, *The Islamic State of Iraq and Syria: The History of ISIS/ISIL*, *supra* note 14, at 17 (2014)).

34. NANCE, *supra* note 1, at 194.

35. *Id.* at 197.

perverse ideology."[36] ISIS has pointedly attacked any other group that it considers to be in apostasy, including Shia Muslims,[37] Yazidis,[38] and Christians.[39] Because this persecution is based on religious identity, it will not stop unless either all of the "non-believers" are eliminated, or ISIS is defeated. ISIS's interpretation of Sharia law specifically authorizes this conduct, sanctioning aggressive jihad against all non-Muslims.[40]

IV. ISIS'S INTERNATIONAL CRIMES AGAINST THE ASSYRIAN AND OTHER RELIGIOUS AND ETHNIC MINORITY GROUPS

To accomplish its objectives, ISIS seeks to expand its control of territories and populations, in Iraq and Syria, by using all available means, including murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance and other inhumane actions. ISIS's actions constitute extreme violations of fundamental norms of international law, including international human rights law and international humanitarian law. ISIS's international crimes include genocide, war crimes, and crimes against humanity.

In March of 2016, the European Parliament officially recognized that the actions of ISIS against minority groups including Assyrian Christians are classified as international crimes.[41] Just days later, the United States followed suit, in a rare unanimous vote in the House of Representatives.[42]

Regarding the main characteristics of ISIS's actions in its control territories, Michael Weiss and Hassan Hassan said:

> Typically, when ISIS takes over a new town, the first facility it establishes is a so-called Hudud Square, to carry out Sharia punishments such as crucifixions, beheadings, lashings, and hand

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36. Matthew Rosenberg, *Citing Atrocities, John Kerry Calls ISIS Actions Genocide*, N.Y. TIMES (Mar. 17, 2016), http://www.nytimes.com/2016/03/18/world/middleeast/citing-atrocities-john-kerry-calls-isis-actions-genocide.html?_r=0.

37. Hamdl Alkhshall & Angela Dewan, *40 Dead in ISIS Attack on Iraqi Shiite Shrine, Officials Say*, CNN (July 8, 2016), http://www.cnn.com/2016/07/08/middleeast/iraq-isis-attack-shiite/.

38. David Stout, *Be Captured and Killed, Or Risk Dying of Thirst: The Awful Choice Facing the Refugees of Sinjar*, TIME (Aug. 6, 2014), http://time.com/3085270/iraq-yazidi-mount-sinjar-islamic-state-refugees/.

39. Treza Kamal, *Thousands Mourn Egyptian Victims of Islamic State in Disbelief*, REUTERS (Feb. 16 2015), http://uk.reuters.com/article/uk-mideast-crisis-egypt-village-idUKKBN0LK1L420150216.

40. Qur'an 9:29; *see also* Qur'an 29:8, 31:15, 47:31.

41. *See* European Parliament Resolution on the Systematic Mass Murder of Religious Minorities by the so-Called ISIS/Daesh, No. 2016/2529 of 02 Mar. 2016, (RSP).

42. H.R. Con. Res. 75, 114th Cong. (2015–2016).

> amputations. It then establishes a Sharia court, police force, and security operation station. The work of Sharia police known as al-Hisbah, is not restricted to the implementation of the religious code, but also includes regulation of the marketplace.[43]

The testimonies before the United States House of Representatives Committee on Foreign Affairs, regarding Assyrians and other religious and ethnic groups, show that ISIS is responsible for widespread violations of international human rights law and international humanitarian law. According to the hearing:

> These communities—Assyrian and Chaldean Christians, Yezidis, Alawites, and others—are under mortal threat in their ancestral homelands. And the mass execution of men, the enslavement of women and children, and the destruction of religious sites, is part of the ISIS effort to destroy these communities, to destroy all evidence of the preexistence of these communities. In fact, ISIS maintains a special battalion. They call it the ''demolition battalion.'' And that battalion is charged with going after art and going after artifacts, religious and historic sites that it considers heretical or idolatrous, and their job is simply to destroy history.[44]

The Assyrian people, together with other Christian communities, have been systematically persecuted in the territories controlled by ISIS. This persecution is based on ethnic and religious reasons.[45]

Regarding the Assyrian and other Christian communities in Iraq, Brian Katulis, Senior Fellow at the Center for American Progress, writes: "ISIS['s] seizure of Mosul and surrounding parts of the nearby Nineveh Plains devastated Christian communities that had roots in those areas reaching back more than 1,500 years."[46]

Amnesty International has documented a number of ISIS crimes. Regarding ISIS's actions against the Assyrian people and against other ethnic and religious minorities, Amnesty writes:

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43. MICHAEL WEISS & HASSAN HASSAN, ISIS: INSIDE THE ARMY OF TERROR 230 (2016) (eBook).

44. *Ancient Communities Under Attack: ISIS War On Religious Minorities: Hearing Before the Committee on Foreign Affairs, House of Representatives* 114th Cong., 3 (2015).

45. *See* Brian Katulis, *The Plight of Christians in the Middle East* 1 (2015), https://cdn.americanprogress.org/wp-content/uploads/2015/03/ChristiansMiddleEast-report.pdf.

46. *Id.* at 14.

> The group that calls itself the Islamic State (IS) has carried out ethnic cleansing on a historic scale in northern Iraq. Amnesty International has found that the IS has systematically targeted non-Arab and non-Sunni Muslim communities, killing or abducting hundreds, possibly thousands, and forcing more than 830,000 others to flee the areas it has captured since 10 June, 2014.[47]

Since April 2013, ISIS has expanded its influence and exerted its control over large territories and populations in Syria and Iraq.[48] ISIS indiscriminately targets civilian populations, including children, and systematically violates fundamental human rights, displacing civilian populations and violating the right to life of minority groups in ISIS occupied territories.[49] According to the United Nations:

> Where ISIS has occupied areas with diverse ethnic and religious communities, minorities have been forced either to assimilate or flee. The armed group has undertaken a policy of imposing discriminatory sanctions such as taxes or forced conversion—on the basis of ethnic or religious identity—destroying religious sites and systematically expelling minority communities. Evidence shows a manifest pattern of violent acts directed against certain groups with the intent to curtail and control their presence within ISIS areas.[50]

ISIS has systematically targeted Christian populations and churches. In September and October of 2013, ISIS fighters destroyed one Greek Catholic church, occupied an Armenian Orthodox church, and burnt down another Armenian church.[51] As ISIS spreads, so does the destruction of Christian places of worship.[52]

ISIS terrorists have publicly beheaded, shot, and stoned civilians, including women and children, mutilating and publicly displaying the bodies.[53] This is often justified by "the practice of takfir, declaring

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47. AMNESTY INT'L, ETHNIC CLEANSING ON A HISTORIC LEVEL: ISLAMIC STATE'S SYSTEMATIC TARGETING OF MINORITIES IN NORTHERN IRAQ 4 (2014).

48. *See* Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, *Rule of Terror: Living Under ISIS in Syria*, A/HRC/27/CRP.3, 6 (Nov. 19, 2014) [hereinafter *Rule of Terror*].

49. *Id.* at 4.

50. *Id.* at 5.

51. *Id.*

52. *Id.*

53. *Rule of Terror*, *supra* note 48, at 6.

someone to be a heretic."[54] ISIS victimizes entire communities by forcing them to witness the executions.[55] Following the executions, ISIS will display the corpses on crosses for days, or place heads on spikes, to intimidate local populaces.[56]

Some of ISIS's most disturbing crimes illustrate its complete lack of respect for children's rights. "Children have been the victims, perpetrators and witnesses of ISIS's executions."[57] ISIS has beheaded and shot children "for alleged affiliation with other armed groups," and has also forced children to execute others.[58] Trauma is also inflicted on children through the psychological effects of public executions, either through forced attendance or by viewing the mutilated corpses in the coming days.[59]

Inflicting terror on children is not an accidental byproduct of ISIS's actions; rather, children are prioritized "as a vehicle for ensuring long-term loyalty, adherence to their ideology and a cadre of devoted fighters that will see violence as a way of life."[60] These actions are inhumane, shocking, and barbaric. They are contrary to any rational understanding of what it means to be human. In philosophical terms, these actions constitute extreme political evil.

ISIS systematically destroys churches, monuments, and other important cultural buildings, without military importance, of any ethnic or religious group that opposes its ideology.[61] Those actions, against protected objects, are international crimes and violations of international humanitarian law.[62]

V. ISIS AND THE ELEMENTS OF CRIMES AGAINST HUMANITY

Widespread murder, torture, rape, forced disappearance, sexual slavery, forcible displacement, sentencing and executions without due process of the law, forced pregnancy are some of ISIS's international crimes.[63] ISIS is consistently and systematically violating fundamental norms of international human rights law and international humanitarian law. Those actions are international crimes. International crimes are often

54. *Id.*

55. *Id.* at 7.

56. *Id.*

57. *Id.* at 10.

58. *Rule of Terror*, *supra* note 48, at 10.

59. *Id.*

60. *Id.*

61. *Id.* at 6.

62. *Id.*

63. *Rule of Terror*, *supra* note 48, at 13.

organized and implemented by government entities or by organizations that have political objectives, such as terrorist organizations. Regarding the interconnectedness of diverse international crimes, Wayne McCormack writes:

> There are also fundamental links among terrorism, genocide, and slavery. A great deal of collective violence is based on ethnic or cultural identity. The crimes of genocide and crimes against humanity reflect not just an intolerance of widespread violence but a revulsion for treating people as less than human.[64]

The different names used for international crimes help us understand why ISIS's actions are crimes against humanity. According to Professor Bassiouni, "[i]nternational crimes are also called 'delicti jus gentium' (crimes against humanity) . . . U.S. founders, often citing European scholars like Grotius, Vattel, Ayala, and Gentili, referred to them also as 'crimes against mankind' and crimes 'against the whole world,' and their perpetrators as 'enemies of the whole human family.'"[65]

The term "crimes against humanity" was first used by the framers of the Nuremburg Charter; it was selected by U.S. Supreme Court Justice, Robert Jackson, who was the chief U.S. prosecutor during the Nuremburg Trials.[66] It was used then to describe the actions of extreme political evil perpetrated by the Nazi regime, including the systematic killings of innocent human beings solely because of their ethnic and religious identity. The crimes against the Jewish people were so extreme that they were considered not only to be crimes against the Jewish, but against all humankind.[67]

In the same way, the actions of ISIS against Assyrian Christians and other groups—systematic torture and murder of innocent human beings, motivated solely because of ethnic and religious identity—are so extreme that they constitute crimes against all humanity. This means, that these crimes are committed not only against the Assyrian people, but also against the American people, the French people, the Russian people, the Bolivian

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64. WAYNE MCCORMACK, INTERNATIONAL CRIMINAL LAW CASES AND MATERIALS 15 (2015).

65. JORDAN J. PAUST ET. AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 5 (1996).

66. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 17 (1992).

67. *See 2010 Education Working Group Paper on the Holocaust and Other Genocides*, TASK FORCE FOR INTERNATIONAL COOPERATION ON HOLOCAUST EDUCATION, REMEMBRANCE, AND RESEARCH, http://www.un.org/en/holocaustremembrance/EM/partners%20materials/EWG_Holocaust_and_Other_Genocides.pdf (last visited Oct. 15, 2016).

people, the Nigerian people, and all other people of the world. Regarding the characteristics of crimes against humanity, David Luban stated:

> [First], the phrase, "crimes against humanity," suggests offenses that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the phrase suggests that these offenses cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings.[68]

Luban also states, that crimes against humanity "are so universally odious that they make the criminal *hostis humani generis*—an enemy of all humankind, like the pirate on the high seas under traditional international law."[69] Luban points to the Biblical account of Cain as an example of the concept of *hostis humani generis*, quoting God's banishment of Cain in Genesis 4: "The voice of thy brother's blood crieth unto me from the ground. And now art thou cursed from the earth, which hath opened her mouth to receive thy brother's blood from thy hand . . . a fugitive and a vagabond shalt thou be in the earth."[70] Cain became "unfit for the society of anyone, and (within the moral limits of proportionality) anyone's legitimate target"—an enemy of humanity.[71]

The Charter of the international Military Tribunal for the Trial of Nazi War Criminals defines crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[72]

Consistent with Professor David Luban's view, there are five legal features of crimes against humanity: crimes against humanity are committed against fellow nationals and foreign citizens; they are international crimes committed by politically organized groups; they consist of the most extreme acts of violence and persecution and they are inflicted

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68. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 86 (2004).

69. *Id.* at 90.

70. *Id.* at 140 (quoting *Genesis* 4:10–12 (King James)).

71. *Id.*

72. INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, OFFICIAL DOCUMENTS 11 (1947).

on victims because of their membership to a specific population.[73] Each one of these distinctive features can be applied to ISIS's crimes against Assyrian Christians.

ISIS's crimes are committed against both fellow nationals and against foreigners. The "Islamic State of Syria and Iraq" acts against anyone that stands in the way of its goal to create a global caliphate. ISIS has shown its capability to commit crimes around the world, in addition to its ground campaign in Iraq and Syria.[74] Assyrian Christians are Iraqi and Syrian nationals, as are many ISIS members. The crimes committed by ISIS are done against foreign and national citizens. The crimes against the Assyrian people and other groups, who are under the political control of ISIS, are comparable to the Nazi regime crimes which included German and non-German citizens.

ISIS justifies its actions by applying its "legal" system, which is a version of Sharia law, in territories under its control. Those norms include the justification of the killing of human beings who do not share ISIS's view of Islam.[75] It is obvious that, by any rational standard, ISIS's "legal system" is unjust, irrational and a perversion of the meaning of law. ISIS's actions are crimes against humanity and its "legal system" cannot be used to justify its criminal behavior.[76]

Traditionally, there was a 'state action' requirement for a crime to be considered a crime against humanity; that is, they "could be committed only by state actors, or by high—placed civilians embroiled with state actors."[77] However, international law has changed in this area, and this requirement is not necessary anymore. This has been seen in cases such as the actions of non-state actors, Serb militias, during the Bosnian War and the civilian groups who perpetrated a significant part of the Rwandan genocide.[78]

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73. Luban, *supra* note 68, at 93–103.

74. *Islamic State Claims Responsibility for Orlando Nightclub Shooting*, REUTERS NEWS (June 12, 2006), http://www.reuters.com/article/us-florida-shooting-claim-idUSKCN0YY0VU; *see also* Rukmini Callimachi, *ISIS Claims Responsibility, Calling Paris Attacks 'First of the Storm'*, N.Y. TIMES (Nov. 14, 2015), http://www.nytimes.com/2015/11/15/world/europe/isis-claims-responsibility-for-paris-attacks-calling-them-miracles.html.

75. *See* Stephen O'Brien, *Syrian Conflict, Requesting added Funds for Life-Saving Operations*, UNITED NATIONS MEETINGS COVERAGE (Sept. 16, 2015), http://www.un.org/press/en/2015/sc12046.doc.htm.

76. *See* Luban, *supra* note 68, at 95. (Professor Luban explains this feature of crimes against humanity as follows: "Article 6(c) of the Nuremburg Charter, in bringing under international law crimes committed by a state against its own residents, represents an incursion against state sovereignty—a point emphasized by the criminalization of acts whether or not in violation of the domestic law of the country where perpetrated.").

77. *Id.*

78. *Id.* at 96.

Today, the requirement of state action has transformed into a requirement of "organizational responsibility."[79] Professor Luban claims that, "the definition of crimes against humanity emphasizes the collective character of the perpetrator."[80] Crimes against humanity are characterized not by whether a state actor is involved, but rather by whether the perpetrator has decided to participate in a widespread and systematic attack. ISIS has made its political strategy, to systematically torture and kill Assyrian Christians. These crimes have been committed while the organization claims to exert legitimate political power over the citizens of its conquered territory, and are justified by ISIS's interpretation of Sharia law.[81] Therefore, there is an organizational responsibility in the commission of the crimes.

According to Article 6(c) of the Nuremberg Charter, there are two categories of crimes against humanity: the first includes crimes such as "murder, extermination, enslavement, deportation, and 'other inhumane acts,'" such as food deprivation, violating corpses, forced witnessing of atrocities against loved ones, and so on.[82] Such crimes are considered within the realm of crimes against humanity because of the "sheer ugliness" inherent in their commission.[83] The second category, or "crimes of the persecution type," as Luban terms it, includes acts such as persecution based on racial, religious, political, or other grounds; this persecution can take various forms, including "deprivations of the rights to citizenship, to teach, to practice professions, to obtain education, and to marry freely; arrest and confinement; beatings, mutilation and torture; confiscation of property; deportation to ghettos; slave labor; and extermination."[84] Therefore, there is no doubt that ISIS is committing crimes against humanity of the "murder" type and the "persecution" type. As it was established in a previous section of this Article, ISIS's crimes consist of the most extreme acts of violence and persecution.

ISIS's international crimes against Assyrian Christians are among the most repugnant in modern history. ISIS has repeatedly raided, kidnapped, and murdered Assyrian Christians since it came to power, and it has committed other heinous acts such as destroying Assyrian homes and

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79. *Id.*

80. *Id.* at 98.

81. Balsam Mustafa, *Islamic State Feature: We Need to Talk about ISIS's Interpretation of Islam*, EA WORLD VIEW (Nov. 30, 2015, 8:49 PM), http://eaworldview.com/2015/11/islamic-state-feature-we-need-to-talk-about-isiss-interpretation-of-islam/.

82. Luban, *supra* note 68, at 98.

83. *Id.* at 99.

84. *Id.* (quoting Steven R. Ratner, Jason S. Abrams & James Bischoff, ACCOUNTABILITY FOR HUM. RTS. ATROCITIES IN INT'L LAW: BEYOND THE NUREMBERG LEGACY, 74 (3d ed. 2009)).

churches, vandalizing and digging up Assyrian cemeteries, and forced displacement from cultural and historical lands.[85]

ISIS's crimes are committed against the Assyrian Christians and against other ethnic and religious minorities because of their ethnic and religious identities. The victims are "getting attacked for being (rather than for doing)."[86] This is a clear description of what ISIS is doing to Assyrian Christians. The victims of ISIS's crimes are not being singled out for their identities as individuals, but rather because they are identified as part of an ethnic and religious group.[87] ISIS's raids target villages with predominantly Christian populations, and ISIS's bombings in Syria specifically target Christian neighborhoods, like the bombings of restaurants in Qamishli, Syria.[88]

Crimes against humanity have two elements: *actus reus* and *mens rea*.[89] Regarding the first element, Professor Kriangsak Kittichaisaree writes:

> The *actus reus* of a crime against humanity . . . comprises commission of an attack that is inhumane in nature and character, causing great suffering, or serious injury to body, or to mental, or physical health. The inhumane act must be committed as part of a widespread or systematic attack against members of a civilian population."[90]

ISIS's actions of systematic murder of ethnic and religious minority groups, persecution of anybody that opposes its religious ideas and others, are extreme inhumane actions which not only seek to exterminate Christians and other religious groups, but are aimed at causing unspeakable suffering to innocent human beings. This is done as part of ISIS's policy and it is implemented in systematic attacks against civilian populations.

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85. *List of Assyrian and Other Churches Destroyed in Syria*, ASSYRIAN INT'L NEWS AGENCY NEWS (Dec. 13 2:15PM), http://www.aina.org/news/20151212211531.htm; *See also ISIS Bomb Assyrian Homes, Monastery in Iraq, Cemeteries Vandalized*, ASSYRIAN INTERNATIONAL NEWS AGENCY NEWS (Dec. 26, 2015, 10:21 85PM), http://www.aina.org/news/20151226052124.htm.

86. Luban, *supra* note 68, at 105.

87. Belz, *supra* note 8, at xiii.

88. John Davison, *Twin Suicide Bombs in Northeast Syria Kill Dozens*, REUTERS NEWS (Dec. 31, 2015, 2:01am), http://uk.reuters.com/article/uk-mideast-crisis-syria-kurds-idUKKBN0UD1WZ 20151231.

89. *See* GUÉNAËL METTRAUX, INT'L CRIMES AND THE AD HOC TRIBUNALS 156–73 (2006) (Mettraux lists five "sub—elements" of crimes against humanity: the 'attack', the nexus between the acts of the accused and the attack, 'any civilian population' as the primary object of the attack, 'widespread or systematic' character of the attack, and the requisite state of mind or *mens rea*).

90. KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 90–91 (2002).

For example, when ISIS captured Mosul in June of 2014, it issued an ultimatum to Assyrian Christians in the city: convert to Islam, pay the *jizya* tax, or be murdered.[91] As a result of this ultimatum, over ten thousand Assyrian Christians left the city within the month.[92] ISIS has repeatedly raided Assyrian villages and kidnapped or murdered Christians and other minority groups. Often, the terrorist insurgent organization has sold women and children in the human trafficking market.[93] Senior UN official Zainab Bangura confirmed in August, 2015, that ISIS had released a "price list" for captured sex slaves.[94]

Regarding the *mens rea* element of crimes against humanity, professor Antonio Cassesse writes: "[a]s the ICTY Appeals Chamber held in Tadic (Appeal), the perpetrator needs to know that there is an attack on the civilian population and that these acts comprise part of the attack."[95] The perpetrator must have some mens rea, or subjective intent, for their crime to be considered a "crime against humanity." Regarding this subjective element, Cassesse writes:

> To sum up, the requisite subjective element or mens rea in crimes against humanity is not simply limited to the criminal intent (or recklessness) required for the underlying offence (murder, extermination, deportation, rape, torture, persecution, etc.). The viciousness of these crimes goes far beyond the underlying offence, however wicked or despicable it may be. This additional element—which helps to distinguish crimes against humanity from war crimes—consists of awareness of the broader context into which this crime fits, that is knowledge that the offences are part of a systematic policy or of widespread and large-scale abuses.[96]

As it was seen before in this Article, ISIS's religious totalitarian ideas have the specific intent, as a matter of policy and as part of a systematic plan, to exterminate those that do not agree with their version of Islam. Therefore, ISIS terrorists have knowledge that their actions are part of a

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91. *Iraqi Christians Flee after ISIS Issue Mosul Ultimatum*, BBC NEWS (July 18, 2014), http://www.bbc.com/news/world-middle-east-28381455.

92. *Id.*

93. *Islamic State 'Abducts Dozens of Christians in Syria'*, BBC NEWS (Feb. 24, 2015), http://www.bbc.com/news/world-middle-east-31601451.

94. Sangwon Yoon, *Islamic State Circulates Sex Slave Price List*, BLOOMBERG NEWS (Aug. 3, 2015, 7:00 PM), http://www.bloomberg.com/news/articles/2015-08-03/sex-slaves-sold-by-islamic-state-the-younger-the-better.

95. CASSESE, *supra* note 2, at 82.

96. *Id.*

widespread and systematic effort to attack and destroy the Assyrian civilian population and other religious minority groups. As part of ISIS's strategy to implement its ideology, ISIS terrorists force Assyrian and other minority groups to choose between adopting its religious extremist worldview or death.[97]

VI. ISIS, POLITICAL EVIL, AND THE DEHUMANIZATION OF THE OTHER

Legal ideas and principles are reflections of specific theological and philosophical presuppositions. To understand the nature of ISIS's crimes against humanity and the normative response of the international community, it is necessary to have a philosophical consideration of the case.

As rational human beings, who are concerned and attempt to make sense of the world in which we live, how can we understand the extreme violations against the human dignity of the Assyrian and other ethnic and religious groups in territories controlled by ISIS? The word "evil" properly describes actions that can be characterized as crimes against humanity. One of the most important analyses, in the history of Western philosophical and theological ideas, regarding the problem of evil was done by St. Augustine of Hippo.

Charles T. Matthews describes Augustine's perspective on evil in the following paragraph:

> [T]he Augustinian tradition interprets evil's challenge in terms of two distinct conceptual mechanisms, one ontological and the other anthropological. Ontologically, in terms of the status of evil in the universe, it understands evil as nothing more than the privation of being and goodness—'evil' is not an existing thing at all, but rather the absence of existence, an ontological shortcoming. Anthropologically, in terms of the effect of evil on a human being, it depicts human wickedness as rooted in the sinful perversion of the human's good nature—created in the *imago Dei*—into a distorted, mis-oriented, and false imitation of what the human should be. Privation and perversion: together, these capture the conceptual contours within which the tradition proposes its practical response to evil.[98]

Although individual members of ISIS may irrationally believe that their religious totalitarian ideas are true and justify their crimes, their actions against innocent Assyrians and other people, of course, lack

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97. *See Iraqi Christians Flee After Isis Issue Mosul Ultimatum*, BBC NEWS (July 18, 2014), http://www.bbc.com/news/world-middle-east-28381455.

98. CHARLES T. MATTHEWS, EVIL AND THE AUGUSTINIAN TRADITION 6–7 (2001).

goodness altogether.[99] These actions constitute a "privation of being." The systematic murder and torture of innocent human beings is an ontological shortcoming. The extreme wickedness of ISIS's actions is a perversion of what human beings are supposed to be and do.

Regarding the place of the rational will and the problem of evil in Augustine's perspective, G. R. Evans writes:

> The only creature capable of acting against the good, and bringing about an evil happening, is a creature with a mind of its own. Augustine located the source of evil . . . in the rational will, which is free to choose between good and evil. . . . In *De Natura et Gratia*, he shows that the nature of man, too, was created faultless (*sine ullo vitio*), having all good things from God: life, senses, mind. The fault that darkened and weakened those natural goods did not come from the Creator but from the good free will he gave them (De Nat. et Grat. I. iii.3). It is in this sense, that every evil event may be said to have a mind behind it.[100]

The will of sovereign states and non-state actors, is an essential element to understand the problem of evil in international relations. In exercising its free will, often sovereign states and non-state actors can and do choose to behave consistent with just normative standards which seek, among other things, to protect the humanity and dignity of other fellow human beings and of ethnic and religious groups which are different from one's own.

In other situations, sovereign states and non-state actors, such as ISIS, exercise their free will by murdering innocent persons, torturing and committing other crimes, which are contrary to what a human being should rationally do. In the Augustinian tradition, those actions are considered actions of extreme evil. When evil actions are done to accomplish political objectives, such as in the case of ISIS, those action are a form of extreme political evil. Regarding Augustine's analysis of will and reason, Evans writes:

> Evil cannot change directly the good natures God has made. The alteration of those natures is possible . . . [i]t takes place in this way: evil arises in the will of rational creatures and makes itself

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99. *See ISIS Attack Assyrian District in Syria, Five Killed*, ASSYRIAN INT'L NEWS AGENCY (May 22, 2015 07:34 GMT), http://www.aina.org/news/20160522033449.htm; *see also IS Group Killed 21 Christians in Al-Qaryatain, Says Patriarch*, ASSYRIAN INT'L NEWS AGENCY (Apr. 11, 2016, 05:53 GMT), http://www.aina.org/news/20160411015349.htm.

100. G.R. EVANS, AUGUSTINE ON EVIL 95 (1982).

> felt by clouding their reason and making it impossible for them to think clearly or to see the truth. They then act upon the world in such a way as to twist everything they touch out of its proper and good nature into something diminished or perverted—as far, that is, as God allows. It is in the mind, then, and specifically in the will (which together with the memory and the understanding, makes up the mind) that we must look for signs of evil.[101]

Applying this to ISIS's crimes against the Assyrian people, it can be said that the reasoning of ISIS leaders is clouded by their inhumane ideology, which systematically dehumanizes people who disagree with their view of the world. Regarding the relationship between crimes against humanity and the dehumanization of others, Professor Wayne McCormack said:

> There are also fundamental links among terrorism, genocide, and slavery. A great deal of collective violence is based on ethnic or cultural identity. The crimes of genocide and crimes against humanity reflect not just an intolerance of widespread violence, but a revulsion for treating people as less than human.[102]

The dehumanization of others is one of the most important factors behind the actions of terrorist organizations. ISIS systematically dehumanizes its victims, while simultaneously accusing them of attacks against ISIS's version of the Islamic faith.[103]

This distorted view of reality has influenced ISIS's militants thinking. Their distorted reasoning has influenced their wills and this has led them to disregard fundamental natural human rights, such as: the right to life, and the right to religious freedom. This has led to an unjust use of violence against the Assyrian, and other ethnic and religious groups—which ISIS sees as apostates—and therefore, as less than human. Because of this, thousands of innocent children, women, and men have been murdered by ISIS. According to St. Augustine:

> there is no single cause of evil; rather, everyone who does evil is the cause of his own evildoing. If you doubt this, recall what I said earlier: [e]vil deeds are punished by the justice of God.

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101. *Id.* at 104.

102. MCCORMACK, *supra* note 64.

103. *See id.* at 17.

> They would not be punished justly if they had not been performed voluntarily.[104]

The cause of ISIS's evil actions is found in its leaders' and followers' will. Therefore, they can justly be punished for their actions of extreme political evil. They are responsible for the use of their free will and its consequences. St. Augustine further writes:

> [T]here are traits like the love of praise and fame, and the will to power. When that drive is not subject to reason it makes us wretched, and no one considers himself superior to another because of his wretchedness. When these impulses of the soul are ruled by reason, a human being is said to be ordered. For we should not call it right order, or even order at all, when better things are subjected to worse. . . . Therefore, when reason, mind, or spirit, controls the irrational impulses of the soul, a human being is ruled by the very thing that ought to rule according to the law that we have found to be eternal.[105]

ISIS's irrational desire to conquer people who disagree with their ideology, exterminate those that do not convert to their version of Islam, and establish a sovereign state where there is absolutely no respect for fundamental human rights, is against natural reason and conscience. ISIS's irrational ideas are seen in its view of "infidels," in its view of other religions, and in its view of human nature.

International legal instruments have a language that addresses political evil actions. This language is mainly expressed in the fields of international criminal law, international human rights law, and international humanitarian law. These areas of international law are expressions of the common will of humankind against actions of extreme political evil. Considering that widespread violations of fundamental human rights are crimes against humanity, analysis of the human rights discourse is especially relevant for this work.

VII. THE IMPORTANCE OF RESPECT FOR FUNDAMENTAL HUMAN RIGHTS

As the international community is witness to the widespread violations of international human rights' norms by ISIS, it is essential to have a

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104. SAINT AUGUSTINE, THE FREE CHOICE OF THE WILL 47 (Thomas Williams trans., 2d ed. 1993).

105. *Id.*

normative language which properly addresses inhumane actions in the 21st century such as what Assyrian Christians are facing in the Middle East.[106]

One of the most powerful answers to the irrationality of extreme political evil actions—such as those of ISIS against Assyrian Christians, is the recognition, by governments and individuals, of the inherent dignity of each human being and the importance of ensuring that a global culture of respect for universal human rights becomes a main foundation for the international normative and political systems.

Regarding the importance of the human rights discourse, Professor Mark Amstutz writes: "[m]uch of the discussion about ethics in international relations takes place in making use of the vocabulary of rights."[107] The language of international human rights is a powerful instrument to prevent and punish crimes against humanity such as the ones of ISIS.

The words of the Preamble of the Universal Declaration of Human Rights (UDHR) are very relevant for the case of ISIS. It reads:

> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people. . . .[108]

ISIS's actions are an expression of a barbarian ideology which should outrage the collective conscience of humankind, and the individual conscience of each rational human being. ISIS is violating the norms of all international human rights legal instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Prevention and Punishment of the Crime of Genocide.

According to Professor Mary Ann Glendon, "[t]he United Nation's Universal Declaration of Human Rights of 1948, is the single most important reference point for cross-cultural discussion of human freedom and dignity in the world today."[109] Considering that the norms of the

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106. *See Syrian Rebels to Assyrians: Convert to Islam to Keep Your Jobs*, ASSYRIAN INT'L NEWS AGENCY NEWS (Aug. 4, 2013, 5:10 PM), http://www.aina.org/news/20130804131312.htm; *see also Jihadists Seize Christian Village in Syria, Expel Its Residents*, ASSYRIAN INT'L NEWS AGENCY NEWS (May 12, 2012, 4:45 PM), http://www.aina.org/news/20120512124546.htm.

107. MARK R. AMSTUTZ, INT'L ETHICS 82 (2d ed. 2005).

108. G.A Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

109. Mary Ann Glendon, *Propter Honoris Respectum: Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV. 1153 (1998).

Universal Declaration of Human Rights are recognized as part of customary international law, they serve as a compelling source to highlight ISIS's violations of international human rights.

Contrary to Article I of the Universal Declaration of Human Rights, which recognizes the fact that "all human beings are born free and equal in dignity and rights," ISIS denies the freedom and dignity of Assyrian and other minority groups.[110] Against the norm of Article II of the UDHR, ISIS systematical discriminates others because of race, religion, gender and other reasons.[111] ISIS also violates the customary international norm of Article III of the Declaration, which recognizes that everybody "has the right to life, liberty and security of person."[112]

In fact, ISIS's actions against the Assyrian people violate every norm recognized by the Universal Declaration of Human Rights. Considering the importance of this normative source in our current historical context, it is important to remember the specific norms that the international community has embraced and ISIS is constantly violating. The Universal Declaration forbids slavery and the slave trade.[113] It prohibits torture and any other form of cruel treatment of human beings.[114] It recognizes the right to legal personality of all,[115] and the principle of equal protection under the law.[116] It acknowledges the right to have effective legal remedies for human rights violations.[117] It rejects any form of arbitrary arrest,[118] and it recognizes the right "to a fair and public hearing by an independent and impartial tribunal."[119]

ISIS has violated, and continues to violate, fundamental human rights of the Assyrian and other religious and ethnic minority groups. Among the rights that ISIS violates, are: the presumption of innocence until proven guilty,[120] and the right not to be subjected to arbitrary interference with "privacy, family, home or correspondence."[121] ISIS systematically denies

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110. G.A. Res. 217 (III) A, *supra* note 108.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. G.A. Res. 217 (III) A, *supra* note 108.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. G.A. Res. 217 (III) A, *supra* note 108.

121. *Id.*

the right to freedom of movement and residence[122] of Assyrian and other minority groups.

ISIS violates the right of every person "to seek and to enjoy in other countries asylum from persecution."[123] It also denies "the right to a nationality;[124] the right to marriage and family;[125] and the right to property."[126] ISIS denies Assyrians and other religious and ethnic groups the right to freedom of opinion and expression,[127] and the right to freedom of association.[128]

There is no doubt, that the right to life is the most important human right, and ISIS is systematically violating that norm. Although compared to the right to life, the right to religious freedom may not seem as fundamental; in the context of ISIS's violations of human rights of Assyrians and other religious minority groups, that right is very important.

The right to religious freedom is of particular significance because one of the fundamental ideas of ISIS's religious totalitarian worldview, is the opposition to the concept of religious liberty. Because of this, religious minority groups such as Assyrian Christians, have become the main targets of the terrorist organization. Considering this fact, it is necessary to highlight the importance of respect for religious freedom as part of the answer against ISIS's ideology and criminal conduct.

Professor Robert George, former Chair of the United States Commission on International Religious Freedom, defines religious freedom as:

> The right to ponder life's origins, meaning and purpose; to explore the deepest questions about human nature, dignity, and destiny; to decide what is to be believed and not to be believed; and, within the limits of justice for all, to comply with what one conscientiously judges to be one's religious obligations—openly, peacefully, and without fear.[129]

Contrary to ISIS's worldview, the international community has acknowledged the importance of legally protecting the right of each human

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122. *Id.*

123. *Id.*

124. *Id.*

125. G.A. Res. 217 (III) A, *supra* note 108.

126. *Id.*

127. *Id.*

128. *Id.*

129. *In Recognition of Dr. Robert George's Advocacy For Religious Freedom: Extension of Remarks,* 113th Cong. E178 (2014) (statement of Hon. Frank R. Wolf, of Virginia).

being to decide what to believe in. International religious freedom, is a fundamental legal norm which serves to create the conditions for the peaceful coexistence of diverse groups. Assyrian Christians and other religious minority groups in ISIS's controlled territories have the right to religious freedom. ISIS is violating Article XVIII of the Universal Declaration of Human Right which states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.[130]

ISIS is violating fundamental principles of the United Nations Charter which indicates that the purposes of that international organization are the promotion and encouragement of "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[131] ISIS is violating the norms of the International Covenant on Civil and Political Rights, which recognizes that every human being has the right to religious freedom, which includes the freedom to express religious views.[132]

ISIS is violating the United Nations Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion and Belief, which was adopted in 1981. The United Nations Declaration recognizes that the right to religious freedom includes, among others, the freedom to worship, the right to write and publish religious literature, and to teach from a religious perspective.[133]

VIII. THE UNITY OF HUMANKIND AGAINST ISIS'S INTERNATIONAL CRIMES

ISIS's actions, against the Assyrian and other religious minority groups, are crimes against humanity. Therefore, the involvement of only some countries, such as France, the United States, Iran, and Russia is not enough. It is true, that certain countries have the military power to stop ISIS's actions; however, from a legal perspective, all countries, both developed and developing members of the international community, can and should ensure that crimes against humanity, such as the ones committed

130. G.A. Res. 217 (III) A, *supra* note 108.

131. U.N. Charter art. 1, ¶ 3.

132. Human Rights Council Res. 2200 (XXI) A, 1 (Dec. 15, 1966).

133. G.A. Res. 36/55 (Nov. 25, 1981).

by ISIS, are stopped and leaders responsible for the crimes are punished individually.

To accomplish this objective, the concept of universal jurisdiction is especially relevant. This type of jurisdiction means that all countries of the world can prosecute and punish ISIS's individuals who are murdering, torturing, and raping innocent Assyrians. According to Professor Paust,

> Universal enforcement has been recognized over 'crimes against mankind,' crimes 'against the whole world' and the 'enemies of the whole human family,' or those persons who become *hostes humani generis* by the commission of international crimes. . . . These crimes also involve obligations *erga omnes*, which are owing not merely to certain states and their nationals, but to all of humankind.[134]

David Luban describes this type of jurisdiction as "vigilante jurisdiction," which "carries the implication that criminals against humanity are anyone's fair target."[135] Any nation can take official legal actions against the perpetrators of crimes against humanity; therefore, all nations have the ability to respond to the crimes perpetrated by ISIS against the Assyrian Christians.[136]

Besides the application of the concept of individual responsibility and universal jurisdiction to prosecute and punish ISIS individuals, it is essential that the international community, through international organizations and each individual country, act to end ISIS's crimes against humanity.

There have been some efforts to accomplish that objective. For example, the United Nations Security Council adopted Resolution 2178 directly in response to the threat of ISIS. The resolution "condemns the violent extremism, which can be conducive to terrorism, sectarian violence, and the commission of terrorist acts by foreign terrorist fighters," and calls member states to cooperate in the efforts to prevent radicalization and

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134. M. CHERIF BASSIOUNI ET AL., CRIMES AGAINST HUMANITY HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 281 (2011).

135. Luban, *supra* note 68, at 91.

136. *See Case Concerning Certain Criminal Proceedings in France (Congo v. Fr.)*, INT'L COURT OF JUSTICE 1, 2 (June 17, 2003), http://www.icj-cij.org/docket/files/129/8206.pdf; *see also* Kaitlin R. O'Donnell, Note, *Certain Criminal Proceedings in France (Republic of Congo V. France) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?*, 26 B.U. INT'L L.J. 375, 388; Kaitlin R. O'Donnell, Note, *Certain Criminal Proceedings in France (Republic of Congo V. France) and Head of State Immunity: How Impenetrable Should the Immunity Veil Remain?*, 26 B.U. INT'L L.J. 375, 388.

recruitment of foreign terrorist fighters.[137] Another example is Secretary General Nabil Al-Arabi of the Arab League's statement, stating: "[w]hat is happening in Iraq, is that the terrorist organization not only threatens a state's authority, but threatens its very existence and the existence of other states."[138]

Many countries have expressed their views through high ranking officials. For example, regarding ISIS's crimes, Australian Prime Minister, Tony Abbot, said, "Australia cannot leave the Iraqi people to face this horror, this pure evil alone, or ask others to do so in the name of human decency, what we won't do ourselves. It is right to do what we prudently and proportionately can, to alleviate this suffering, to prevent its spread and to deal with its perpetrators."[139] Khaled Bin Ahmed Al Khalifa, the Bahraini Foreign Affairs Minister, indicated that "[t]his situation requires immediate response from the international community in order to unify ranks, beleaguer and terminate all terrorist groups."[140]

German Chancellor, Angela Merkel, said: "We have seen acts of unbelievable brutality . . . can we really wait and hope that somebody else will see it as his or her responsibility? . . . Now, we have the chance to help save lives and prevent any further mass murder in Iraq, and we must use this chance."[141] King Abdullah II of Jordan said:

> Those who say, this "is not our business" are wrong. The security of every nation will be shaped by the fate of the Middle East. . . . The terrorists and criminals targeting Syria, Iraq, and other countries today are extreme reflections of a global threat. Our international community needs a collective strategy to contain and defeat these groups.[142]

United Kingdom's former Prime Minister, David Cameron, said, "[w]e must use all the instruments at our disposal, humanitarian, diplomatic and military, to squeeze this barbaric terrorist organization out of existence.[143] Shinzo Abe, Prime Minister of Japan, said, "Japan regards the activities of

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137. S.C.Res. 2178 ¶¶ 22–25 (Sept. 24 2014).

138. Agence France—Presse, *Islamic State Must Be Confronted 'Militarily and Politically' - Arab League Chief,* GMA NETWORK, (Sept. 7, 2014), http://www.gmanetwork.com/news/story/378152/news/world/islamic-state-must-be-confronted-militarily-and-politically-arab-league-chief.

139. *Selected Leader Statements About International Efforts to Counter ISIL and Support the People of Iraq and Syria*, U.S. DEP'T OF STATE, http://www.state.gov/s/seci/c64518.htm (last visited Oct. 15, 2016).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

ISIL, which extends across national borders and has declared unilaterally the establishment of a so—called 'state,' to be a serious threat to international order. What is important now is preventing extremism from taking root while also responding swiftly to the region's humanitarian crises."[144]

Prime Minister Haile Mariam of Ethiopia said, "ISIS's utmost savagery is a satanic act that has no religious basis and that needs to be condemned by all people across the globe . . . the people of Ethiopia, irrespective of their religious, ethnic, socio-economic and political differences, should stand in unison to fight extremism and terrorism."[145]

The Panamanian Ministry of Foreign Affairs condemned ISIS's actions as violations of human rights, intended to "spread panic, grief, and pain among the peoples of the international community," and vowed "to combat terrorism in all its forms and manifestations, and acts of indiscriminate violence arising from religious, cultural, and ethnic intolerance."[146]

Countries such as Germany, France, and Spain have assisted in the fight against ISIS by providing military and counter-terrorism training, while other countries such as Albania, Hungary, Estonia, Greece, New Zealand, and the Czech Republic have pledged support in the form of weapons, ammunition, or military personnel. Several nearby Middle Eastern countries have also pledged their support against ISIS, including Lebanon, Algeria, Afghanistan, Morocco, Kuwait, and others.[147]

IX. CONCLUSION

In the current historical context, in which the international community is witnessing extreme atrocities committed by ISIS against Assyrian and other ethnic and religious minority groups, it is difficult to make sense of what human beings are capable of doing, and propose normative responses to end acts of extreme wickedness. One of ISIS's main ideological and legal foundations, to justify its crimes against humanity, is the

144. *Id.*

145. *Ethiopia: Demonstrations to Protest the Utmost Savagery of ISIS*, GEESKA AFRIKA ONLINE (Apr. 23, 2015), http://www.geeskaafrika.com/8653/ethiopia-demonstrations-to-protest-the-utmost-savagery-of-isis/8653/.

146. *Panama Joins the International Community Coalition Against Islamic State*, MINISTERIO DE RELACIONES EXTERIORES (Feb. 5, 2015), http://mire.gob.pa/noticias/2015/02/05/panama-se-une-coalicion-de-la-comunidad-internacional-contra-estado-islamico.

147. Jay Akbar, *Revealed: The Astonishing Fifty-Four Countries and Groups Battling ISIS... So why Haven't they Been Crushed Already?*, DAILY MAIL UK (July 10, 2015 04:45 EST), http://www.dailymail.co.uk/news/article-3154680/The-astonishing-FIFTY-FOUR-countries-groups-battling-ISIS-haven-t-crushed-already.html.

presupposition that they have a religious duty to impose their worldview by using all means. This includes the systematic killing of those that oppose their ideology such as the Assyrian people.

An integrative jurisprudential analysis, which considers the historical facts, provides philosophical reflections and applies universal legal norms to the case, can contribute to understanding the reason for ISIS's actions and creates a persuasive discourse in the struggle to end crimes against humanity.

The Augustinian perspective, on the problem of evil, enables one to understand ISIS's crimes against humanity as acts of extreme political evil. ISIS's ideology provides an irrational justification for international crimes against the Assyrian people. Those actions dehumanize Assyrians and anybody that opposes ISIS's religious totalitarian ideas. This leads to widespread violations of human rights which amount to crimes against humanity.

ISIS's extreme form of religious totalitarianism is contrary to the consensus of the international community that has recognized the existence of fundamental human rights, including the right to life and the right to religious freedom, in the Universal Declaration of Human Rights and other international legal instruments. The Declaration exists as a result of the historical agreement, of the international community, to codify norms for the protection of fundamental inherent natural human rights and human dignity. Like, the actions of the Nazis against the Jewish community, ISIS's extreme political evil behavior requires a compelling normative response to ensure that the crimes against the Assyrian people and other groups are stopped and punished.

Considering the nature of ISIS's actions, they are crimes against the entire human race. Because of this, a global response to ISIS's violations of international law is essential. This approach should engage most members of the international community, not only powerful countries. In this decisive moment in the history of humankind, the international community needs to look back to the ideas which provided the foundation for the recognition of the existence of universal inalienable human rights. This will contribute to prevent and punish acts of extreme political evil. This is a compelling and just normative response to ISIS's religious totalitarian ideas and to their crimes against humanity.

ENFORCING INTERNATIONAL LAW IN U.S. COURTS: THE LAW OF THE SEA CONVENTION AT PLAY IN KIVALINA

Esmeralda Colombo[*]

"Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations."

The Federalist No.22 (Alexander Hamilton)

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I. INTRODUCTION

In the divide between law and justice, individuals often propend for justice and find law. When it comes to international law, individuals might not even find any law, let alone the sacred ideal of justice. Neither was international law originally conceived for directly applying to individuals, nor was any court purposefully created for adjudicating their claims.[1] Yet, this major gap is prominently perceived when industrial installations and environmental degradation either affect or threaten to affect individuals' life. What is the role of international law in adjudicating environment-related claims which are put forward by individuals or non-state parties?

The insight to understand how international law and domestic law are intertwined is not a novel one. Nor is the factual and normative assumption that individuals are sometimes able to invoke international law norms specifically in domestic courts rather than in international settings. Nevertheless, attempts to understand whether international law is apt to offer a repository of underused assets for advancing the "sacred" idea of justice in a specific case, *before* the case appears in court, might be an interesting one. Not only would domestic courts provide a more proximate and familiar environment for individuals than international settings, but they would also be better placed to mandate scientific assessments and issue enforceable reliefs. Yet, international law is not always easy to adapt neither to domestic courts nor to specific legal claims.

Kivalina, a community in Northwest Alaska, has recently encountered many setbacks in the courts of the United States, in what one may characterize as a long and bitter environmental confrontation with major corporations, both in terms of climate change litigation and on account of water degradation due to the operation of the Red Dog Mine, one of the largest mines worldwide.

In this paper, I will attempt to address Kivalina's water issues that still appear outstanding and not addressed after long years of purely domestic litigation in the courts of the United States. This article will proceed as follows. Part II.A will address the reasons why it is advisable that international law be implemented, among other means, within domestic courts. Parts II.B and II.C hinge on the different approaches U.S. courts have applied toward international law and how international law can play out in future environmental claims. I will then consider the factual matters and case posture of Kivalina claims under Part III.A, with specific reference to the shortcomings of domestic litigation and the outstanding claims related to the pollution of water under Part III.B. Under Part III.C, I will identify which water claims should still be addressed, and how this can be

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1. ANTONIO CASSESE, INTERNATIONAL LAW 142–44, 376–77 (2nd ed., Oxford University Press 2005).

done by looking at the United Nations' Law of the Sea Convention (LOS Convention) in order to test the following hypothesis: would Kivalina residents be able to invoke specific provisions of the LOS Convention in order to have their claims better addressed in courts of the United States? In the affirmative, what techniques could be deployed, in light of past and present approaches of U.S. courts, and specifically the U.S. Supreme Court, vis-à-vis international law? I conclude by arguing that Kivalina residents are able to advance water-related claims by relying on the interpretation of domestic statutes consistent with the LOS Convention. Most specifically, I will hold that both common law and statutory remedies can be triggered effectively by relying on the customary character of some of the environmental provisions contained in the LOS Convention, as summarized in Part IV.

The foregoing hypothetical is based on a number of assumptions and limitations. I am assuming that Kivalina residents are/will be willing to engage in litigation, rather than Alternative Dispute Resolution. Moreover, I am specifically considering the available information in public domain documents, yet the factual characterization of the case is necessarily more complex. Furthermore, notwithstanding the host of issues that might be addressed, I am going to tailor down this account to solely water issues, which will not be assessed through multiple sources of international law, but solely by hinging on the LOS Convention.[2] Most fundamentally, I am going to select exclusively *some* provisions under the LOS Convention that may be applicable. The chosen wording for addressing the difference between U.S. states and States at international law rests on qualifying U.S. states as states and states at international law as States.

II. THE MIXED FUEL OF U.S. AND INTERNATIONAL LAW

The implementation of international law is not a given. All the more so, the implementation of international law in domestic courts is specifically challenging due to the host of rules and approaches on how to domesticate internationally binding law within domestic legal orders.

In order to prepare the groundwork for a prospective application of international law to the Kivalina case, I will evaluate whether and why a given legal order should aim as much as possible at a mixed fuel, namely a combination of domestic and international law to be applied by judges for the resolution of controversies, especially in environmental matters. I will then sketch the historical trajectory along which U.S. courts have variedly applied international law. The ultimate aim is to appraise the likelihood for U.S. courts to make any use of international law in environmental cases, in

2. United Nations Convention on the Law of the Sea, Oct. 12, 1982, 1833 U.N.T.S. 3 [hereinafter Convention on the Law of the Sea].

light of the most recent judgments. I will conclude by arguing that U.S. courts are not as unfriendly to international law as some scholarship has depicted them, however, a vein of self-restraint specifically emerges when environmental claims are advanced through the Alien Tort Claims Act.

A. Do We Actually Need a Mixed Fuel?

If we look at the law as a fuel for development and prosperity, the preservation of the environment and cohesive communities, it would not be hard to understand that there is still a long way for environmental laws to achieve the most effective fuel composition. Almost in every country, environmental laws are in place, but their enforcement is extremely difficult as some instances may exemplify. In South Africa, a middle-income country, transition to democracy has made way for environmental policies and legislation, but domestic agencies have faltered to enforce environmental law.[3] Conversely, in such a developed country as the United States, notwithstanding innovative policies,[4] enforcement is still critical, and a survey has shown that two-thirds of U.S. corporate counsels admitted that their companies had recently violated environmental laws.[5]

If the law enforcement apparatus is not effective and responsive to societal concerns on environmental depletion, individuals usually turn to domestic courts. But what happens if domestic law is not protective enough? If domestic law is narrowly characterized, i.e. as a body of normative rules that are domestically produced, individuals might not be able to find any effective judicial remedy and courts will not play their established role in the dynamics of checks and balances.

I believe, however, that domestic law can be effectively supplemented by an additional ingredient to the fuel of prosperity, environmental protection and cohesiveness, namely international law. This would result from either application or interpretation. By way of application, domestic courts are incrementally able and prone to apply international law even when the latter has not been fully implemented internally, at either the legislative or executive level (*direct application*).[6] By way of

3. Angela Mathee, *Environment and Health in South Africa: Gains, Losses, and Opportunities*, 32 J. PUB. HEALTH POL'Y 537–43 (2011).

4. *See* Final Policy Statement on Incentives for Self-Policing of Violations, 65 FED. REG. 19, 618 (2000) (the Environmental Protection Agency (EPA) has incentivized self-policing of violations, given the multitude of sources of pollution and the difficulties of monitoring them all at a centralized level).

5. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION LAW 1071 (Wolters Kluwer ed., 7th ed. 2000).

6. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J 2347, 2349 (1991); Simon Marsden, *Invoking Direct Application and Effect of International Treaties by the*

interpretation, national courts are often able, and sometimes specifically required, to construe and apply national law in such a manner that any conflict with international rules is prevented (*consistent interpretation* or the *Charming Betsy* canon).[7] More generally, the types of international obligations that I will look after in this paper are 'inward-looking obligations,' namely obligations undertaken by the specific State in the capacity of international actor, in relation to its conduct within its domestic jurisdiction rather than with other States on the international plane.[8]

This emerging practice, which has been characterized by Lord Bingham as almost unimaginable in the past,[9] is progressively leading to a new branch of international law dubbed comparative international law.[10] Techniques of implementation differ widely and bring about a variety of results according to each domestic system,[11] yet the domestication of international law is not contingent to specific domestic cases, but also contributes to the development and enforcement of international law more broadly.[12] In fact, the implementation of specific international law norms at domestic level signals and strengthens their legitimacy, allowing for their overall enforcement according to Thomas Franck's theory of compliance; what is more, the International Court of Justice (ICJ) has consistently portrayed domestic courts' decisions as reflective of international customary law, and the implementation of specific international law norms would ease out and fasten the identification of customary rules.[13]

European Court of Justice: Implications for International Environmental Law in the European Union, 60 INT'L & COMP. L.Q. 737, 738–40 (2011); ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 117–18 (2011); Dinah Shelton, *Introduction* to INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS INCORPORATION, TRANSFORMATION AND PERSUASION 11–13 (Dinah Shelton ed., Oxford Univ. Press 2011).

7. Rebecca Crootof, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L. J. 1784 (2011).

8. Antonios Tzanakopoulos, *Domestic Courts as the Natural Judge of International Law: A Change in Physiogonomy in* 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 155–68 (James Crawford & Sarah Nouwen eds., Hart Publ'g 2011); *see* THE ROLE OF THE DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 1–60 (David Sloss ed., Cambridge U. Press 2009) [hereinafter STUDY]; *see also* David Sloss, *Treaty Enforcement in Domestic Courts: A Comparative Analysis, in* THE ROLE OF THE DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 1–60 (David Sloss ed., Cambridge U. Press 2009) [hereinafter *Analysis*].

9. Lord Bingham, *Foreword* to SHAHEED FATIMA, USING INTERNATIONAL LAW IN DOMESTIC COURTS, at xi (Hart Publ'g 2005).

10. Anthea Roberts, *Comparative International Law? The Role of the National Courts in Creating and Enforcing International Law,* 60 INT'L & COMP. L.Q. 57, 60 (2011).

11. CASSESE, *supra* note 1, at 224.

12. Roberts, *supra* note 10, at 58.

13. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (Oxford University Press 1990); *see* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J.

Nonetheless, international law is no panacea to the shortcomings of domestic environmental law. As a "global environmental crisis"[14] is unfolding, international environmental conventions and soft law are at their apex, yet enforcement often lacks teeth[15] and even domestic measures are sometimes "exported," making for their (extraterritorial) application in place of the feeble and fragile specter of international law.[16] Yet, exporting domestic legislation—albeit highly protective—is a byword for diplomatic hostility and non-coordinated, therefore inefficient, implementation of common legal rules and principles. For this reason, I am herein propounding the vision of a mixed fuel scenario of domestic law and international law as intertwined tools for incrementally addressing environmental issues that local communities in general, and the Kivalina community in particular, are faced with.

B. The Mixed Fuel in U.S. Courts: An Overview from the Bench

In order to understand whether the mixed fuel of international and domestic law might work in the case of Kivalina, which should be advanced in U.S. courts, I will here overview the historical posture of U.S. courts vis-à-vis international law, with no intent to provide an exhaustive line of cases.

Notwithstanding the fairly clear interplay between international and national law under the monistic and dualistic doctrines,[17] the enforcement of international law in U.S. courts has been characterized as one of "the 'most confounding' in the United States law of treaties."[18] Within the perspective of the present contribution, it is safe to contend that the confusion is not limited to the United States' law of treaties, but also vastly affects the status of international law in U.S. courts, as well as the tools that are available for individuals to vindicate their rights in court. When and how do treaties create judicially enforceable individual rights in U.S. courts?

Rep. 3, ¶¶ 56–58 (Feb. 14); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 248 (2008).

14. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 269 (University Casebook Series, 5th ed., Foundation Press 2015).

15. *Id.* at 367; *see* some notable exceptions to this assertion *id.* at 404, 405.

16. *Id.* at 1455.

17. CASSESE, *supra* note 1, at 213; John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310, 311 (1992).

18. Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties* 89 AM. J. INT'L L. 695, 695 (1995) (quoting United States v. Postal, 589 F.2d 862, 876 (5th Cir. 1979)); David Sloss, *Self-Executing Treaties and Domestic Judicial Remedies* 98 AM. SOC'Y INT'L L. PROC. 346, 509 (2004) [hereinafter *Remedies*].

The choice of U.S. courts for my hypothesis on the Kivalina case is mainly due to three reasons. Firstly, Kivalina is located in Northwest Alaska, namely the 49th State of the Union, so that any remedy to be devised for Kivalina at the domestic level will be set in a U.S. court.[19] Secondly, U.S. judges appear to be a good example of a disinterested third party able to determine the merits of even complex disputes, which is the assumption of any enforcement of international law in domestic courts.[20] Moreover, the case-law trajectory on the interaction between U.S. and international law epitomizes some of the most fundamental challenges that a national judiciary faces when approaching international law.

U.S. courts are presently not regarded as particularly international law-friendly.[21] Yet, it strikes to note that in 1972, Justice Powell characterized domestic courts as the "the best means for the development of a respected body of international law '[u]ntil international tribunals command a wider constituency.'"[22]

The very origins of the United States as a country rest with international law. The Federalist Papers extensively mentioned the role of the law of nations in U.S. courts, and the Constitution bestowed the judicial power of the United States not only to cases arising under the Constitution and the laws of the United States, but also to cases arising under treaties, and specific controversies of an international kind.[23] According to the majestic expression of the U.S. Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land," which judges are bound to enforce "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[24] For this reason, U.S. courts and legislators initially viewed customary international law and treaty obligations as part of domestic law.[25]

Indeed, the Supreme Court took the constitutional wording very seriously, as illustrated in *Ware v. Hylton*, where it held that a treaty

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19. Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 853 (9th Cir. 2012).

20. Tzanakopoulos, *supra* note 8, at 157.

21. Koh, *supra* note 6, at 2356–58; Benvenisti, *supra* note 13, at 248 (sometimes, courts cannot be international-law friendly on account of statutes prohibiting any reference to so-called foreign law); Tzanakopoulos, *supra* note 8, at 166 (citing Oklahoma's constitutional amendments to prohibit State courts to consider Sharia law or international law or indeed "the legal precepts of other nations or cultures." The Amendment passed by referendum in 2011).

22. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 775 (1972).

23. U.S. CONST. art. III, § 2; Koh, *supra* note 6, at 2352 (citing the internationalist approach enlivened in the Federalist Papers).

24. U.S. CONST. art. VI, § 2; *Remedies*, *supra* note 18, at 508.

25. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 868 (1987).

overrules all State laws upon the subject.[26] Until 1860, the Supreme Court gave no deference to the executive branch's interpretation of treaties,[27] but it rather vigorously enforced international law to the detriment of statutes, and more sparsely interpreted the Constitution itself in light of international treaties.[28]

An abrupt change occurred in mid-nineteenth century, when the Supreme Court started denying treaties' status of federal law,[29] under the comity exception, the separation-of-powers and related political question doctrine, as well as the judicial incompetence exception.[30]

Firstly, under the comity exception, which was further asserted through the act of state doctrine, the Supreme Justices decided not to adjudicate on "the acts of the government of another,"[31] for sake of a 'comity' exception,[32] further declaring that no federal common law could govern the case "except in matters governed by the Federal Constitution or by acts of Congress."[33]

Secondly, the separation-of-powers exception revolved around the separation-of-powers disclaimer, by which the Supreme Court inaugurated a phase of deference to the President of the United States,[34] and more generally to the executive power of states. Self-restraint was no more

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26. Ware v. Hylton, 3 U.S. 199 (1796); David Sloss et al., *International Law in the Supreme Court to 1860, in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT CONTINUITY AND CHANGE 13 (Cambridge U. Press 2011) [hereinafter *Supreme Court*].

27. *Supreme Court*, *supra* note 26, at 17.

28. Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 15 (2006); *Supreme Court*, *supra* note 26, at 41 (where the international law-bound interpretation of the Constitution is deemed more opportunistic than with statutes).

29. Duncan B. Hollis, *Treaties in the Supreme Court, 1861–1900* INTERNATIONAL LAW IN THE US SUPREME COURT CONTINUITY AND CHANGE 55–59, 60, 61–88 (David L. Sloss et al. eds., Cambridge U. Press 2011).

30. Koh, *supra* note 6, at 2357.

31. Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (noting that "every sovereign State is bound to respect the independence of every other sovereign State"); *see* Oetjen v. Central Leather Co, 246 U.S. 297, 303–04 (1918) (act of State doctrine "rests at last upon the highest considerations of international comity and expediency"); *see also* Ricaud v. American Metal Co, 246 U.S. 304 (1918); Hilton v. Guyot, 159 U.S. 113 (1895); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

32. Koh, *supra* note 6, at 2357.

33. Erie R Co. v. Tompkins, 304 U.S. 64 (1938) (a case of diversity jurisdiction on civil liability overruling Swift v. Tyson, 41 U.S. 1 (1842)).

34. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (holding that "the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.").

applied in light of mere comity to other countries, but was rather entrenched in the U.S. separation of powers system, by which any question entailing determinations on the legality of foreign states' acts was tantamount to a political question,[35] which appertain to the political branch's prerogatives. It is no coincidence that such shift happened quite lately, and precisely in the 1930s and 40s,[36] when alliances were sought and wars waged.[37]

Thirdly, the Supreme Court branched out the separation-of-powers doctrine into a new exception, namely the judicial incompetence exception, by which "the very nature of executive decisions as to foreign policy is political, not judicial,"[38] thus banning not only findings of fact in international cases, but also the very activity of interpretation regarding international law and foreign affairs law.[39]

Besides the three exceptions, more interpretive hurdles were set forth by the courts. It might have very well been that the wave of human rights treaties, which swept and reshaped international law after the Second World War, increasingly put pressure on the U.S. judiciary, and prompted federal and state courts to hammer out a more defined doctrine of non-self-executing treaties, which must be domesticated into national law by a statute to become the "Law of the Land."[40] The judge-made distinction between self-executing and non-self-executing treaties kept percolating in the case law as long as the Cold War era ensued, and the need for protecting U.S. governmental actions might have been one of the reasons for upholding such a theory.[41]

A new trend favoring international law was impressed back again in such decisions as *Mendoza-Martinez* and *Afroyim* on denaturalization laws,

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35. United States v. Pink, 315 U.S. 203 (1942); *see* Baker v. Carr, 369 U.S. 186 (1962).

36. *See generally* United States v. Belmont, 301 U.S. 324 (1937).

37. *See generally* Curtiss-Wright Export Corp., 299 U.S. at 311.

38. Chicago & S Air Lines, Inc. v. Waterman Steamship Co., 333 U.S. 103, 111 (1948).

39. Koh, *supra* note 6, at 2358.

40. *See, e.g.*, Sei Fujii v. State, 38 Cal. 2d 718 (1952); Pauling v. McElroy, 278 F.2d 252 (D.C. Cir. 1960) (individual may not invoke the UN Charter to enjoin detonation of test nuclear weapons in Marshall Islands); Vlissidis v. Anadell, 262 F.2d 398 (7th Cir. 1959) (alien may not resist deportation on ground that U.N. Charter superseded racist provisions of immigration laws); *See Remedies*, *supra* note 18, at 20. *But see* Hollis, *supra* note 29, at 76; Lori Fisler Damrosch, *Medellin and Sanchez-Llamas: Treaties from John Hay to John Roberts* INTERNATIONAL LAW IN THE U.S. SUPREME COURT CONTINUITY AND CHANGE 460 (David L. Sloss et al. eds., Cambridge Univ. Press 2011) (according to some commentators, the doctrine of non-self-executing treaties was first shaped in Foster v. Neilson, 27 U.S. 253 (1829)) (the distinction *Foster* drew between self-executing and non-self-executing treaties, did not prove a hurdle in the judicial enforcement of treaties. The most extensive discussion of the issue case in a dissent by Justice Field in Baldwin v. Franks, 120 U.S. 678 (1887)).

41. Koh, *supra* note 6, at 2362; *Banco Nacional de Cuba*, 376 U.S. at 398 (which also dates back to the Cold War era and is a landmark decision on the act of state doctrine).

which the Court struck down by relying on the Law of Nations.[42] The Eighth Amendment also prominently became a fertile ground for citing foreign and international sources.[43] With *Filártiga v. Peña-Irala,*[44] a branch of transnational public law litigation seemed to parallel the achievements of domestic public law litigation[45] in Federal courts under the Alien Tort Claims Act (ATCA or ATS, Alien Tort Statute).[46]

In *Sosa* the Supreme Court explained at length the "transnationalist" approach historically applied in such decisions as *Paquete Habana*[47] and *Nereide,*[48] but refrained from adjudicating ATS claims for violations of "any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar" when the ATCA was enacted,[49] and therefore "specific, universal, and obligatory."[50] The ATS-kind of law of nations, however, was understood as encompassing even present-day norms of international law.[51]

The understanding of *Sosa* is still debated,[52] yet it has been argued that it bestows jurisdiction on Federal courts to decide on customary international law status if no express interpretation is offered by the political branches, which is a fairly balanced solution since judges are still often perceived as unelected actors.[53]

Yet, the rise of transnational public law litigation was apparently quelled in recent cases, such as *Breard*,[54] *Sanchez-Llamas*,[55] and *Medellin*

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42. Afroyim v. Rusk, 387 U.S. 253 (1967); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 (1963) (citing the EMER DE VATTEL, LAW OF NATIONS (1758) and HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (2007)).

43. *See* Coker v. Georgia, 433 U.S. 584 (1977).

44. *See* Filártiga v. Peña-Irala, 442 U.S. 901 (1979).

45. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976).

46. Alien Tort Claims Act, 28 U.S.C. § 1350 (2012).

47. The Paquete Habana*,* 175 U.S. 677, 714 (1890).

48. The Nereide, 13 U.S. 388, 423 (1815).

49. Sosa v. Alvarez-Machain, 124 U.S. 2739, 2766 (2004).

50. *Id.*

51. *Id.* at 2761–62; *see* U.S. v. Hasan, 747 F. Supp. 2d 599 (2010).

52. John O. McGinnis, *Sosa and the Derivation of Customary International Law* INTERNATIONAL LAW IN THE SUPREME COURT: CONTINUITY AND CHANGE 481–93 (David L. Sloss et al. eds., Cambridge U. Press 2011).

53. *Id.* at 484.

54. Breard v. Greene, 523 U.S. 371 (1998); *see* Damrosch, *supra* note 40, at 458.

55. Sanchez-Llamas v. Oregon, 126 U.S. 2669, 2679 (2006) (concerning the police not informing a person under arrest or detention that he/she could request his/her own Consulate to be notified of his/her detention).

II.[56] The latter decision is widely known for having further extended the wall of separation between domestic law and international law by excluding the automatic enforcement—absent implementing legislation—of ICJ decisions when provisions at issue are not self-executing, in this case Article 94 of the U.N. Charter.[57]

The legacy of this new line of decisions, and specifically of *Medellin*, is a seeming presumption of non-self-execution of international law norms,[58] however enforcing environmental treaties and customary norms requires a separate analysis, to which I will now turn.[59]

C. The Enforcement of Environmental Treaties and Customary International Law

With respect to environmental agreements, almost twenty years ago they were considered non-self-executing[60] more often than not. In a notable case, involving the enforcement of international whaling quotas, the Supreme Court seemed to set aside the political question doctrine[61] by maintaining that, "under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones."[62] In some other instances, courts have not found provisions specific enough to warrant their application,[63] or applicable to non-state parties.[64]

More generally, with concern to international agreements, U.S. courts apply two different approaches that have been labeled as the nationalist approach and the transnationalist approach.[65] Under the nationalist

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56. Medellin v. Texas, 522 U.S. 491 (2008).

57. U.N. Charter art. 94.

58. Crootof, *supra* note 7, at 1787.

59. Damrosch, *supra* note 40, at 453.

60. Daniel Bodansky & Jutta Brunnée, *The Role of National Courts in the Field of International Environmental Law*, 7 REV. EUR. COMMUNITY & INT'L ENVTL. L. 11, 113, 129 (1998).

61. *See Baker*, 369 U.S. 186.

62. Japan Whaling Ass'n v. American Cetacean Soc, 478 U.S. 221, 230 (1986) (at the end of the decision, the Court cited *Moby Dick* by Melville).

63. Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (1991).

64. Beanal v. Freeport-McMoran Inc., 197 F.3d 161 (5th Cir. 1999); Defenders of Wildlife Inc. v. Endangered Species Scientific Authority, 725 F.2d 726, 726 (1984) (the Court merely referred to Article VI (2) of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) and then struck down administrative guidelines as incompatible with it); *see* CATHRIN ZENGERLING, GREENING INTERNATIONAL JURISPRUDENCE 57, (Martinus Nijhoff Publishers 2013).

65. *Remedies*, *supra* note 18, at 504.

approach, courts deploy an array of interpretive tools as agents of the domestic legal system only, while under the transnationalist approach courts act as agents of both the domestic and international legal system, in a sort of double role.[66] Quite understandably, outcomes vary according to the specific approach that courts discretionarily apply. Most notably, the transnationalist approach is shown as the most favorable approach for the advancement of international law in U.S. courts.[67]

According to recent empirical research on the subject, the transnationalist conceptual framework is applied more often than the nationalist approach when private parties are adverse to each other, rather than to the government.[68]

When it comes to customary law, customs in environmental matters have not been often invoked in court, however such a litigation strategy has been attempted in some instances by hinging on the Alien Tort Claims Act.[69] In a specific case of alleged pollution of the rain forests and rivers in Ecuador and Peru, a Federal court implied that a corporation could be liable to indigenous people for breaches of international environmental law,[70] but later dismissed the claim on the *forum non conveniens* ground.[71]

Still, a recent attempt to have human rights law directly applied as customary law in domestic courts brought about the landmark *Kiobel v. Royal Dutch Petroleum Co*. lawsuit,[72] characterizing ATCA as presumptively against extraterritorial application in the absence of an express declaration of extraterritoriality on the part of Congress, according to the political question theory.[73] Secondly, it maintained that ATCA can be invoked only in "causes of action based on sufficiently definite norms of international law," namely norms that are "specific, universal, and obligatory."[74]

Not only is *Kiobel* relevant for environmental litigation, but it also encapsulates the Supreme Court's most recent attitude toward ATS

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66. *Id.* at 522; GEORGES SCELLE, PRÉCIS DE DROIT DES GENS: PRINCIPLES ET SYSTÉMATIQUE pt. 2, at 10–12 (1934).

67. *See Remedies*, *supra* note 18, at 509.

68. *Id.* at 532 (according to a recent empirical research, in cases where private parties are adverse to each other, U.S. courts are more likely to apply transnationalist tools than nationalist tools, whilst in government-party cases U.S. courts are more likely to apply nationalist tools than nationalist tools).

69. 28 U.S.C. § 1350; *see* HUNTER ET AL., *supra* note 14 at 1380–90.

70. Aguinda v. Texaco*,* 303 F.3d 470 (2nd Cir. 2002).

71. *See* Change of Venue, 28 U.S.C. § 1404 (2012).

72. Kiobel v. Royal Dutch Petroleum Co*.*, 133 U.S. 1659 (2013).

73. *Id.* at 1668; Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001).

74. *Kiobel*, 133 U.S. at 1664–65; *Sosa,*124 U.S. at 2766.

litigation, which is all the more restrictive in light of the political question, separation of powers and act of state theory.[75]

All in all, such a framework concerning the aptitude of U.S. courts to either apply or interpret international law will be especially useful as soon as it is applied to the specific facts of the Kivalina case, which will now be considered.

III. THE KIVALINA CASE

In this section, I will illustrate the most relevant environmental impacts that the Red Dog Mine is alleged to have caused on the Kivalina community and the surrounding environment.

The Red Dog Mine is the United States' largest mining polluter, whose activities have been often countered by the nearby Kivalina community. Three issues have principally arisen from its operation: the effects of wind-blown ore dust and traffic air pollutants; the disruption of animal migration; and the unlawful discharge of pollutants in riverine waters as well as at the port site.

For the purposes of the present paper, I will tailor down the scope of the research to water-related issues.

With reference to water protection from the operation of the mine, Kivalina individuals currently perceive that many issues are still outstanding, in spite of the long-battled lawsuits. Such a recount attempts to make way for the application of my initial hypothesis stating the need for a mixed fuel of domestic and international law in the case of Kivalina. Most notably, I argue that water-related issues that have not been addressed at domestic level could receive a more effective response through the intertwinement of domestic law and international law.

A. Factual and Procedural Recount

The Red Dog Mine is a lead and zinc mine, and the most heavily polluting facility in the United States,[76] which was excavated and mined out by Teck Alaska Incorporated (Teck) on the land owned by NANA Development Corporation (NANA),[77] approximately forty-six miles inland

75. Koh, *supra* note 6.

76. *Toxic Release Inventory*, U.S. ENVIRONMENTAL PROTECTION AGENCY, http://myrtk.epa.gov/info/report.jsp?IDT=TRI&ID=99752RDDGP90MIL [https://perma.cc/L3XX-TCRG] (last visited Aug. 2, 2016) (showing Red Dog Mine ranking #1).

77. CHRISTINE SHEARER, KIVALINA. A CLIMATE CHANGE STORY 79, 106–07 (Haymarket Books 2011).

from the coast of the Chukchi Sea.[78] Teck is now excavating a nearby deposit, the Aqqaluk Pit, which is also located on NANA land.[79]

In order to understand which norms of either treaty law or general international law are applicable to the case, an overall assessment of the mine's environmental impact is in order.

Three main issues have arisen from the operation of the mine. Firstly, the mine has been deemed responsible of emitting wind-blown ore dust and traffic air pollutants, principally due to the transportation of mineral ore from the Delong Mountain Transportation System (DMTS) to a Teck-run nearby port.[80] Secondly, environmental groups and native communities have been vocal in reporting the disruption of animal migration, mainly due to the use of the DMTS and the operation of the Aqqaluk Deposit.[81] Lastly, Teck has experienced waste-water discharge issues, inland and at the port site on coastal/ocean waters.[82] With reference to the port site, the Alaska Spill Prevention Unit has also reported the occurrence of petroleum spills.[83]

All three types of alleged degradation were perceived by Kivalina residents, an Iñupiat community living fifty-four miles southwest of the mine on a thin long-barrier reef island located between the Chukchi Sea and a lagoon at the mouth of the Kivalina River.[84] Kivalina is perhaps best known as the first village suing major fossil fuel companies on the ground of their contribution to climate change,[85] which is now disrupting not only the subsistence life of Kivalina but also its own very existence.[86] Subsistence is at danger due to the faster migration of animals to northern colder areas, and related difficulties for hunters to provide the community

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78. U.S. ENVIRONMENTAL PROTECTION AGENCY, RECORD OF DECISION FOR THE RED DOG MINE EXTENSION AQQALUK PROJECT 1 (2010).

79. *Id.*

80. *Id.* at 11. The 52-mile DeLong Mountain Regional Transportation System (DMTS) haul road leads to port facilities located on the Chukchi Sea. The road has been of concern also for the fact that it passes through the Cape Krusenstern National Monument. However, EPA stipulated with the Alaska State Historic Preservation Officer (SHPO) that no adverse impact would ensue if measures and operational controls were included in the Cultural Resources Protection Plan (CRPP) presented by Teck, which it did.

81. *Id.* at 5.

82. *Red Dog Mine,* STATE OF ALASKA CONTAMINATED SITES PROGRAM, http://dec.alaska.gov/spar/csp/sites/reddog.htm (last visited Aug. 2, 2016).

83. *Id.*

84. SHEARER, *supra* note 77, at 101.

85. Native Village of Kivalina v. ExxonMobil Corp., 133 U.S. 2390 (2013); *Kivalina*, 696 F.3d at 849.

86. SHEARER, *supra* note 77, at 101.

with sufficient traditional food.[87] Additionally, recurrent storms and the rising sea level have put the community under physical and emotional stress, with a majority of people voting for relocation.[88] Indeed, the lawsuit against the major fossil fuel companies on grounds of climate damages was intended to collect the necessary funds for relocating the threatened village, but it was unsuccessful.[89]

Action has recently been taken with former President Obama requesting Congress to earmark $400 million "to cover the unique circumstances confronting vulnerable Alaskan communities, including relocation expenses for Alaska Native villages threatened by rising seas, coastal erosion, and storm surges," which would be administered by a Coastal Climate Resilience Fund to be established at the Department of the Interior.[90]

Nevertheless, given the difficulties in finding an alternative location and the lack of governmental involvement, I am arguing that more efforts need be devoted to understanding whether life as it is now in Kivalina can be ameliorated by way of international law. Domestic law has often been invoked, especially with reference to water-related issues, but not much has been achieved, and people in Kivalina still characterize water as being one of the most urgent challenges to be addressed.[91]

Given the limited aim of this paper, I will tailor down my quest for domestic remedies through international law by considering only water-related issues that have been attributed to the Red Dog Mine and leaving aside those contentions that the Kivalina community relates to wind-blown ore dust and animal wildlife disruption. Both aspects will nonetheless come up in relation to water issues. In case water claims are established, my ultimate aim is to tentatively equip Kivalina people with tools to make them justiciable, and achieve an enhanced quality of life.

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87. *Id.* at 76.

88. *Id.* at 103–04; Glenn Gray et al., *Kivalina Consensus Building Project: Results of Door-to-Door Survey* (July 2010), http://www.relocate-ak.org/wordpress/wp-content/uploads/2012/09/Kivalina_survey_summary5.pdf.

89. *Kivalina*, 133 U.S. at 2390; *Kivalina*, 696 F.3d at 849.

90. *See* Chris Mooney, *The Remote Alaskan Village That Needs to be Relocated Due to Climate Change,* WASH. POST (Feb. 24, 2014), https://www.washingtonpost.com/news/energy-environment/wp/2015/02/24/the-remote-alaskan-village-that-needs-to-be-relocated-due-to-climate-change/ [https://perma.cc/4DPT-EZ2T]; *'President Obama Proposes New Funding to Build Resilience of Alaska's Communities and Combat Climate Change*' WHITE HOUSE FACT SHEET (Feb. 9, 2016), https://www.whitehouse.gov/the-press-office/2016/02/09/fact-sheet-president-obama-proposes-new-funding-build-resilience-alaskas [https://perma.cc/7BD4-LJK5].

91. Gray, *supra* note 88.

B. Water Issues and Responses at Domestic Law

In the present paragraph, I broach the specific mining processes undertaken by Teck, which relate to the alleged degradation of water. After considering the first site (the "Main Deposit"), I will turn to the newly-dug Aqqaluk Deposit. Finally, I will look at the port facilities, which have been serving both sites. In all instances, I will also highlight the procedural history of the relevant environmental claims that have been brought throughout time, notably by members of the Kivalina community. Notwithstanding a host of claims, which have been adjudicated by notoriously advanced courts, most of such water-related issues are still outstanding, all the more so after the excavation of the second site, namely the Aqqaluk Deposit.[92]

The Main Deposit started operating in 1989 and was mined out by 2011.[93] It was subject to an Environmental Impact Assessment under NEPA[94] and both a point-source wastewater/stormwater permit and a dredge-and-fill permit under the Clean Water Act (CWA).[95] Ore was removed from the open pit mine and milled to obtain zinc and lead concentrates; tailings and process wastewater were impounded in a storage area (tailings pond); from there, treated wastewater was discharged into the Middle Fork of Red Dog Creek.[96]

What is here of concern is the wastewater permit, which is known as the National Pollutant Discharge Elimination permit (NPDES), in that Kivalina residents rely on that water—specifically, from the Wulik River—for drinking, subsistence hunting and fishing, and aesthetic enjoyment.[97]

In 2002, six Kivalina residents filed a citizen enforcement suit under section 505 CWA, documenting over 2,171 violations of Teck NPDES permit, of which Teck admitted to more than 1,100.[98] The ultimate aim was

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92. *See ExxonMobil Corp.*, 696 F.3d at 849.

93. U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 78, at 2.

94. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–47 (2012) (under § 102(2)(C) NEPA, all major Federal actions "significantly affecting the quality of the human environment" are to be accompanied by a "detailed statement." Under 40 C.F.R. § 1508.18 (2016), Major Federal Action, private projects requiring federal approval are also subject to NEPA).

95. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012) (Teck was specifically required to apply to and obtain a NPDES permit under § 402 CWA (EPA's authority and a dredge-and-fill permit under § 404 CWA (Army Corps of Engineers' authority))) [hereinafter Clean Water Act].

96. U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 78, at 2.

97. 33 U.S.C. §§ 1251–1387; SHEARER, *supra* note 77, at 113.

98. James Macpherson, *Village Claims Red Dog Contamination*, COMMUNITY (Sept. 29, 2002, 8:00 PM), http://www.alaskajournal.com/community/2002-09-30/village-claims-red-dog-conta

to ask the Court to enforce/have enforced the limit standards. The lawsuit was eventually settled through consent decree with Teck purchasing reverse osmosis units and good faith-pledging to build an effluent pipeline from the Red Dog Mine to the Chukchi Sea.[99] The interesting part of the settlement comes about when it reads that, whether Teck Cominco decided not to build the pipeline for good cause, it would pay a penalty of $8 million, or, whether it did not build it *without* a good cause, then it would pay a penalty of $20 million, both penalties apparently to the Federal Government.[100]

Turning to the Aqqaluk Deposit, major litigation arose after the EPA's issuance of its Record of Decision and new NPDES permit taking into account the imminent reclamation of the Main Deposit and fast advancing project for the Aqqaluk Deposit.[101] Such issuance followed a complex Teck-led Supplemental Environmental Impact Assessment (SEIS), which convinced the EPA to permit the operations and discharges at the Aqqaluk deposit, lower some of the effluent standards,[102] and allow for self-compliance by Teck coupled with periodic inspections on the part of the Administration.[103] For the fact that Kivalina and Port Hope residents did not explain why such enforcement strategy was not sufficient, their appeal was dismissed by both the Environmental Appeals Board and the Ninth Circuit.[104] The SEIS also clearly stated that maintenance of the two deposits would be needed in perpetuity,[105] with the concurrent need of

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mination#.V-cOaVUrJEY; *see* Adams v. Teck Comnico Alaska Inc., No. 3:04–cv–00049–JWS, 2006 WL 2105501 (D. Alaska Jul. 28, 2006).

99. *Kivalina Settlement Summary,* TECK, http://www.reddogalaska.com/DocumentViewer.aspx?elementId=128367&portalName=tc [https://perma.cc/VNW6-A5PF] (last visited Aug. 2, 2016).

100. *Id.* (another prong of the settlement dwelled on the compliance Teck pledged to the 1998 permit, as amended in 2003, with a major exception on Total Dissolved Solids (TDS), for which Teck would have paid a penalty when non-compliance occurred).

101. Native Village of Kivalina IRA Council v. EPA, 687 F.3d 1216 (9th Cir. 2012).

102. *Red Dog Mine Extension—Aqqaluk Project: Final Supplemental Environmental Impact Statement,* TETRA TECH, INC., (Oct. 2009), http://dnr.alaska.gov/mlw/mining/largemine/reddog/pdf/rdseis2009vol.1.pdf [hereinafter TETRA TECH, INC.] (most specifically, in their adjudicatory appeal lodged with the Alaska Department of Environmental Conservation (ADEC), petitioners held that the Alaska certification under § 401 CWA was violating the State's Antidegradation Policy (no degradation analysis plan was in place) and amounted to backsliding under CWA (§§ 402(o) and 303(d)(4)), restricting the cases under which NPDES permit limits might be relaxed in case of permit renewal, reissuance, or modification. Most notably the contested limits covered average monthly effluent limits (AMEL) for lead, and the effluents limits for cyanide, zinc and TDS as compared to the 1998 permit limits. A request for recusation was made towards ADEC's Commissioner, who was appointed in 2007 by Alaska Governor Sarah Palin as Commissioner of the ADEC, after being Teck's lawyer for a decade).

103. U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 78, at 7–8.

104. *Native Village of Kivalina IRA Council*, 687 F.3d at 1216.

105. U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 78, at 4.

hazing activities to deter wildlife from using open water at the sites.[106] There appears to be, however, no relevant plan in place to address this specific issue.

All in all, the EPA approved the plan put forward by Teck. The EPA approved Teck's plan as the Preferred Alternative, yet the Environmentally Preferable differed from what Teck proposed, and consisted of three pipelines for transporting (i) concentrate to the port, (ii) wastewater to the Chukchi Sea instead of the Middle Fork Red Dog Creek, and (iii) diesel fuel from the port to the mine.[107] The Preferred Alternative was identified in the plan proposed by Teck because the EPA asserted not to have the authority "to require construction of a pipeline and a separate marine discharge, but rather this would be a separate permitting action in response to an application provided by Teck."[108] Nevertheless, the EPA acknowledged that the Preferred Alternative was identified precisely on the basis of the SEIS, including an assessment of impacts that would result from the construction and operation of the pipeline.[109]

Teck ultimately opted out of any wastewater pipeline project, lodging a file with the U.S. District Court for Alaska that contained the findings of a study it conducted.[110]

Yet, doubts that Alaskan officials will not be able to monitor the actual release of water effluents are still looming over the wilderness of Alaska. All the more so after the EPA tasked the Alaska Department of Environmental Conservation (ADEC) with the NPDES permit program, a decision that was unsuccessfully challenged in court.[111]

In June 2014, Kivalina residents faced a public health emergency as Kivalina's source of drinking water was contaminated due to an equipment

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106. TETRA TECH, INC., *supra* note 1062 at 245; U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 78, at 47 ("EPA accepts that personnel may not be available to implement hazing practices 24 hours a day, seven days a week; however, we are confident that the measures Teck proposes will not result in population-level effects to any species in the vicinity of the operation.").

107. U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 78, at 6–7.

108. *Id.* at 36.

109. TETRA TECH, INC., *supra* note 102, at 99 (the SEIS, upon which the Record of Decision is based, at times appears to ground its assessment on the construction of a water pipeline, which is "considered reasonably foreseeable in terms of cumulative effects," on the basis of a future NEPA action "once Teck finalizes its plans and submits an application to build and operate a wastewater pipeline.").

110. *Id.* at 110.

111. Akiak Native Community v. U.S. EPA, 625 F.3d 1162 (9th Cir. 2010) (DEC started administering wastewater and discharge permitting and compliance program for Alaska on October 31, 2012, after the passage of Senate Bill (SB 110) and EPA's final approval in October 2008, under State primacy).

failure at the mine site.[112] Teck recognized that the company failed to keep Kivalina residents informed after the incident,[113] and no specific action appears to have ensued.

By way of difference, Kivalina residents have not brought issues concerning the port along the Chukchi Sea from where Teck ships minerals overseas. According to the Alaska Division of Spill Prevention and Response, the entire transportation corridor (DMTS) from the mine to the port, including the road, the port facilities, and the barges is under Alaska's Contaminated Sites Program, apparently due to escaping ("fugitive") dust from operations along the transportation corridor.[114] The program is also addressing historic spills of petroleum products at the mine.[115] Still, risk assessments have never covered organic compounds associated with past petroleum hydrocarbon spills at the port site, allegedly because they occur in localized areas and generally remain at depth or beneath pavement, apparently being "not in a place where current human exposure occurs."[116]

Moreover, it does not appear that the Corps made a decision to issue, deny or update a Rivers and Harbor Act Section 10 permit for any work or structures at the port sites.[117]

The EPA acknowledges the existence of a pollution issue concerning the port site and nearby wetlands.[118] In its Record of Decision to the SEIS, it deemed wetlands already contaminated due to past and ongoing fugitive dust emissions from the road.[119] The latest independent study on fish

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112. Jillian Rogers, *After Red Dog Spill, Kivalina Issues Wulik River Water Advisory*, THE ARTIC SOUNDER (June 20, 2014), http://www.adn.com/article/20140620/after-red-dog-spill-kivalina-issues-wulik-river-water-advisory [https://perma.cc/6MLH-M942].

113. *Id.*

114. STATE OF ALASKA CONTAMINATED SITES PROGRAM, *supra* note 82.

115. *Red Dog Mine*, DIVISION OF SPILL PREVENTION AND RESPONSE CONTAMINATED SITES PROGRAM, http://dec.alaska.gov/spar/csp/sites/reddog.htm [https://perma.cc/BN7T-BQKW] (last visited Jan. 15, 2017) (Red Dog Mine sites are subject to the regulatory requirements under DEC Contaminated Sites Program (CSP), pursuant to 18 AAC 75.360).

116. *Id.*

117. Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1899); *see generally* United States v. Republic Steel Corp., 362 U.S. 482 (1960); *see generally* United States v. Standard Oil Co., 384 U.S. 224 (1966).

118. U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 78, at 6.

119. *Id.* (the EPA concedes that a concentrate pipeline would have manifold beneficial effects. It would avoid truck traffic, reduce fugitive dust emissions and future dust-related effects on the environment, as well as reduce effects on traffic-induced caribou movement to the advantage of Kivalina's harvest of caribou. Concerning particulate matters, EPA asserts that it is highly unlikely that the PM2.5 NAAQS is exceeded, but does not exclude that.); *id.*at 4 (the State of Alaska has proposed to adopt the federal PM2.5 standard, although this has not yet been finalized. According to area

population was undertaken by the Alaska Department of Fish and Game Division of Habitat in 2011, and it seems to ambiguously reveal that heavy metals were found in the Dolly Varden fish population in the Wulik River.[120] Yet, no sampling was undertaken in marine waters. The only available sampling on marine water appears to date back to 2003, and was published in 2007 but the ensuing assessment does not seem to be in the public domain.[121]

Furthermore, the latest study concerning heavy metals on mosses and soils can only be tracked to 2001, when the highest levels of heavy metal concentrations were retrieved near the Red Dog Haul Road, prompting evaluators to state that those levels equaled or exceeded (1.5 – 2.5 times) "maxima reported for samples from severely polluted regions in Central European countries."[122]

Harvesting animals both at sea and in the tundra, Kivalina residents have been concerned with possibly heightened blood lead level (BLL).[123] The EPA did not address the issue in its Record of Decision, stating that there was no baseline to contrast current BLLs against since no blood lead levels were collected prior to the opening of the mine.[124] In 2005, Teck and ADEC signed a Memorandum, later amended in 2007, by which Teck

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designation in 2006 (the latest issued) Northwest Arctic Borough is unclassifiable/attainment areas for PM2.5 under Part C of the Clean Air Act (CAA)).

120. ALVIN G. OTT & WILLIAM A. MORRIS, AQUATIC BIOMONITORING AT RED DOG MINE 2010, ALASKA DEPARTMENT OF FISH AND GAME DIVISION OF HABITAT vi (2011) (the study on the Dolly Varden fish concluded that it "is unlikely that tissue metals concentrations or changes could be related to events at the Red Dog Mine since large Dolly Varden fishes attain their growth in the marine environment." However, ADEC Spill Division acknowledges that marine degradation principally results from ore dust-blown pollution).

121. DIVISION OF SPILL PREVENTION AND RESPONSE CONTAMINATED SITES PROGRAM, APPENDIX A 23 (2007); *see* STATE OF ALASKA CONTAMINATED SITES PROGRAM, *supra* note 82.

122. Jesse Ford & Linda Hasselbach, *Heavy Metals in Mosses and Soils on Six Transects Along the Red Dog Mine Haul Road*, ALASKA (May 2001), http://dec.alaska.gov/spar/csp/docs/reddog/reddogrpt2.pdf.

123. Elizabeth J. Kerin & Hsing K. Lin, *Fugitive Dust and Human Exposure to Heavy Metals around the Red Dog Mine*, 206 REVIEWS OF ENVIRONMENTAL CONTAMINATION AND TOXICOLOGY 60 (David M. Whitacre ed., Springer 2010) (residents do not appear to have blood levels of concern, however no statistical analysis and no isotopic studies were undertaken for elucidating the environmental source of blood level in children. Moreover, the last public health analysis dates back to 2001 and referred to blood tests undertaken in the 90s); *see Public Health Evaluation of Exposure of Kivalina and Notak Residents to Heavy Metals from Red Dog Mines,* DIVISION OF SPILL PREVENTION AND RESPONSE CONTAMINATED SITES PROGRAM, http://dec.alaska.gov/spar/csp/docs/reddog/publichealthexpos_102501.htm [https://perma.cc/HJA3-45EK] (last visited Jan. 15, 2017) [hereinafter *Heavy Metals*].

124. U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 78; *see* Jason Prno &D. D. Slocombe, *'A Systems-Based Conceptual Framework for Assessing the Determinants of a Social License to Operate in the Mining Industry'* 53 ENVTL. MGMT. 672 (2014).

committed to hammer out and implement a fugitive dust risk management plan.[125] The latter gave rise to a series of Annual Management Plan Reports, the latest of which is from 2013 and refers to a 2007 human health and ecological risk assessment undertaken by Teck-contracted Exponent.[126] The human health risk assessment stated that harvesting remained off limits only within the DMTS, and the ecological risk assessment evaluated potential risks to "ecological receptors inhabiting terrestrial, freshwater stream and pond, coastal lagoon, and marine environments from exposure to DMTS-related metals," therefore also at the port site.[127] No specific action, however, was undertaken.

C. A Proposed Solution at International Law

The mixed fuel of domestic and international law, as proposed in Section II of this paper, is not intended to remain wishful thinking, but should rather be tested in practice, and specifically in the Kivalina case.

I will first assess which water-related claims might not have found a proper response in previous litigation. I will contend that this legal gap could be filled by applying relevant international law norms, and specifically the LOS Convention. Since its provisions can only be applied in U.S. courts if they are proven customary, I will draw on political statements, relevant case law and scholarship in order to prove that specific environmental provisions of the LOS Convention have reached the rank of customary rules. I will advocate for the adoption of the *Charming Betsy* canon when invoking relevant federal law, namely NEPA, the CWA, EPCRA, the Rivers and Harbors Act, as well as Alaska private nuisance law. To my understanding, such interpretation of domestic law can be embraced by U.S. courts, allowing for the recoup of damages to be awarded to Kivalina people and the prevention of further pollution.

1. In the Aftermath of Domestic Litigation: Prospective Outstanding Claims

In the following paragraph, I briefly summarize the main water-related impacts of the mine sites on Kivalina residents that are still outstanding,

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125. Elizabeth J. Kerin & Hsing K. Lin, *supra* note 123 (residents do not appear to have blood levels of concern, however no statistical analysis and no isotopic studies were undertaken for elucidating the environmental source of blood level in children. Moreover, the last public health analysis dates back to 2001 and referred to blood tests undertaken in the 90s); *see Heavy Metals, supra* note 123.

126. *See Fugitive Dust Risk Management Plan 2013 Annual Report*, RED DOG MINE (Nov. 2014), https://dec.alaska.gov/spar/csp/sites/docs/2013_fugitivedustriskmanagementplan_annualreport.pdf.

127. *Id.* at 8.

either because they were not mitigated through domestic litigation or they never achieved the status of legal claims.

As explained in Sections III.A and III.B, three factors have been and are allegedly affecting inland and coastal waters, as well as Kivalina residents' life, namely (i) the water pollutants discharged from the mine sites onto the Middle Fork Red Dog Creek, which confluences with the Ikalukrock Creek and then flows into the Wulik River, the source of Kivalina's drinking water and a tributary of the Chukchi Sea; (ii) the contamination of the fish population, which constitutes part of Kivalina's subsistence life, through effluents in the river, and ore deposits/possibly oil spills at the port site; (iii) the contamination of marine waters and sediments at the port site due to air pollution and possibly oil spills.

Some of these adverse impacts of the mine operations have already been known, e.g., the exceedance of effluents discharges on the creeks.[128] Some of these impacts have seemingly been overlooked, such as the presence of petroleum and ore contamination at the port site.[129] Past litigation under both Alaska and federal law—albeit somewhat successful—has not addressed specific issues, nor provided long-term solutions.

Some leeway left for effective litigation might revolve around the following: (i) the need for compensating individuals, rather than the executive branch, for noncompliance of Teck with environmental laws; (ii) the need to increase permit standards and assess the impact of wastewater discharges, oil spills and air-borne ore dust on the marine environment, at least at the port site, since no follow-up ensued the 2007 ecological risk assessment undertaken by Teck-contracted Exponent, which evaluated potential risks to ecological receptors inhabiting terrestrial, freshwater stream and pond, coastal lagoon, and marine environments from exposure to DMTS-related metals; (iii) the need to tackle the presence of hydrocarbon spills, even in localized areas, and primarily at the port site since the site might well become a Superfund site[130] if no proper action is undertaken; (iv) the need for an Environmental Assessment in light of fresh data to be collected, especially at the port site; (v) the tools that are available for preventing the unlawful degradation of waters; (vi) the feasibility of building a wastewater pipeline directly discharging on the Chukchi Sea so that Kivalina's residents' drinking water would not risk being contaminated; (vii) the protection of the marine ecosystem from climate change, and the protection of Kivalina from submergence.

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128. *See* SHEARER, *supra* note 77, at 113.

129. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 78.

130. Comprehensive Environmental Response, Compensation, and Liability, 42 U.S.C. §§ 9601–75 (2012).

2. Possible Responses from International Law: A Case for the Law of the Sea Convention

I now turn to the LOS Convention in order to test the hypothesis that I put forward in Section I, namely whether outstanding water issues of Kivalina can be addressed by way of a mixed fuel encompassing international (substantive) law and U.S. (procedural and substantive) law.

The chosen international law instrument to be deployed in the case is the LOS Convention, namely the most comprehensive, and successful, instrument for protecting the seas. For the purpose of this paper, I will not be able to offer a fair account of the Convention's history, case law and varied implementation.[131] Rather, I will first overview the sections specifically relevant to the case, give an account of the positioning of the United States vis-à-vis the Convention and understand whether a case can be made for the customary status of some of the Convention's environmental provisions.

Indeed, here lies a legal dilemma: the United States has never ratified the Convention, but the 'magic'[132] of customary law has persuasively been invoked with respect to specific sections of the Convention.

If it is true that the law of the sea is "as old as nations,"[133] the modern law of the sea is also the remarkable result of UNCLOS III, a nine-year negotiated conference extending the efforts of the previous UNCLOS I and II conferences.[134] The Convention resulting from UNCLOS III notably contains a comprehensive legal framework devoted to the protection and preservation of the marine environment (Part XII), encompassing a variety of provisions, among which general obligations, monitoring and environmental assessment, international rules and national legislation to prevent, reduce and control pollution of the marine environment, enforcement in general and provisions for the smooth coordination of the LOS Convention with other conventions on the protection and preservation of the marine environment.[135]

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131. *See generally* JAMES B. MORELL, THE LAW OF THE SEA: A HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES (McFarland 1992); DAVID D. CARON & HARRY N. SCHEIBER, BRINGING NEW LAW TO OCEAN WATERS (2004); HUGO CAMINOS ET AL., LAW OF THE SEA, FROM GROTIUS TO THE INT'L TRIBUNAL FOR THE LAW OF THE SEA (Martinus Nijhoff Publishers 2015).

132. *Quoting* Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT'L L. 491 (2008).

133. LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 212 (2d ed. 1979).

134. LORI F. DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 1354 (West Academic 2014).

135. Convention on the Law of the Sea, *supra* note 2, at art. 207.

The United States signed and ratified all four UNCLOS I conventions. It also actively engaged in UNCLOS III negotiations, yet an abrupt change of posture occurred after the election of President Reagan, when, among other opposition techniques, an internal U.S. policy review known as the Green Book was being circulated at the Conference in early 1982, with the proposal of over 100 amendments.[136] On that account, President Reagan considered the deep seabed provisions[137] fatally flawed and in contrast with his "free enterprise philosophy."[138] In July 1982, Reagan announced that he would not sign the Convention, which nonetheless hit all previous records with 117 countries signing on the very first day it was open to signature.[139]

As early as in 1983, Reagan announced that the United States regarded the LOS Convention, save for the deep seabed mining provisions (Part XI), as containing "provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states."[140] Reagan sketched instances of the traditional uses of the oceans as navigation, overflight, and generally all high seas rights and freedoms that are not resource related.[141] Quite interestingly, the Declaration also encompassed a number of statements concerning the marine environment, establishing a 200 nautical mile Exclusive Economic Zone with a view to enable "the United States to take limited additional steps to protect the marine environment," specifically by working "through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping."[142]

After the adoption of the Convention's Implementing Agreement by the U.N. General Assembly in 1994,[143] the Convention was sent to the Senate for advice and consent, which have not been given yet.[144]

Since this paper is geared toward judicial remedies, it is worth considering whether U.S. courts have characterized the LOS Convention as part of customary law. Firstly, I am going to tackle this issue by looking at

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136. TED L. MCDORMAN, SALT WATER NEIGHBORS: INTERNATIONAL OCEAN LAW RELATIONS BETWEEN THE UNITED STATES AND CANADA 101 (Oxford University Press 2009).

137. *Id.* at 102.

138. *Id.* at 103.

139. *Id.* at 104; TETRA TECH, INC., *supra* note 102, at 99.

140. Ronald Reagan, President, U.S. Statement on United States Oceans Policy (March 10, 1983).

141. *Id.*

142. *Id.*

143. DAMROSCH & MURPHY, *supra* note 134, at 1357.

144. *Id.*

courts' understanding of the customary character of the LOS provisions in light of the declarations made by the United States in that concern. Secondly, I will turn to a tentative analysis of the customary character of some of the LOS environmental provisions at international law and besides the understanding that U.S. courts have had of the political branch position on the issue.

With reference to the courts' view on the U.S. Executive Branch stance toward the LOS Convention, the Supreme Court has consistently maintained that the United States has not ratified the Convention, "but has recognized that its baseline provisions reflect customary international law."[145] This understanding has prompted a District Court to note in *Sarei v. Rio Tinto*, that the United States "is obliged to refrain from acts that would defeat the object and purpose of the agreement,"[146] specifically when the norms at issue are customary norms reflected in Article 194(1) of the LOS Convention, but dismissed the claim as non-justiciable, which was overturned in appeals.[147] Eventually the Supreme Court vacated the appellate judgment and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Kiobel*.[148] The Appellate Judges affirmed the district court's judgment upholding the non-justiciable character of the claim for it being a political question and rendered a judgment of dismissal with prejudice, which means any further attempt to bring the same case to court is ruled out.[149]

Be that as it may, the finding of a customary character of *specifically* Article 194(1) by the District Court was not contended, and will be material to the Kivalina case, as I will explain further in this paragraph under the prong of a general (non US-based) assessment of the customary nature of some of the LOS Convention's environmental provisions. Nevertheless, in *Sarei v. Rio Tinto*, the district court approached the environmental claims of the dispute by asking for and obtaining evidence of the linkage between the mining corporation and the State where environmental violations occurred,[150] yet it later dismissed the case precisely because any such act

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145. United States v. Alaska, 503 U.S. 569, 588 (1992) (citing Brief for United States 25, n.6) (internal quotation omitted); Mayaguezanos por la Salud y el Ambiente v. United States, 198 F.3rd 297, 305 (1st Cir. 1999).

146. Sarei v. Rio Tinto Plc., 221 F. Supp 2d. 1116, 1116 (2002); *see also* Rio Tinto PLC et al. v. Alexis Holyweek Sarei et al., 133 U.S. (2013); *see also* Sarei v. Rio Tinto Plc., 722 F.3d 1109, 1109 (9th Cir. 2013).

147. *Rio Tinto*, 221 F. Supp. 2d at 1209.

148. *Rio Tinto*, 722 F.3d at 1109 (citing Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013)).

149. *Id.* at 1207.

150. OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENT CONFLICT (Hart Publ'g 2004).

would fall under the act of state doctrine, making any claim non-justiciable. Were the customary character of Article 194(1) to be put forward in future claims, courts might be confused by the district court's request of a linkage between the corporation and the State in the perpetration of the alleged environmental violations. Such a linkage would not be present in the Kivalina case since the concession for exploiting mineral resources is granted by a Nonprofit Organization, NANA Regional Corporation Inc., rather than by the state or the federal government, and the latter have no part in the management of the mines.

As a separate strand from the U.S. positioning and practice, U.S. courts might alternatively consider whether provisions show a customary character at international law.[151]

Any such inquiry should follow the strict *dicta* put forward by the Second Circuit in *Kiobel*, even more so in the context of environmental cases since *Kiobel* was an environmental case also.[152] The first step of the evidentiary inquiry dwells on retrieving "international conventions, whether general or particular, establishing rules expressly recognized by contesting states," which in this case is the LOS Convention.[153] As *Kiobel* maintains, the treaty's evidentiary value for customary law depends on the number of signatory parties and the parties' relative influence on the issue,[154] which are quite numerous and would lead to the affirmative in the case of the LOS Convention.[155] Nonetheless, the further steps pointed out by *Kiobel* are not as easy to assess since evidence of a custom also springs from a general principle of law recognized by civilized nations; an international custom as evidence of a general practice accepted as law; or judicial decisions and the teachings of the most qualified publicists of the various nations, which would only constitute *subsidiary* means for the determination of rule of law.

Since the Convention's text was finalized and adopted, all countries have agreed that many provisions parallel the provisions included in the UNCLOS I Conventions, and even some of the provisions that had no UNCLOS I counterpart are clearly established customary law.[156] As of late 2014, 167 countries have become party to the Convention, and 147 of them have become party to the Implementing Agreement.[157] It is, however, safe

151. *Hasan*, 747 F. Supp. 2d at 634.

152. *Kiobel,* 133 U.S. at 1660.

153. *Id*. at 1161.

154. *Id.* at 1166.

155. *Hasan*, 747 F. Supp. 2d at 634.

156. DAMROSCH & MURPHY, *supra* note 134, at 1356.

157. *United Nations Convention on the Law of the Sea*, BLUEBIRD, http://www.bluebird-electric.net/oceanography/Ocean_Plastic_International_Rescue/United_Nations_Convention_On_The_Law_Of_The_Sea_UNCLOS.htm (last visited Oct. 15 2016).

to say that the UNCLOS I Conventions still govern States Parties to them, but it also governs States Parties to the UNCLOS III Convention insofar as the latter did not supersede the earlier Conventions.[158] Since the 1958 Conventions are guides to the customary law of the sea governing States not party to the convention, we now turn to those.[159]

The 1958 Convention on the High Seas, resulting from UNCLOS I, encompasses several provisions seeking to ensure safety at sea (Article 10) and the prevention of sea pollution by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil (Article 24), or even from the dumping of radioactive waste (Article 25).[160] It does not, however, comprise some of what UNCLOS III would later cover, namely pollution from land-based sources, through the atmosphere and from dumping at sea (Article 207 – 212), nor its enforcement provisions, notably foreign vessels, by port countries (Article 218 covering pollution in the internal waters, territorial sea or exclusive economic zone) and coastal countries (Article 220 covering pollution in the territorial sea and exclusive economic zone).[161]

With reference to land-based sources of marine pollution (LBSMP), which is material in the case of Kivalina, it was argued that customary law is established as covering the principles and obligations of good neighborliness and reasonable use of the seas.[162] The same commentator, however, also recalled the customary nature of Article 207 of the LOS Convention (Pollution from land-based sources), which is eventually deemed too general for effectively tackling this kind of pollution, but the author did not set as his objective to provide a thorough account of all the applicable provisions of the Convention to cases of land-based pollution affecting the marine environment.[163]

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158. MORAKINYO ADEDAYO AYOADE, DISUSED OFFSHORE INSTALLATIONS AND PIPELINES TOWARDS "SUSTAINABLE DECOMMISSIONING" 56 (Kluwer Law Int'l eds., 2002); DAMROSCH & MURPHY, *supra* note 134, at 1359.

159. DAMROSCH & MURPHY, *supra* note 134, at 1359.

160. Convention on the Law of the Sea, *supra* note 2, at art. 10, 24, 25.

161. DAMROSCH & MURPHY, *supra* note 134, at 1494; *see* Convention on the Law of the Sea, *supra* note 2.

162. Daud Hassan. *Land-Based Sources of Marine Pollution: The Global Framework for Control* AUSTL. INT'L L. J. 61, 62 (2003).

163. *See id.* (for retrieving soft law instruments relating to LBSMP, most notably Montreal Guidelines for Protection of the Marine Environment against Pollution from Land-Based Sources, Decision 13/18/li, Governing Council of Unep (May 24, 1985); Washington Declaration on Protection of the Marine Environment from Land-Based Activities, a/51/116, Annex I, Appendix li (Nov. 3, 1995). Further soft law instruments relevant to the environmental provisions of the LOS Convention are, *inter alia*, Principles 7 and 21 of the Stockholm Declaration and Intergovernmental Working Group on

In my view, the underused assets of the Convention's environmental provisions can be better retrieved in the repository of the general provisions (Arts. 192 – 196). As sharply noted, Article 192 sets forth an obligation on "States," rather than "States Parties," to "protect and preserve the marine environment,"[164] alternatively implying (i) the customary character of such rule; (ii) obligations for third-State parties within the meaning of the 1969 Vienna Convention on the Law of Treaties (Articles 34 – 48 of the VCLT);[165] or, (iii) a general principle of international law, which is the most favored option by commentators.[166] The term pollution and dumping are quite broadly defined in Article 1 of the LOS Convention.[167] Article 192 of the LOS Convention seems to require active measures to maintain or improve the marine environment,[168] in "all parts of ocean space both within and beyond the limits of any national jurisdiction."[169]

Article 192 is further fleshed out in Article 194(1), whereby "States shall take, individually or jointly as appropriate, all measures consistent" with the Convention "that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection."[170] Again, the article appears applicable also to countries that have not ratified the LOS Convention,[171] and clearly refers to the need for establishing international standards (also Article 213 – 222 of the LOS

Marine Pollution (IWFMP) Principles for Assessment and Control of Marine Pollution (1971), a/Conf.48/lwgmp.li/5).

164. Myron H. Nordquist et al., Commentary, *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. IV, 39 (Martinus Nijhoff Publishers 1985).

165. 1969 Vienna Convention on the Law of the Treaties, 1155 U.N.T.S. 331.

166. Nordquist et al., *supra* note 164.

167. Convention on the Law of the Sea, *supra* note 2, at art. 1(1)(4) (pollution of the marine environment means:

> The introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

According to Article 1(1)(5)(a) dumping means "(i) any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea; (ii) any deliberate disposal of vessels, aircraft, platforms or other man-made structures at sea.").

168. Nordquist et al., *supra* note 164, at 40.

169. *Id.* at 43.

170. Convention on the Law of the Sea, *supra* note 2, at art. 1, ¶ 1.

171. Nordquist et al., *supra* note 164, at 64.

Convention), to be enforced through national organs, whether judicial or not.[172] Most notably, Article 194(3) provides that prevention/protection measures should be applied in relation to a number of circumstances, and, for the purposes of this paper, "(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping; (b) pollution from vessels," taking into consideration vessels' construction, equipment, operation and manning.[173] Pursuant to Article 194(5), the required measures "shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life," which is specifically suited to the ecosystems in and around Kivalina.[174]

Nonetheless, what is most important to assess is the host of international standards that would allow these provisions to be specific enough, in the light of the *Sosa* decision, to supplement domestic rules. With relation to pollution from vessels, MARPOL[175] would fill in the gap or suggest an increase of domestic standards through its six technical annexes requiring preventive measures covering five categories of substances, as well as a Protocol concerning Reports on Incidents Involving Harmful Substances.[176] Differently, with relation to the inadequacy of water permit standards, further standards cannot be provided by the Convention on Biological Diversity, since the United States signed it in 1993, but never ratified it.[177] Rather, possibly applicable provisions can be retrieved in the LOS Convention itself, and specifically in Article 204(1), which sets forth the obligation for "States" to "observe, measure, evaluate and analyze, by recognized scientific methods, the risks or effects of pollution of the marine environment."[178]

Furthermore, pursuant to Article 204(2) of the LOS Convention, States shall "keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment."[179] The obligation

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172. *Id.* at 65.

173. Convention on the Law of the Sea, *supra* note 2, at art. 194, ¶ 3.

174. *Id.* ¶ 5.

175. *See generally* International Convention for the Prevention of Pollution from Ships (Marpol), Nov. 2, 1973, S. Exec. Doc. C, 95-1, 1340 U.N.T.S. 184.

176. MYRON H. NORDQUIST ET AL, UNCLOS 1982 COMMENTARY SUPPLEMENTARY DOCUMENTS 803 (Martinus Nijhoff Publishers 2012).

177. Robert F. Blomquist, *Ratification Resisted: Understanding American's Response to the Convention on Biological Diversity, 1989–2002*, 32 GOLDEN GATE U. L. REV. 493 (2002).

178. Convention on the Law of the Sea, *supra* note 2, at art. 204, ¶ 1.

179. *Id.* at art. 204, ¶ 2.

to carry out an Environmental Impact Assessment (EIA) was acknowledged as customary in character under certain circumstances by the ICJ in the *Pulp Mills* case,[180] and a domestic court might be able to flesh out the content of Article 204 of the LOS Convention by mandating EIAs on environmental agencies, even when the activities have been permitted but long-term effects were not duly/possibly anticipated.

All in all, Article 192, Article 194 and Article 204 of the LOS Convention, as supplemented by further instruments at international law, are seemingly apt to be applied also in domestic settings, on ground of their fairly established customary character and specificity.[181] With reference to the U.S. judicial setting, specificity would be needed for these provisions to meet the *Sosa* test and therefore be applied either directly as a rule or indirectly as a standard within the canon of interpretation (the *Charming Betsy* canon). Moreover, the holding by which Article 194 of the LOS Convention partakes in customary law has never been invalidated through the *Sarei v. Rio Tinto* case law.[182]

Be that as it may, this conceptual framework is now to be applied to the specificities of Kivalina's prospective claims.

3. The LOS Convention at Play in Kivalina

In the following paragraph, I specifically address the water issues that I have previously characterized as still outstanding for Kivalina residents in light of my contention on the customary character of Articles 192, 194 and 204 of the LOS Convention. I will eventually argue that specific legal claims may be brought to the competent U.S. courts, or environmental administrations, mainly by relying on specific provisions of the LOS Convention.

Such legal claims would be targeted to the following objectives: (i) to achieve compensation for individuals; (ii) to increase the environmental standards contained in the relevant permits and assess the impact of wastewater discharges, oil spills and air-borne ore dust on the marine environment, at least at the port site in that the last ecological risk assessment dates back to 2007, was undertaken by Teck-contracted Exponent and it eventually emphasized potential risks to ecological receptors inhabiting terrestrial, freshwater stream and pond, coastal lagoon,

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180. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 204 (Apr. 10).

181. *See* DAMROSCH & MURPHY, *supra* note 134, at 1493 (reporting that the works of the International Law Commission have only analyzed customary norms with relation to transboundary damage prevention and allocation of loss, as well as in transboundary aquifers context).

182. *Sosa*, 124 U.S. at 2763 (requiring a specific, universal, and obligatory content for rules to be the law of nations under the ATS); *Sarei*, 722 F.3d at 1109.

and marine environments from exposure to metals related to the operation of the mine; (iii) to assess the presence of hydrocarbon spills, even if in localized areas, and primarily at the port site since no official documents have been issued apparently on this concern; (iv) to undertake an Environmental Assessment in light of fresh data to be collected, especially at the port site; v) to understand which tools are available for preventing the unlawful degradation of waters; (vi) to assess the feasibility of the construction of a wastewater pipeline directly discharging on the Chukchi Sea so that Kivalina's residents drinking water would not risk being contaminated; and (vii) to ensure the protection of the marine ecosystem from climate change, and the protection of Kivalina from submergence.

I will eventually argue that Kivalina residents might resort to three avenues, and specifically to (a) a private nuisance action before an Alaska state court and an ATS action before a federal court for point (i); (b) a request for the issuance/re-issuance, modification and revocation of permits and the right to petition for points (ii), (iii) and (iv); (c) a citizens' suit based on the violation of the NPDES permit and an EPCRA[183] action for point (v). I did not find, however, a way to address points (vi) and (vii) by relying on the customary provisions of the LOS Convention.

With reference to the need for compensating individuals, the CWA spells out the right for citizens to sue in section 505, with no possibility to be awarded damages in case of violation of the wastewater permit, i.e., the NPDES permit.[184]

Alaska's Civil Code of Procedure allows individuals to bring a civil action to enjoin or abate a private nuisance, with damages awarded in the action.[185] Such remedy has not been displaced by the CWA, according to section 505 (e) CWA.[186] In case of actions connected to air emission or water or solid waste discharge, which would be the case for Kivalina people, an action would be barred "where the emission or discharge was expressly authorized by and is not in violation of a term or condition of (1) a statute or regulation; or (2) a license, permit, or order that is issued after public hearing by the state or federal government and subject to (i) continuing compliance monitoring; (ii) periodic review by the issuing agency; or (iii) renewal on a periodic basis; or (3) a court order or judgment."[187]

Kivalina residents might contend that no continuing compliance monitoring nor periodic review has been warranted at the port site, nor a

183. Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001–50 (2012).

184. Clean Water Act, *supra* note 95, § 505.

185. Action Based on Private Nuisance, ALASKA STAT. § 09.45.230(a) (2011).

186. Clean Water Act, *supra* note 95, at § 505(e).

187. § 09.45.230(b).

periodic renewal of the permit for the operation of the port has been undertaken since the NPDES renewal ensuing the approval of the Aqqaluk project arguably refers only to discharges on the Middle Fork Red Dog Creek, neglecting discharges at the port and the effect that the discharge of increased effluents on the Middle Fork Red Dog Creek has on the port site. Nevertheless, plaintiffs need to work very carefully to (i) show substantial harm, probably by referring to the effects of water pollutants on the animals they harvest and the fallouts of air pollutants on their own health, as well as (ii) negligence or reckless conduct.[188]

Such actions are not apparently displaced by the Clean Water Act in that the Supreme Court referenced to *Ouellette*[189] in a dicta of *American Elec. Power Co., Inc. v. Connecticut*[190] asserting that the Clean Water Act does not preclude aggrieved individuals from bringing a "nuisance claim pursuant to the law of the *source* State."[191]

Be that as it may, Articles 192, 194, and 204 of the LOS Convention would not need to be directly applied, but rather invoked for the consistent interpretation with international law of Alaska's provisions on private nuisance (*Charming Betsy* canon).[192] Most notably, the three LOS provisions would imply a need for stringent monitoring and permit renewal in order to protect and preserve the marine environment, and Kivalina residents could bring a private nuisance action concerning all three outstanding claims that I identified previously. As for most international agreements, provisions are not binding on private parties, be they either individuals or corporations, but rather on States Parties.[193] Still, by applying the *Charming Betsy* canon, the analyzed LOS Convention provisions would not be apt to horizontal application (private-to-private claim), but rather would specify both state and federal legislation as they belong to the law of the land and should therefore be enforced.[194]

With reference to the first outstanding claim, namely the water pollutants discharged from the mine sites onto the Middle Fork Red Dog Creek, which are alleged to impact the source of Kivalina's drinking water and possibly also the Chukchi Sea, any violation of the NPDES might trigger a private nuisance claim in that Kivalina residents might show substantial harm and recklessness/negligence of the violating conducts,

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188. Restatement (Second) of Torts § 822 (1979); Fernandes v. Portwine, 56 P.3d 1 (Alaska 2002).

189. International Paper Co. v. Ouellette, 107 U.S. 805 (1987).

190. American Elec. Power Company Inc., v. Connecticut, 131 U.S. 2527, 2540 (2011).

191. *Ouellette,* 107 U.S. at 497.

192. Convention on the Law of the Sea, *supra* note 2, at art. 192, 194, 204.

193. *Id.* at art. 192, 194, 204.

194. *Id.*

which are further aggrieving given the lack of notification of such events, as it turned out in 2014.[195] Article 194(3) of the LOS Convention would help construe some of the terms of Alaska private nuisance rules, and specifically the reference to "continuing compliance monitoring," "periodic review by the issuing agency" or "renewal on a periodic basis,"[196] which should cover "(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping," as set forth in Article 194(3)(a) of the LOS Convention.[197] By leveraging on the threat of private nuisance claims, companies might be incentivized to voluntarily put in place such customary-based monitoring mechanisms even when the permit does not require them to do so.[198]

In relation to the second outstanding claim, namely the contamination of the fish population, which constitutes part of Kivalina's subsistence life, through effluents in the river, and ore deposits/possibly oil spills at the port site, the monitoring apparatus necessary for avoiding a threat of private nuisance claims would consist of mechanisms "to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life," pursuant to Article 194(5) of the LOS Convention, which is particularly apt for the fragile ecosystem of Alaska.[199] On Kivalina's facts, no recent impact statement on the fish population at the port site is currently available.

Also with respect to the third outstanding claim, namely the contamination of marine waters and sediments at the port site due to air pollution/possibly oil spills, in order not to be liable for a private nuisance claim, Teck would be required to comply with Article 194(5) of the LOS Convention, assessing the impact of vessels and discharges on the "fragile ecosystems" of the port, as well as the "habitat of depleted, threatened or endangered species and other forms of marine life."[200] More importantly, Teck itself is in charge of operating the port. In order to avoid pollution from vessels, Teck would be spurred on to evaluate which MARPOL protocols have been domesticated in the U.S. legal system, as well as to assess whether any such obligation is binding on private port authorities as well.

What is most interesting about Alaska's Code of Civil Procedure is the fact that the foregoing restrictions on private nuisance actions do not apply

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195. Clean Water Act, *supra* note 95.

196. § 09.45.230(a).

197. Convention on the Law of the Sea, *supra* note 2, at art. 194.

198. *See generally* § 09.45.230(a).

199. Convention on the Law of the Sea, *supra* note 2, at art. 194.

200. *Id.*

if the discharge produces a result that was unknown or not reasonably foreseeable at the time of the authorization.[201] Therefore, if Kivalina residents were able to prove the unknown result/not reasonably foreseeable effect of the discharge, they would be able to succeed in the action, even when the relevant judge deems the level of monitoring and permit renewal sufficient. Unfortunately, it is not possible to make any prediction on the environmental impact of the mine operations on the port site in that data are lacking. Nevertheless, permit and monitoring do not appear to have been periodic. This might suggest that nuisance conducts were unknown or not reasonably foreseeable at the time of the authorization, allowing private nuisance actions to be brought with no restriction. By qualifying the polluting conduct as "an action for waste or trespass upon real property" and in light of Alaska Supreme Court's decision in *Fernandes v. Portwine*, the statute of limitations appears to be six years.[202]

With reference to the ATS claim, an alien should file it, so there should be at least one person within the Kivalina community having multiple citizenships/a foreign citizenship and being willing to file the claim. Yet, no case law has been retrieved on standing for U.S. citizens filing the ATS claim as foreign nationals on account of multiple citizenships.

On the likelihood of succeeding in court, the *Sarei v. Rio Tinto* litigation would not be a legitimate precedent.[203] Although the Court did not rule out the customary nature of the LOS Convention, and specifically Article 194, *Kiobel*[204] is still an overpowering legacy and might dispel purely environmental law-based ATS claims without a specific differentiation between human right-based and environmental law-based claims. Given the non-extraterritorial character of a prospective ATS claim brought by Kivalina residents, however, the outcome might not be impacted by *Kiobel*. Yet, the *Sosa* standards for a customary rule to apply would still need to be met. ATCA contains no limitations period, yet this does not imply there is none and court practice is varied in this regard.[205]

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201. § 09.45.230(c) (2011).

202. *Fernandes*, 56 P.3d at 5.

203. *See Sarei*, 722 F.3d at 1110.

204. *See generally Kiobel*, 133 U.S. 1659.

205. *See Sosa* 124 U.S. 2739 at 2766 (according to *Sosa*, in order to be applied under the ATCA international law norms need be "specific, universal and obligatory."); *see* Wesley Papa v. U.S. and the U.S. Immigr. & Naturalization Serv., 281 F.3d 1004, 1011–13 (Fed. Cir. 2002); Doe v. Islamic Salvation Front, 257 F. Supp. 2d 115, 118–19 (D.C. Cir. 2003); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 461–66 (D.N.J 1999) (the case-law on the relevant statute of limitations for an ATCA claim is varied, usually being a ten-year time bar in analogy to the Torture Victims Protection Act (TVPA)); s*ee* In re Agent Orange Prod. Litig., 373 F. Supp. 2d 7, 63–64 (E.D.N.Y 2005) (it appears that in this instance only a federal court held that "there are no statutes of limitation with respect to war

As a second prong of litigation, Kivalina residents might petition for the re-issuance, modification, and revocation of permits pursuant to specific environmental regulations,[206] which are also applicable to state programs.[207] In the case of Alaska, the NPDES permit program is administered at the state level.[208] This prong of litigation is not *per se* judicial, however, it might become so in case the petition is denied with no reasonable ground in light of the holdings of *Massachusetts v. EPA*.[209]

Under this prong, the analyzed LOS Convention provisions would be directly binding on the relevant level of government in the permit process, rather than on a corporation, such as Teck.[210] A corporation would, however, be indirectly affected by the application of those provisions at the governmental level, which would result in higher environmental standards.[211]

Most specifically, with regard to section 402 CWA (stormwater) permit, which is required for the discharge of water pollutants on the Middle Fork Red Dog Creek, Kivalina plaintiffs will need to petition the Alaska Department of Environmental Conservation. Kivalina plaintiffs are in the position to ask for more stringent effluents limits, which would counter the lowering of some of the effluent standards in the latest NPDES permit, which were challenged unsuccessfully.[212] Such a right to petition is enshrined in the Code of Federal Regulations and can be better fleshed out by relying on the need for states to "take, individually or jointly as appropriate, all measures consistent" with the LOS Convention "that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection" (Article 194(1) LOS Convention).[213] On the same ground, Kivalina residents might require a modification of the current system of NPDES enforcement, which

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crimes and other violations of international law"); Jan Arno Hessbruegge, *Justice Delayed, Not Denied: Statutory Limitations & Human Rights Crimes*, 43 GEO. J. INT'L L. 2, 381 (2012); *but cf.* J. Romesh Weeramantry, *Time Limitation Under the United States Alien Tort Claims Act*, INT'L COMMITTEE RED CROSS 627, 632 (2003).

206. 40 C.F.R. § 122.62 (2008).

207. 40 C.F.R. § 123.25 (2015).

208. National Pollutant Discharge Elimination System Memorandum of Agreement Between State of Alaska & U.S. Envtl. Prot. Agency, Alaska DEC 3 (Oct. 29, 2008).

209. *See* Massachusetts v. EPA, 127 U.S. 1438 (2007).

210. Convention on the Law of the Sea, *supra* note 2, at art.194.

211. *Id.*

212. *See Native Village of Kivalina IRA Council*, *supra* note 104.

213. Convention on the Law of the Sea, *supra* note 2, at art. 194.

presently provides a mechanism of self-compliance by Teck coupled with periodic inspections on the part of the Administration. Enhanced controls on the part of either ADEC or third parties that have been assessed as truly neutral could provide a better enforcement system.

With regard to section 404 CWA (dredge-and-fill) permit, which is required for the operation of the Aqqaluk deposit and probably also at the port site, yet the latest point is not apparent, the relevant authority to petition would be the Army Corps of Engineers, Alaska District.[214] The aim would still be to petition for increased environmental standards and more frequent controls on the governmental side.

Moreover, Kivalina residents would also need to petition the Army Corps of Engineers, Alaska, for a Rivers and Harbors section 10 permit for the operation of the port site in that it does not appear to be in place. By way of difference from the CWA, the right to petition is not specifically granted in the Rivers and Harbors Act.[215] Such a right should be derived from the general right to petition as enshrined in the Right to Petition Clause contained in the First Amendment of the U.S. Constitution and the petition would be substantiated by relying on Article 204(1) of the LOS Convention (*Charming Betsy* canon), which sets forth the obligation for "States" to "observe, measure, evaluate and analyze, by recognized scientific methods, the risks or effects of pollution of the marine environment," namely the activities that are required for the issuance of a Rivers and Harbors section 10 permit.[216]

All in all, pursuant to Article 204(2) of the LOS Convention, States shall "keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment."[217] This obligation appears specifically stringent in the context of permit issuance, re-issuance, modification, and revocation, all the more so at the port site, which was not covered by the latest Supplemental Environmental Impact Assessment.

Since the project is subject to NEPA, one further line of petitioning might dwell on the request for an Environmental Assessment to be carried out at the port site according to specific environmental regulations.[218] Moreover, the same LOS Convention provision, as complemented with the *Pulp Mill* judgment,[219] can be construed as requiring recurrent or at least precautionary Environmental Assessments. On Kivalina's facts, citizens

214. Clean Water Act, *supra* note 95, § 404.

215. *Id.*

216. Convention on the Law of the Sea, *supra* note 2, art. 204.

217. *Id.*

218. 40 C.F.R. § 1501.4 (2016).

219. *See* Pulp Mills on the River Uruguay (Arg. v. Uru.), *supra* note 180.

may petition for an Environmental Assessment concerning the impact of Middle Fork Red Dog Creek's discharges on the Chukchi Sea, and specifically at the port site, which was not analyzed by the latest SEIS.

With concern to the permit process, Kivalina residents might also petition for the withdrawal of approval from the programs that have been delegated to Alaska, under both the stormwater (section 402(c)(3)) and dredge-and-fill (section 404(i)) programs.[220] Even in these cases, the right to petition would need be grounded on the First Amendment to the U.S. Constitution and substantiated within the activities mandated by Article 204(2) of the LOS Convention.

Under the third prong of action, namely citizens' suits and civil actions, Kivalina residents may bring a suit against any person alleged to be in violation of water-related permits,[221] immediately for violations of NPDES or toxic effluents standards,[222] and in general after sixty days from when the plaintiff has given notice of the alleged violation to the Administrator, the State, and the alleged violator.[223]

Nonetheless, any such action is barred if the Administrator or State "has commenced and is diligently prosecuting a civil or criminal action."[224] Kivalina residents were able to meet the standing prongs in previous NPDES litigation, therefore they are likely to meet them also at this time. Such a citizen enforcement action, however, could only be targeted to stop permit violations, since it does not allow citizens to recoup damages, but only litigation costs.[225]

A citizens' suit may also be brought against the EPA Administrator on a failure to perform any act or duty.[226] Such a strand of litigation, however, is specifically difficult to pursue in that the duty/act should be non-discretionary. On Kivalina's facts, the Administrator's duty can be fleshed out in the obligation to update and tighten up the NPDES and dredge-and-fill permits, as well as in the duty to carry out/update an environmental assessment at the port in light of the obligation for States, pursuant to Art. 194(1), to "prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities."[227] Yet, the means for accomplishing these duties are discretionary. Besides, this strand of

220. Clean Water Act, *supra* note 95, § 404.

221. Federal Water Pollution Control Act, 33 U.S.C. § 505 (2012).

222. Clean Water Act, *supra* note 95, at § 505(b).

223. *Id.* at § 505(b)(A).

224. *Id.* at § 505(b)(B).

225. *Id.* at § 505(d).

226. *Id.* at § 505(a)(2).

227. Convention on the Law of the Sea, *supra* note 2, at art. 194.

litigation would not specifically benefit from the consistent interpretation of the CWA with the customary environmental provisions of the LOS Convention.

This prong of litigation also rests on the civil actions' provision set forth in EPCRA,[228] which can be filed against either the violator or the State Administrator. Such actions, nonetheless, are geared toward a different goal from the one set in the CWA, and precisely compliance with reporting obligations, also in case of accidental chemical release under the Toxic Release Inventory (TRI) Program. The EPA would investigate cases of EPCRA non-compliance and may issue civil penalties, including monetary fines, and require correction of the violations. On Kivalina's facts, citizens can certainly file such an action were a violation of the NPDES to occur without Teck stating an emergency notice, as it happened in 2014.[229] This specific prong of litigation, however, would not require the application of the *Charming Betsy* canon with reference to the LOS Convention, since the latter could not add much to such a specific piece of legislation. Citizens would not be able to recoup damages, but they can still count on the further means of an injunctive relief.[230]

Likewise, I do not see how the actual construction of a wastewater pipeline directly discharging into the Chukchi Sea can be mandated by wielding on LOS Convention provisions. Therefore, this specific claim of Kivalina people cannot be advanced by relying on the LOS Convention.

The last outstanding claim that I have put forward is the protection of the marine ecosystem from climate change, and the protection of Kivalina from submergence. I believe that both concerns might come under the ambit of the specific solicitude that States need to show for "rare or fragile" ecosystems (Article 194(4) LOS Convention)[231] and climate change considerations should be internalized within a new EIS[232] according to NEPA and Article 204 of the LOS Convention. Notwithstanding, I cannot see how greenhouse gas emissions, namely the cause for Kivalina's prospective submergence, might be curbed by relying on the LOS Convention. Therefore, this prong of litigation cannot rely on the *Charming Betsy* canon, as applied to the LOS Convention.

A specific concern might be addressed at policy level, which is the environmental justice posture of the present case. The landmark executive order issued by President Clinton in 1994 prompts all federal agencies to

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228. Emergency Planning & Community Right-to-Know Act, 42 U.S.C. § 11046(a)(1).

229. Clean Water Act, *supra* note 95, § 505(a).

230. Emergency Planning & Community Right-to-Know Act, *supra* note 228, § 11046.

231. Convention on the Law of the Sea, *supra* note 2, at art. 194.

232. *See* Michael B. Gerrard, *Climate Change and the Environmental Impact Review Process*, 22 NAT. RESOURCES & ENV'T 20 (2008).

carry out a review of their internal decision-making procedures to incorporate consideration of environmental justice issues therein. Such an executive order will not create a right of action for Kivalina people, still the concerns it addresses must be adequately incorporated in such federal executive actions as an environmental statement/EIS under NEPA.[233]

All in all, I contend that it is possible to flesh out rules of diligence at both company level (Teck), and governmental level (State and Federal government) by way of a consistent interpretation of domestic legislation with the specific provisions resulting from the customary rules of the LOS Convention, namely Article 192, Article 194 and Article 204. In this way, companies, such as Teck, might anticipate the risk of litigation, especially under the private nuisance prong, and undertake actions to exceed permits' requirements. Similarly, under the administrative prong, in case the relevant authorities refusal to reissue modify or revoke permits, courts might pay less deference to the executive branch under the *Chevron* doctrine, or at least frame deference within the limit of political discretion and claim jurisdiction to rule on how the agency is fulfilling its duties in light of the environmental rules of the LOS Convention, which have been ascertained as customary in character.[234]

Nevertheless, in any thread of litigation one should carefully balance the opposing interests of full environmental soundness and public health safety with the economic prosperity Teck is bringing to the area. In all the foregoing legal argumentations, legal counsels should emphasize the need for tackling pending environmental issues as they appear now in order to avoid future litigation costs, epidemiological diseases, reclamation costs, and internal opposition from Native American workers at Teck.

In conclusion, and especially in light of the historical trajectory of the stance U.S. courts have taken vis-à-vis international law and its judicial enforceability, I would not recommend a litigation strategy that depends on the direct application of the LOS Convention environmental provisions, but rather on the application of the *Charming Betsy* canon while applying relevant domestic legislation and regulations.

IV. TAKING STOCK

In this paper, I have attempted to analyze how a specific case of environmental injustice can be addressed by hinging on international law provisions.

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233. Exec. Order No. 12898, 59 Fed. Reg. 7629 (1994); *see* Counsel of Executive Quality, *Environmental Justice: Guidance under the National Environmental Policy Act*, EXECUTIVE OFFICE OF THE PRESIDENT (1997).

234. Chevron USA, Inc., v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

The case of environmental injustice is now unfolding around the largest zinc mine worldwide, Alaska's Red Dog Mine, and is specifically impacting the Native Alaskan Kivalina community. The latter has long battled against environmental degradation under U.S. law, with no apparent success. In light of the impasse of purely domestic remedies, I have focused on the water-related issues of the litigation and argued that international law might equip plaintiffs with stronger arguments allowing for the implementation of international law in U.S. courts.

Most notably, I have made the case for specific pieces of U.S. environmental legislation being interpreted consistently with the environmental provisions of the Law of the Sea (LOS) Convention. The LOS Convention is of interest to the case not only by the fact that it is strictly relevant to the subject matter, but also because of the customary character of some of its provisions, as acknowledged by U.S. courts and scholarship.

Some issues, however, are still outstanding, even at the end of my analysis.

It still must be proven that the ICJ *Pulp Mill* decision can be extended to the imperative of undertaking *recurrent* or even *precautionary* environmental assessments. Moreover, I have not tested the potential of the LOS Convention on all the possibly applicable pieces of environmental legislation. For instance, I did not assess its impact on the interpretation of some of the provisions of the Safe Drinking Water Act. Furthermore, I have not tested the potential of all LOS applicable provisions either. The understanding of how the LOS Convention can be intertwined with climate change instruments is specifically compelling, but worth a brand new chapter.

The quest for justiciable rights and competent courts to assess them is ultimately intended to enhance awareness on the part of the national judiciary of its entrustment as interpreter of the whole of the relevant law, be it both domestic and international. Moreover, this attempt of domestic/international solutions to current environmental issues might also serve the cause of the international legal order, where enforcement is often problematic. It can also conjure up the threat of litigation costs that companies may incur in case such litigation claims prove successful, enabling companies to prevent environmental degradation in the first place. Lastly, and more importantly, the domestic staging of environment-related claims against the backdrop of international law would set individuals, and not only States, as recipients and actors of international law, hopefully equipping them with further tools to advance their rights.

INTERNATIONAL COURT OF JUSTICE

SPECIAL AGREEMENT

**BETWEEN THE STATE OF AMESTONIA (APPLICANT)
AND THE FEDERAL REPUBLIC OF RIESLAND (RESPONDENT)
TO SUBMIT TO THE INTERNATIONAL COURT OF JUSTICE
THE DIFFERENCES BETWEEN THE TWO STATES
CONCERNING THE FROST FILES**

jointly notified to the Court on 1 September 2015

COUR INTERNATIONALE DE JUSTICE

COMPROMIS

**ENTRE L'ÉTAT D'AMESTONIA (DEMANDERESSE)
ET LA RÉPUBLIQUE FÉDÉRALE DE RIESLAND (DÉFENDEUR)
SOUMIS À
À LA COUR INTERNATIONALE DE JUSTICE
LES DIFFÉRENCES QUI OPPOSENT LES DEUX ÉTATS
AU SUJET DES DOSSIERS DE FROST**

notifié conjointement à la Cour le 1 septembre 2015

JOINT NOTIFICATION
ADDRESSED TO THE REGISTRAR OF THE COURT:

The Hague, 1 September 2015

On behalf of the State of Amestonia and the Federal Republic of Riesland, in accordance with Article 40(1) of the Statute of the International Court of Justice, we have the honor to transmit to you an original of the Special Agreement for submission to the International Court of Justice of the differences between the Applicant and the Respondent concerning the Frost files, signed in The Hague, The Netherlands, on the first day of September in the year two thousand fifteen.

Mata Rosenberg, Ambassador of the State of Amestonia to the Kingdom of The Netherlands

Klaus Hall, Ambassador of the Federal Republic of Riesland to the Kingdom of The Netherlands

SPECIAL AGREEMENT

SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE STATE OF AMESTONIA AND THE FEDERAL REPUBLIC OF RIESLAND ON THE DIFFERENCES BETWEEN THEM CONCERNING THE FROST FILES

The State of Amestonia and the Federal Republic of Riesland (hereinafter referred to as "Amestonia" and "Riesland" respectively and "the Parties" collectively),

Considering that differences have arisen between them concerning the legality of certain alleged acts of espionage, and other matters;

Recognizing that the Parties have been unable to settle these differences by means of negotiation; and

Desiring further to define the issues to be submitted to the International Court of Justice (hereinafter referred to as "the Court") to resolve this dispute;

In furtherance thereof the Parties have concluded this Special Agreement:

Article 1

The Parties submit the questions contained in this Special Agreement (together with Clarifications to follow) ("the Case") to the Court pursuant to Article 40(1) of the Statute of the Court.

Article 2

(a) It is agreed by the Parties that Amestonia shall act as Applicant and Riesland as Respondent, but such agreement is without prejudice to any question of the burden of proof.

(b) The Parties agree that any reference in this Special Agreement to documents obtained and disclosed without the consent of Respondent is without prejudice to Respondent's objection to the admissibility of these documents as evidence before the Court.

Article 3

(a) The rules and principles of international law applicable to the dispute, on the basis of which the Court is requested to decide the Case, are those referred to in Article 38, paragraph 1 of the Statute of the Court.

(b) The Court is also requested to determine the legal consequences, including the rights and obligations of the Parties, arising from its Judgment on the questions presented in the Case.

Article 4

(a) All questions of rules and procedure shall be regulated in accordance with the provisions of the Official Rules of the 2016 Philip C. Jessup International Law Moot Court Competition.

(b) The Parties request the Court to order that the written proceedings should consist of Memorials presented by each of the Parties not later than the date set forth in the Official Schedule of the 2016 Philip C. Jessup International Law Moot Court Competition.

Article 5

(a) The Parties shall accept any Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(b) Immediately after the transmission of any Judgment, the Parties shall enter into negotiations on the modalities for its execution.

In witness whereof the undersigned, being duly authorized, have signed the present Special Agreement and have affixed thereto their respective seals of office.

Done in The Hague, The Netherlands, this first day of September in the year two thousand fifteen, in triplicate in the English language.

Mata Rosenberg, Ambassador of the Federal Republic of Riesland to the Kingdom of The Netherlands

Klaus Hall, Ambassador of the State of Amestonia to the Kingdom of The Netherlands

****SPECIAL AGREEMENT****

THE CASE CONCERNING THE FROST FILES

AMESTONIA / RIESLAND

1. Riesland is a developed democratic state with a population of approximately 100 million, which boasts one of the fastest growing free-market economies in the world. Many of Riesland's top corporations are listed on the New York, London, and Shanghai

stock exchanges. Its rapidly-expanding information technology and communications sector is world-renowned.

2. Amestonia is a developing country bordering Riesland to the south, with a population of approximately 20 million. Amestonia is a predominantly agrarian export economy. Agriculture employs 55% of Amestonia's workforce.
3. The Rieslandic Secret Surveillance Bureau ("the Bureau") engages, *inter alia*, in covert operations and collects intelligence outside of Riesland pursuant to the provisions of the Secret Surveillance Bureau Act 1967 ("SSBA"), as amended.
4. Section 21 of the SSBA, entitled "Electronic Surveillance," grants the Director of the Bureau ("the Director") the power to authorize "electronic surveillance," without a court order, to acquire "foreign intelligence." The SSBA defines "electronic surveillance" as "the installation of an electronic, mechanical, or other surveillance device outside Riesland's territory, and/or the acquisition by such a device of the content of or other technical information concerning a wire or radio communication." The statute defines "foreign intelligence" as "any information located or emanating from outside Riesland's territory, which is relevant to the ability of Riesland to protect itself against any actual or potential threat to its national security or the ability of Riesland to conduct its foreign affairs."
5. Section 32 of the SSBA, "Minimization Procedures and Structural Safeguards," sets forth five limitations on the Bureau's surveillance activity. *First*, electronic surveillance may not be authorized by the Director whenever there is a "substantial likelihood" that information acquired thereby will include "any communication to which a national of Riesland is a party." *Second*, it establishes a five-judge National Security Tribunal ("the Tribunal"), which must review all electronic surveillance conducted under the SSBA every six months. Proceedings before the Tribunal are closed to the public, but the Tribunal is authorized to call on technical experts, academics, and NGOs to participate as *amici curiae*. *Third*, a Parliamentary Committee for Surveillance Oversight is created, with access to all information relating to the Bureau's operations, and the capacity to launch independent investigations and to summon the Bureau's Director and other personnel to appear before it. *Fourth*, the statute provides that surveillance of "foreign public officials" may be authorized only when the Director, with the concurrence of the Minister of Foreign Affairs, considers it "necessary." *Fifth*, the Bureau must comply with any regulations issued by the Attorney General concerning legal aspects of any surveillance program.

6. Relations between Riesland and Amestonia, which share a common language and have similar ethnic composition, have been largely positive. On 11 December 1970, Riesland's Prime Minister visited Amestonia to mark the centenary of the completion of the first railway line between the two countries. During that visit, the Prime Minister and his Amestonian counterpart signed a number of bilateral agreements, concerning tourism, trade, extradition, intelligence-sharing, and other fields of cooperation. Since then, the two nations have enjoyed healthy cross-border economic, cultural and security ties, including the establishment of a free-trade area in agricultural and agricultural-related goods in 1992. By 1998, Riesland had become the top importer of Amestonian agricultural produce, totaling approximately €1.5 million per day. Between 2003 and 2013, Amestonia saw an annual GDP growth rate of between 6.8% and 7.4%, the highest in the region.
7. On 4 March 1992, Riesland and Amestonia signed the "Treaty on The Establishment of Broadcasting Facilities" ("the Broadcasting Treaty," Annex I), pursuant to which each state was permitted to build, staff, and operate a television station in the other's territory. In a joint press release, ministers from both states expressed their hopes that the treaty "will become yet another milestone in what is already the warmest of friendships between our two societies." Both Parties ratified the Broadcasting Treaty shortly thereafter.
8. Riesland National Television is a state-owned and operated corporation, which provides public broadcasting services across Riesland. In accordance with the Broadcasting Treaty, Riesland established a new division of the corporation, The Voice of Riesland ("VoR"), to operate in Amestonia. The inaugural program of the new station and its Amestonian counterpart, a combined performance by the two countries' national orchestras of Vivaldi's "The Four Seasons," aired on 22 December 1992. VoR broadcast a variety of award-winning documentaries and highly-acclaimed programs for the next 22 years.
9. One of VoR's most popular shows was "Tea Time with Margaret," a weekly one-hour news program featuring interviews with leading Amestonian political and business figures. Margaret Mayer, the show's host, is a television icon from Riesland, appointed by the Ministry of Telecommunications to serve as Head of VoR. Among those appearing on her show were former and incumbent Amestonian presidents, cabinet ministers, parliamentary party leaders, business executives, and diplomats.
10. The Institute for Land and Sustainable Agriculture ("ILSA"), a Dutch NGO established for the purpose of monitoring global soil

structure, composition, and biodiversity, began to express concerns in the early 1990s about the long-term sustainability of Amestonia's agricultural production and trade. In particular, ILSA's reports addressed Amestonian farmers' reliance on a class of neuro-active insecticides known as neonicotinoids, or "neonics," produced solely by Rieslandic companies, to boost yields. From time to time ILSA called on the governments of both countries to study and review the environmental and ecological impacts of these insecticides on the regional biosphere.

11. On 2 October 2012, ILSA published a report entitled "The Plight of the Bumblebee." The report summarized a 20-year peer-reviewed scientific study examining the negative effects of the increased use of neonics by Amestonian farmers on populations of bees and other pollinators. ILSA experts found that the region's honeybee population had decreased by some 25% over the previous 20 years, due in part to the well-documented phenomenon of Colony Collapse Disorder ("CCD"). The report also found a statistically significant correlation – but not definitive evidence of causation – between the gradual increase in CCD and the rise in the use of neonics across the region. ILSA urged Riesland to reevaluate its production of this type of insecticide, and Amestonia to reevaluate its extensive use, suggesting that the only long-term solution would be a complete phase-out of neonicotinoids. It concluded, "the current rate of decrease in bee populations will, if it continues unchecked, result in catastrophic consequences for the environment, for food production, for sustainable farming, and ultimately for the economies of both states."
12. The European Commission adopted a Regulation on 24 May 2013, restricting for a period of two years the use of a number of neonics for seed treatment, soil application, and foliar treatment in crops attractive to bees. The ILSA report and the European Commission's action sparked academic and parliamentary debates in both Riesland and Amestonia, but no policy changes were undertaken in either country.
13. On 2 July 2013, a new website, www.longlivethehive.com, was launched. The website invited environmental activists to register online and to utilize its chat rooms to discuss ways to stop the continued production and use of neonicotinoids. The website quickly gained attention in Amestonia and Riesland, and at its peak was visited by approximately 200,000 users a day. Conversations on its online forums, which protected users' anonymity, often focused on lobbying activities in support of draft legislation. However some members also promoted violent actions, including sabotage and

arson. One anonymous post, which was later reposted onto social media and received widespread attention in Amestonia, read: "Our politicians have failed to respond to peaceful initiatives. We must take charge and command attention. The despoliation of the Earth, and of its living creatures, is an act of violence, and unless it is stopped, it must be responded to effectively and in kind."

14. On the night of 2 February 2014, seven Amestonian warehouses were simultaneously set on fire. The warehouses stored a significant number of barrels of neonicotinoids. In total, five people died from smoke inhalation, and many others were injured. Two of the dead were Rieslandic nationals. Police found spray-painted images of a bee on the asphalt outside the sites. Initial government reports estimated the damage from the attacks, including long-term adverse health consequences for the local population, at €75 million.
15. The President of Amestonia, Jonathan Hale, was interviewed by Margaret Mayer on the day following the arson attacks. When asked about the alleged involvement of environmental activists in the attacks, President Hale responded: "We do not yet have all of the facts concerning these terrible, orchestrated crimes. The police are investigating and will bring the perpetrators to justice. Given the critical importance of agriculture to our national economy, acts of sabotage like these should be seen as attacks on us all. My administration will not tolerate such provocations."
16. On 7 March 2014, 263 envelopes containing white powder were sent to the Ministries of Trade and Agriculture in both Riesland and Amestonia, to prominent Amestonian farmers, and to board members of three neonic-producing Rieslandic corporations. The image of a bee was stamped on the back of all of the envelopes. Examinations determined that the powder was a non-toxic variant of a neonicotinoid. An anonymous tweet by user @buzzkiller24601 posted that evening, which quickly went viral, read: "You've been warned. The threat is real. It must be addressed. Next time you'll taste your own poison. #banneonics #savethebees."
17. President Hale and the Prime Minister of Riesland, Alice Silk, discussed the arson and the white powder incident in a telephone conversation the following day. Prime Minister Silk offered Riesland's continued cooperation in combatting what she called "acts of eco-terrorism," including coordination and sharing of intelligence information, and stressed the importance of continued agricultural trade between the two countries. Following the call, the Prime Minister announced that she had ordered Riesland's security and intelligence services to direct their operations against "what

appears to be a new, growing, and dangerous threat to the well-being of both of our countries."

18. On 16 October 2014, Tom Sivaneta, the Bureau's Director, met with the Amestonian Minister of Internal Affairs. He informed the Minister that the Bureau had succeeded in identifying a ring of Amestonian environmental activists who had been plotting to contaminate a large shipment of honey, intended for consumption in Riesland, with a chemically-altered and toxic neonicotinoid. He provided the Minister with the names and locations of the ring members. The following day, Riesland declared a Terrorism Alert pursuant to the Terrorism Act 2003 (Annex II). The Terrorism Alert was reissued in April 2015.
19. On 21 October 2014, the police broke into a garage located in Amestonia's capital and apprehended three Amestonian college students. The students had in their possession significant quantities of chemically-altered neonicotinoids and detailed maps of a number of honey extraction facilities in Amestonia. They admitted to planning an attack (which they insisted would not cause injuries or deaths), and to being part of a group of environmentalists, which they called "The Hive." The students refused to provide the authorities with the names, locations, or future plans of other members of the group.
20. Frederico Frost, a national of Riesland, is a former Bureau intelligence analyst who had been part of the Bureau's eco-terrorism working group, established in early 2014. Frost had full access to sensitive information relating to Riesland's intelligence operations in Amestonia. On the morning of 16 December 2014, Frost drove from the Bureau's facilities to Amestonia, where he contacted Chester & Walsingham, a law firm that had previously represented defendants in a number of high-profile whistle-blower and national security cases. Frost handed lawyers from the firm a USB drive containing nearly 100,000 documents labeled top secret that he said he had directly downloaded from Bureau computers. The firm agreed to represent Frost in relation to any disclosure or dissemination of the materials.
21. On 18 December 2014, accompanied by his lawyers, Frost met with two reporters from *The Ames Post*, Amestonia's most widely-circulated newspaper. He gave the reporters a copy of the USB drive, requesting that the newspaper publish the contents on its website. In a written statement, Frost explained that "I have come to realize how surveillance programs, like the ones I was engaged in, threaten individual liberties and sovereign equality. I am compelled to talk about this! If we are going to trade liberty for security, we have to do

it with our eyes open. These decisions should be made by the public, not by politicians."

22. In January and February 2015, thousands of documents marked "top secret" were gradually published, unedited and unredacted, on the website of *The Ames Post*, following what the newspaper termed "a process of authentication and review performed by our reporters and lawyers." One of the documents, published on 23 January and headed "The Verismo Program," bore a signature of Tom Sivaneta. It detailed a May 2013 operation he had authorized, in which a waterproof recording pod was installed on the undersea fiber optic cable that was the primary backbone for Amestonia's international internet and telephone communications traffic. The device was placed on a section of the cable located in Riesland's exclusive economic zone. The pod copied all information that went through the cable and transferred it to the Bureau's servers. According to the document, 1.2 million gigabytes of data were collected and stored daily pursuant to Verismo. The document also noted that, following the white powder incident on 7 March, Bureau employees had been instructed to use all of the Bureau's resources "to track environmental activists in Amestonia," relying on specifically tailored search terms, or "selectors."

23. On 29 January 2015, *The Ames Post* published on its website a document on the letterhead of the Office of the Attorney General of Riesland, James Deloponte. Dated 2 July 2014, it detailed regulations issued by the Attorney General regarding the Bureau's surveillance. The document provided that all data collected by the Bureau through Verismo or related programs, other than as the result of investigation of a specific individual, could be stored for a maximum of two years. It also noted that the Tribunal, in accordance with the SSBA, had reviewed the Verismo Program every six months since its inception with no participation from outside experts. The Parliamentary Committee for Surveillance Oversight had also reviewed Verismo twice in closed-door hearings, but neither the Tribunal nor the Committee had ever challenged its legality. According to the document, Amestonian security authorities had knowingly accepted, on at least 50 occasions, redacted information relating to terrorist activity derived from Verismo.

24. On 2 February 2015, Riesland's Minister of Foreign Affairs sent a diplomatic note to his counterpart in Amestonia requesting the immediate extradition of Frost, in accordance with the 1970 Extradition Treaty, to stand trial for theft and a number of data security offenses. The diplomatic note also requested that Amestonia recover the information Frost had downloaded, believed to be held

by either Chester & Walsingham or *The Ames Post*, and return it to Riesland for use in the ongoing criminal investigation against Frost. It emphasized that "any further publication of these materials will have a long-term, damaging impact on cooperation between our two nations in our joint campaign against terrorism." The Amestonian Minister indicated that the extradition request would be considered in accordance with the Treaty, but noted the Amestonian Government's "surprise at the reported scope and reach of Riesland's surveillance programs." He called upon the Minister to provide more information on the extent of these activities and their impact on Amestonian nationals' private lives.

25. On 16 February 2015, the banner headline of *The Ames Post* website read: "Margaret the Spy!" Another document leaked by Frost stated that since its inception in 1992, the premises of the VoR station had been used by the Bureau to promote its surveillance activities on Amestonian soil. The document was printed on the letterhead of the Office of the Bureau's Director. According to the document, Margaret Mayer was part of an operation called "the Carmen Program," intended to collect intelligence on high-ranking Amestonian public figures and private sector leaders. Whenever such individuals came to be interviewed for Mayer's show, they were told that their electronic devices could interfere with the sensitive wireless microphones used during broadcasts. They were offered the opportunity to place their devices in a locker within their line of sight from the studio. Electronics placed in the locker were removed during the interviews by means of a concealed backdoor. This provided Bureau engineers, who doubled as VoR employees, sufficient opportunity to hack into the guests' phones and portable computers and install a rootkit malware referred to in Frost's documents as "Blaster," which then provided the Bureau full remote privileged access to these devices. The information collected from "Carmen" was stored and later analyzed in an underground floor within the VoR building, code-named "The Opera House."

26. A number of memoranda mentioning "Carmen" were also published in raw form on *The Ames Post*'s site. They revealed that over 100 Amestonian public figures, businessmen, officials, and diplomats were surveilled under this program, whose primary objective was "to collect information concerning Amestonia's domestic and foreign policy, in order to advance Riesland's political and economic interests in the region." One memorandum contained an image of David Cornwell, Amestonia's Ambassador to the United Nations, and detailed how Carmen operatives had been able to hack his phone

and access emails regarding Amestonia's positions on upcoming votes in the General Assembly and specialized agencies.

27. That evening, Amestonian police applied to a judge for an emergency warrant to seize all assets and property of VoR pending an investigation into whether criminal offenses had been committed, citing as probable cause the Carmen Program documents published by *The Ames Post*. While the police were in chambers with the judge applying for the warrant, VoR's television broadcasting was interrupted and replaced with old reruns of "Tea Time with Margaret." The judge immediately granted the warrant. Upon execution of the warrant that night, the Amestonian police found the station unattended, although the TV broadcasting equipment and various other devices and documents had been left untouched. These articles were all catalogued and removed by the police.

28. At 3:15 A.M. the following morning, Amestonia's Border Patrol, conducting routine operations, encountered Margaret Mayer and two other Rieslandic VoR employees on a train crossing into Riesland. The Border Patrol requested that they present their travel documents for inspection. They refused, and were promptly detained. When the commander of the police unit conducting the investigation into VoR learned of this development, she sought and was granted a warrant for the arrest of the three on suspicion of espionage. They were subsequently charged with that offense, and were denied bail on the basis that they were a flight risk.

29. President Hale held a press conference on the morning of 17 February 2015. Before taking questions, he read a prepared statement:

> I am deeply troubled by reports that Riesland has, for decades, engaged in a concerted surveillance campaign targeting our citizens and violating our territorial integrity and political independence. Riesland's own documents show that these offenses against our sovereignty were purely politically motivated and had no public order implications. We are entitled to an explanation. Any claims that such programs are necessary to combat terrorism simply ring hollow. No matter how severe any perceived threat to Riesland's national security, there is absolutely no justification for the systematic infringement of our citizens' privacy. Mass electronic surveillance of our people and institutions violates Riesland's obligations under the U.N. Charter, the Vienna Conventions on Diplomatic and Consular Relations, the Broadcasting Treaty, and

> principles of comity between nations. Simply put, gentlemen do not read each other's mail, and friends do not spy on friends.

30. In response to a reporter's question, President Hale went on to say, "Our police authorities are treating the VoR facilities and its equipment as a crime scene. Margaret Mayer and the other VoR employees are suspected of having committed the very serious crime of espionage, charges which will be handled according to our laws." He denied that the search of the premises and the detention of the three individuals violated Amestonia's obligations under the Broadcasting Treaty, saying: "the VoR facilities and employees lost their immunities and privileges once the station ceased acting as a broadcaster and became a nest of spies." Amestonia then recalled its ambassador to Riesland for consultations, and officially closed its TV station in Riesland.

31. On 19 February 2015, Prime Minister Silk rejected President Hale's characterization of Riesland's and VoR's activities in a televised interview. She explained that Riesland's surveillance programs complied with both domestic and international law because they "were prescribed by statutes, structured around minimization procedures, and routinely reviewed by competent authorities with oversight power." She asserted that the methods employed were "both necessary and proportionate," observing that the results of the surveillance "had benefited the national security and interests of Amestonia just as much as those of Riesland." She ended her statement by saying:

> Our two nations have enjoyed decades of fruitful bilateral cooperation, which is now being severely compromised. We make no apology for our efforts to keep ourselves and our friends safe from acts of terrorism. Meanwhile, the Amestonian administration is hardly reciprocating our acts of friendship. It is providing sanctuary to Frederico Frost, who is accused of very serious crimes in Riesland, and has expropriated our property and arrested our nationals in blatant disregard of the treaty between us.

32. Joseph Kafker is a 70-year-old retired Amestonian politician who founded the Green Party, now the third largest in the Amestonian Parliament. For years, Kafker has been a vocal opponent of the use of neonics in agricultural production. During his years as a Member of Parliament he attempted, on a number of occasions, to promote legislation banning them. None of these efforts was successful, a fact he lamented on his retirement in 2012. On 7 March 2015, Kafker was

invited to give the keynote address at an international environmental law conference at Riesland's largest law school. After he completed his speech, he was detained by the police, allegedly in accordance with the Terrorism Act. The story broke in the international media the following day. In a special session, the Amestonian Parliament adopted a resolution denouncing Kafker's detention and demanding his release. The Government of Riesland did not respond.

33. On 10 March 2015, Kafker's case was brought before the National Security Tribunal. Following a request from the Attorney General's Office, the Tribunal ruled that all evidence pertaining to Kafker's activities and leading to his apprehension was "closed material," as the term is defined in the Terrorism Act. The Tribunal further allowed Bureau officers to testify via video conferencing, with their faces and voices obscured, regarding the need to detain Kafker. Following their testimony, the Tribunal granted the petition to extend Kafker's detention for reasons of national security. Kafker's lawyer, who had been selected from a list of approved "special advocates," was present during the proceedings, but was not permitted either to consult with his client or to share with him any of the secret information said to substantiate the allegations against him. Kafker remains detained without charge in a maximum-security facility in Riesland and his detention has been extended by the Tribunal every 21 days. A motion challenging the constitutionality of the proceedings was filed before the Supreme Court of Riesland but was denied.

34. On 12 March 2015, Amestonia's Foreign Minister contacted his counterpart in Riesland and demanded access to the secret evidence that constituted the basis for Kafker's detention. He also stated that, in Amestonia's view, the Terrorism Act did not comply with international human rights standards. The Rieslandic Minister rejected the request, responding that disclosure of the information concerning Kafker's apprehension would endanger the integrity of particular intelligence sources and therefore the national security of Riesland. The Minister further stressed that the National Security Tribunal had already determined that the information could not be disclosed in accordance with the Terrorism Act.

35. On 14 March 2015, President Hale instructed his Minister of Justice to refuse the extradition request for Frederico Frost, citing the "political offense" exception in the Extradition Treaty. He also ordered that Riesland's request for the documents held by *The Ames Post* be denied. Attorney General Deloponte responded to these developments in a statement:

> The Government of Riesland has repeatedly made clear that it will not tolerate the publication of leaked confidential information, and that it will do whatever is in its power to disrupt any further threats to our national security. With or without foreign government support, we will continue our efforts to bring the fugitive Frost to justice, and to stop the damage that will result from any dissemination of Riesland's top secret documents.

36. On 17 March 2015, *The Ames Post* website's banner read "A Kafker-esque Affair." A memorandum, sourced from Frost's USB stick, revealed that a May 2014 interview with Kafker on "Tea Time with Margaret" had allowed the Bureau to hack into his electronic devices. According to the memorandum, Kafker was considered a "high-level suspect with ties to The Hive, including the planned contamination of a large shipment of honey with a toxic variant of neonicotinoids in 2014." The continuous surveillance of Kafker, following the bugging of his devices, was considered a "top priority." From intercepted communications, Bureau analysts were able to establish that Kafker was a frequent visitor to the longlivethehive website, had participated in online chats, and had used the forum's "like" function to endorse conversations including calls for violent disruptions to raise public awareness of the neonics controversy. Attorney General Deloponte refused to comment on questions raised by the media following *The Ames Post'*s publication. He stated only that Riesland was in possession of "closed materials" that "directly link Kafker to The Hive's senior echelons."

37. On 22 March 2015, the computer networks and communication switches at both *The Ames Post* and Chester & Walsingham were hacked and disabled. Investigators found that the hackers had used a malicious program to disrupt the operation of the computer systems and to corrupt master boot records, to the extent that nearly 90% of the information was "non-recoverable."

38. Based on traffic analysis, cyber security experts from the Amestonian Institute of Technology concluded: "The malware used in the hacking of the computers has been traced to IP addresses within Riesland's territory that are associated with Riesland's computer infrastructures. Significant segments of code in the malware are exact replicas of those used in the Bureau's 'Blaster' program. These code segments are not otherwise known to be in use or available to the general public." Both Chester & Walsingham and *The Ames Post* contracted external appraisers, who have estimated the combined damages related to infrastructure and to unrecoverable

data at €45-50 million. A significant number of proceedings before Amestonian courts were delayed for months as a result of Chester & Walsingham's inability to access its files. *The Ames Post* had to shut down its operations entirely; it resumed publication only in June 2015.

39. On 1 April 2015, President Hale issued a statement denouncing the cyberattacks, stating that "all of the evidence points back to the Bureau and to Riesland." He described them as "not only undermining freedom of expression and attorney-client privilege – essential values in and of themselves," but as an "assault upon the very principles that stand at the core of our society." In an interview with local news held on 5 April 2015, Attorney General Deloponte refused to respond to allegations that Riesland was involved in the attacks.

40. On 22 April 2015, the Amestonian Ministry of Justice announced that the police investigation into the items found at the VoR station premises had determined that a number of them had been used for surveillance. The Ministry reported that it had obtained a forfeiture order against the premises and all property found there on the basis that it was employed in criminal activity. Finally, the Ministry stated its intention to sell the station's real estate and property, estimated to be worth €20 million, by public auction. Challenges to the original warrant dated 16 February 2015 and to the forfeiture order, presented to Amestonia's High Court by attorneys from Riesland National Television Corporation, were rejected. All subsequent appeals were summarily dismissed. The auction has been stayed until the conclusion of all outstanding legal proceedings before the International Court of Justice.

41. In mid-2015, diplomats from Riesland and Amestonia began meeting in an attempt to settle their differences. After several months of negotiations, the parties were unable to reach an agreement. In July 2015, Amestonia circulated among the members of the United Nations Human Rights Council the text of a proposed resolution calling on the recently-appointed Special Rapporteur on the Right to Privacy to investigate whether Riesland's cyber and surveillance programs were in compliance with international law. An article published in *The Sydney Morning Herald* on 9 July 2015 reported that Riesland's supporters on the Council had urged it to resolve its disputes with Amestonia. A source within the Council told the newspaper: "A number of countries voiced their concern that the continued uncertainty as to the legality of the challenged surveillance programs would hinder their ability to continue to engage and share

intelligence with Riesland without fear of being complicit in human rights abuses."

42. In light of growing international pressure, Riesland and Amestonia agreed to refer all matters in dispute to the International Court of Justice, and for this purpose have drafted and signed this Special Agreement. Riesland, however, has reserved its objections to the admissibility of information derived from any confidential documents that may have been provided to *The Ames Post* by Frost. The parties agreed that the issue of the admissibility of the documents would be left for the Court to resolve, as reflected in Article 2(b) of this Special Agreement.

43. Amestonia and Riesland are both members of the United Nations, and are parties to the Statute of the International Court of Justice; the Vienna Convention on the Law of Treaties; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; the Vienna Convention on Diplomatic Relations; the Vienna Convention on Consular Relations; the International Convention for the Suppression of Terrorist Bombings; and the International Convention for the Suppression of the Financing of Terrorism. Neither state has made any reservations, declarations or understandings with regard to any of these treaties.

44. Applicant asks the Court to adjudge and declare that:

    (1) 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 violates international law; and Amestonia is therefore entitled to an order directing the immediate cessation of those programs with assurances of non-repetition;

    (2) The seizure and forfeiture of the VoR station and its equipment, and the arrest of Margaret Mayer and the other two VoR employees, did not violate the Broadcasting Treaty, and were in accordance with Amestonia's other international law obligations;

    (3) 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; and

(4) 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.

45. Respondent asks the Court to adjudge and declare that:

(1) 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;

(2) 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;

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

(4) The cyber attacks against the computer systems of *The Ames Post* and Chester & Walsingham cannot be attributed to Riesland, and in any event did not constitute an internationally wrongful act.

ANNEX I

TREATY ON THE ESTABLISHMENT OF BROADCASTING FACILITIES BETWEEN THE STATE OF AMESTONIA AND THE FEDERAL REPUBLIC OF RIESLAND 4 MARCH 1992

[excerpts]

The State of Amestonia and the Federal Republic of Riesland ("the Contracting Parties"),
(a) *desiring* to fortify the friendship between the two countries; (b) *recognizing* the importance of strengthening understanding and cooperation between their peoples; (c) *seeking* to offer their citizens radio and television channels that will reflect the two nations' dynamic political, cultural, and artistic activity; have agreed upon the following articles:

ARTICLE 1

1. Each Contracting Party may establish and operate in the territory of the other a radio and television broadcasting station.
2. The land on which each station will be constructed will be procured by the operating-state and held in its name. The operating state will be responsible for staffing, running, and funding the station, and shall procure at its own expense and in its own name the materials and other equipment required for its operation.

[...]

ARTICLE 2

Each station shall produce and air programs and content including news stories, interviews, documentaries, and movies produced either in or by the operating country, with local viewers and listeners in the host country as the target audiences.

[...]

ARTICLE 14

1. The premises referenced in article 1(2) of the present Treaty shall be inviolable, and agents of the host state may not enter those premises without the consent of the head of the station. Such consent may be assumed only in cases of fire or other similar disaster posing or threatening serious immediate danger to public safety or order.

2. In addition to the premises of the station, its furnishings, equipment, and other property used in its operation, as well as its means of transport, shall be immune from search, requisition, attachment, expropriation, or execution.
3. The receiving state is under a special duty to take all appropriate steps to protect the premises of the station against any intrusion or damage, and to prevent any disturbance of the peace of the premises or impairment of its dignity.

4. The archives and documents of the station shall bear visible external marks of identification, and shall be inviolable at all times and wherever they may be.

[...]

ARTICLE 15

1. Each station's employees, who are also nationals of the operating state, shall be entitled to the
following immunities and privileges:
    a) The persons of each station's employees shall be inviolable, and they shall not be liable to any form of arrest or detention. The host state shall treat them with due respect and shall take all appropriate steps to prevent any attack on their freedom or dignity.
    b) Each station's personnel shall enjoy immunity from the criminal jurisdiction of the receiving state, and shall not be obliged to give evidence as witnesses.
    c) 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.

[...]

ARTICLE 23

1. Without prejudice to their privileges and immunities, it is the duty of all persons employed by each station to respect the laws and regulations of the host state. Those who are nationals of the operating state have an additional duty not to interfere in the internal affairs of the host state.
2. The premises of the station must not be used in any manner incompatible with the station's functions as envisaged in the present

Treaty, in other rules of general international law, or in any other agreements in force between the Parties hereto.

[...]

ARTICLE 36

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.

[...]

ARTICLE 40

The term of this agreement shall be 30 years.

(Signed)
Shannon Belle Cambridge
Minister of Telecommunications
State of Amestonia

(Signed)
John Andre Sorge
Minister of State of
Telecommunications
Federal Republic of
Riesland

ANNEX II

TERRORISM ACT 2003

[excerpts]

1. Definitions
[...]
"*National Security Tribunal*" ("the Tribunal") shall have the meaning given that term under the Secret Surveillance Bureau Act 1967;
[...]
"*Terrorist Act*" shall mean an act as defined in Article 2.1(b) of the International Convention for the Suppression of the Financing of Terrorism (9 December 1999);
[...]

2. Terrorism Alert
If the Government receives information that there is a credible danger of an imminent terrorist act being committed in Riesland, it may issue a Terrorism Alert. Such an Alert shall be valid for six months, unless it is revoked earlier. Upon its expiration or revocation, the Government may issue a new Terrorism Alert if it considers that the credible danger of terrorist acts still persists or has been revived.

3. Detention Powers
a. When a Terrorism Alert is in force, the Government may detain any foreign national suspected of being involved in instigating, authorizing, planning, financing, carrying out, or aiding a Terrorist Act, as defined herein, for a period not exceeding 180 days.
b. Except as provided herein, no court shall review the detention of any person hereunder, but every detainee shall be brought before the Tribunal within three days of his or her detention.
c. Proceedings before the Tribunal will be held in secret, and its proceedings will not be disclosed to the public or the media. Records of the Tribunal's proceedings shall be entitled to the highest protection provided by law.
d. The Tribunal may decide whether continued detention of an individual is required for reasons of national security or public safety. The Tribunal shall give appropriate consideration to factors including, but not limited to:
    i. the likelihood that the detainee has in fact committed, instigated, authorized, planned, financed, or aided a Terrorist Act;

ii. the likelihood that the detainee will commit a Terrorist Act or will incite others to do so if he or she is released;
iii. the likelihood of family or government rehabilitation or support for the detainee if he or she is released;
iv. the likelihood that the detainee may be subject to criminal trial, whether under this Act or some other statute;
v. the likelihood that, following release, the detainee's country of nationality will request extradition from Riesland; and
vi. any substantial interest in the detainee expressly stated by national law enforcement or intelligence authorities.

e. In making its decision under subsection (d), the Tribunal may receive and accept any documentary or testimonial evidence from any source. It shall determine whether or not particular evidence is to be treated as "closed material." Closed material shall not be made available to the detainee, his or her counsel, or third parties, without the Tribunal's authorization.
f. In proceedings before the Tribunal, officials from the security and intelligence authorities may be allowed to testify anonymously via video conferencing with their faces and voices obscured.
g. After the initial review provided in subsection (b), each detainee will be brought before the Tribunal no less often than every 21 days for a periodic review. The Tribunal will consider whether conditions such as those listed under subsection (d) have changed, allowing for the detainee's criminal prosecution or release.
h. The Tribunal may extend the detention of any detainee in appropriate circumstances, but no detainee shall remain in custody under this Act for a period of more than 540 days in total.
i. Persons detained under this Act may be represented by legal counsel to be selected by them from a list of "Special Advocates," who possess appropriate security clearance. This list shall be compiled by the Attorney General. Only Special Advocates will be entitled to participate in proceedings where closed material is presented. A Special Advocate may not disclose closed materials to or discuss them with the detainee or any third party, or obtain the detainee's instructions pertaining to such materials.

[...]

2016 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT COMPETITION

CORRECTIONS AND CLARIFICATIONS TO THE SPECIAL AGREEMENT

The following corrections and clarifications to the Special Agreement have been agreed to by the parties, and the text jointly notified to the Court on 1 September 2015 should be considered amended accordingly. The Registrar of the Court reminds all parties and participants of the following:

a. The Special Agreement is, in essence, a negotiated stipulation of facts. Its words have been carefully chosen, and are the result of extensive negotiation. The parties decline to "clarify" matters about which they are unlikely to agree.

b. Any request for clarification not addressed in the following paragraphs has been considered by the parties to be redundant, inappropriate, or immaterial, or the parties were unable to reach agreement on a mutually acceptable answer.

c. Except to the extent that corrections and clarifications are set out below, participants are to assume that the Special Agreement is accurate in all respects.

d. With respect to pronunciations of the various proper names used in the Special Agreement, all parties and the Court have agreed that they will not take formal or informal offense at any reasonable effort to pronounce proper names correctly.

CORRECTIONS

1. The words "radio and" should be deleted from both subparagraph (c) to the preamble and Article 1(1) of the 4 March 1992 Broadcasting Treaty, excerpted in Annex I.

2. At the end of section 3(a) of the Terrorism Act, excerpted in Annex II, the following sentence should be added: "No detention shall be undertaken under this Act except pursuant to a warrant issued by the National Security Tribunal."

3. At the end of Paragraph 43 the following sentence should be inserted: "Amestonia and Riesland are not parties to any other bilateral or multilateral treaty of potential relevance."

CLARIFICATIONS

1. Amestonian police investigators found that the chemically altered neonicotinoids in the possession of the three Amestonian college students, referenced in Paragraph 19, could potentially cause serious bodily injury to anyone handling or inhaling them.

2. The undersea fiber optic cable, referenced in Paragraph 22, is owned by a multinational telecommunications company registered in Germany, and is roughly 2000 km in length. At the request of the Amestonian government, divers from the telecommunications company were sent to the coordinates cited in the "Verismo Program" published on the *Ames Post* website. They identified the pod and dismantled it by 6 April 2015. Company investigators were able to determine that the pod did not cause any breaking or injury to the cable, nor did it interrupt or in any other manner obstruct communications.

3. When, as referenced in Paragraph 23, the intelligence obtained under what the Frost Files called "the Verismo Program" was provided to Amestonian security authorities, its source was never disclosed. Amestonian officials always accepted the intelligence, and never challenged or otherwise demanded additional information as to the nature, scope, and reach of the Verismo Program, until 2 February 2015.

4. In accordance with the provisions of the Broadcasting Treaty, Amestonia approved the appointment of each Rieslandic national working at VoR. Thereafter, these employees received documentation detailing their privileges and immunities under the Treaty.

5. The memoranda detailed in Paragraph 26 additionally revealed that the Rieslandic Minister of Foreign Affairs was consulted on the authorization of the Carmen Program and was routinely briefed on the program's activities.

6. Amestonia was immediately informed of Kafker's detention when he was apprehended, and he was afforded consular assistance. Kafker has access to medical care and the ability to communicate with, and accept visits from, his immediate family.

7. Riesland reissued a Terrorism Alert in October 2015. It has notified the Secretary General of the United Nations of each of the issued Alerts without providing any additional information.

8. The Amestonian Institute of Technology (AIT) referenced in Paragraph 38 is a world-renowned research-intensive academic institution with a focus on engineering and computer science. The Amestonian Government turned to security experts from AIT following the 22 March 2015 cyberattack, and asked for their assistance in determining the identity of the perpetrators. The experts were also provided unfettered access to the devices seized from the VoR station.

9. AIT's subsequent investigation determined that the computer infrastructures referenced in Paragraph 38 were Rieslandic governmental computer infrastructures.

10. Amestonia and Riesland became parties to the Vienna Convention on the Law of Treaties in 1982 and 1976 respectively.

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 on its reliability and probative value.[8] Though international criminal courts may

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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).

[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.

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]

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

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[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.

[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.

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-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]

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[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).

[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.

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.

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.

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[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).

[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.

ii. The interferences were disproportionate to legitimate aims.

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

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[40] *See supra* §I.B.1.b.i.

[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.

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

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 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

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[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.

[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.

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]—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.

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.

[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.

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 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

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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.

the other Treaty provisions are to be interpreted and applied."[73]

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]

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

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[73] *Oil Platforms (Iran/U.S.)*, Preliminary Objection, 1996 I.C.J. 803, ¶28; *Nicaragua*, Merits, ¶273.

[74] Broadcasting Treaty, Preamble.

[75] Compromis, ¶¶25-27.

[76] Compromis, ¶28.

[77] Compromis, ¶27.

[78] Compromis, ¶27.

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] 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

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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.

[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),

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 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

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[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.

[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.

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.

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]

As argued above, Riesland violated its obligations under Article 23. This provision represents the mutual obligations of the parties governing

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[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.

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

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 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

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[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.").

[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.

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 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.

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[116] *Lotus Case*, 18.

[117] Compromis, ¶40

[118] Compromis, ¶8.

[119] Yang, 316.

[120] Fox & Webb, 376-377.

[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).

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 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]

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[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).

[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.

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 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.

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

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[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).

[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).

[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).

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 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.

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[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).

[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).

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 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,

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[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).

[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).

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 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

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[165] HRC Gen. Comm. 35, ¶17.

[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).

review the detention of an individual under the Terrorism Act. 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 "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

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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).

[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).

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 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]

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[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.

[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).

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 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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[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).

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

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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).

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

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]

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

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[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).

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

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 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

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[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.

[225] Compromis, ¶35.

[226] *Id.*

[227] ARSIWA, Art.8.

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 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.

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[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).

[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.

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] 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 constitute violations of these provisions,[246] which States have a "positive obligation" to prevent,

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[237] *Nicaragua*, ¶205.

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

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

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 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

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[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.

[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.

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 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

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[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).

[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-

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 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]

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.

[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

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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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, 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).

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 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]

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[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.

[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.

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 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]

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[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 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).

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]

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.

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[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.

[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.

Under UNCLOS Article 58, broadly considered custom,[40] states may engage in intelligence collection in any EEZ without other States' notice or 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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[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).

[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]

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]

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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.

[58] Compromis, ¶22.

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 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

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[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.

[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).

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]

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

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[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.

[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).

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]

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. 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

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[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. 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).

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 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.

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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.

[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.

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 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

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[96] Broadcasting Treaty, Art.36.

[97] *See supra* §II(A)(1)(b).

[98] See *infra* §II(B)(2).

[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).

procured and held in the operating state's name,[103] that the station's premises[104] and documents[105] are inviolable, and 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 presumption of immunity for both States and state

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

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

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

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

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 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

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[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.

[123] See *supra* §II(A)(1)(b).

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

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 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

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[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.

[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.

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]

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

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[133] *Chorzow Factory*, 541.

[134] See *infra* §III(D).

[135] *See Tehran*, ¶¶84-87, 91-92.

[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-

ICCPR Parties, which this Court must consider,[141] confirms this 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

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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).

[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).

inappropriate, unpredictable, or 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 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.

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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.

[158] Compromis, ¶16,18.

[159] Compromis, ¶36; *See supra n*.26.

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]

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.

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[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).

[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).

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]

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

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[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, ¶.

[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

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

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]

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[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).

[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.

provided the threat is imminent[186] and affects 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 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]

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[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 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.

[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.

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]

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

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[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.

[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.

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]

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

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[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).

[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.

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 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

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[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.

[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.

more serious the charges, the higher the degree of proof of 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. The cyber-attacks cannot be linked to an organ of Riesland.

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 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.

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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.

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

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

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* 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

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[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. II, Art.8, p.72.

[243] *Genocide Case*, ¶¶403-405.

[244] *Nicaragua*, ¶111.

[245] *Nicaragua*, ¶¶109-111.

[246] *Nicaragua*, ¶¶103-04, 110.

officials, provides even less proof than the facts of *Nicaragua*.

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

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]

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

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[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.

[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).

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 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, which Amestonia refused to confiscate.[264] The cyber-attacks were proportionate to the threat of harm from large-scale

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[254]Compromis,¶37,38.

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

[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.

[264] Compromis, ¶35.

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] 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

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[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).

[272] ARSIWA Art.52(2).

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

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 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.

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[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.

[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

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Selected ILA Weekend speeches, panel remarks, and other proceedings are published each year in the International Practitioners' Notebook, which is the annual spring issue of the *ILSA Journal of International & Comparative Law*. Further information about the International Law Association and ILA Weekend is available at http://www.ambranch.org/.

Both law students and professionals in the field are welcome in the ABA Section of International Law and Practice. For membership information, visit http://www.abanet.org/about/membership.html.

International Law Students Association

- The International Law Resource
- Networking & Exchange Opportunities
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For additional information contact the ILSA Executive Office at ilsa@ilsa.org.

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AMERICAN BRANCH

http://www.ambranch.org

The International Law Association (ILA), founded 1873 in Brussels, is a private international organization. It is a non-governmental association with United Nations consultative status. The ILA's biennial conference debates and proceedings have in many cases influenced the decisions of the United Nations General Assembly.

ILA members may belong to one of more than forty national ILA branches. The ILA's Secretary General of the Association maintains an office in London, England, and individual ILA members whose countries do not yet have ILA branches are members of the London "Headquarters." The ILA conducts international law study through committees. Committee members are specialists and prepare biennial conference reports under the supervision of the ILA's Director of Studies.

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More information and an online application for membership in the ILA American Branch are available on the ILA Website at http://www.ambranch.org/fee.htm.

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