The 2002 Philip C. Jessup International Law Moot Court Competition

Republic of Turingia

v.

Republic of Babbage

The Case Concerning Regulation of Access to the Internet

BEST OVERALL MEMORIAL – APPLICANT

First Place
Richard R. Baxter Award

University of Otago
New Zealand (Team #385)

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STATEMENT OF JURISDICTION

The Republic of Turingia and the Republic of Babbage have brought their case before this court by notification of the Special Agreement as provided for by Article 40(1) of the Statute of the International Court of Justice. The Court has jurisdiction over the case pursuant to Article 36(2) of the said Statute.

STATEMENT OF FACTS

Turingia is a large, developed state with a highly educated and technologically literate population. Babbage is a smaller developing state, with little infrastructure, although the availability of internet access for Babbagian citizens has increased markedly in recent years. In 1994, the Babbagian government promulgated a new Criminal Code. Section 117 of the Code prohibited the publication of indecent material, defined to include material targeted at and designed to offend members of a particular ethnic group, and material offensive to the public morality of Babbage. On September 25 1999, the head of Babbage's government, President Revuluri, issued a Presdiential Declaration extending the legal scope of section 117 to embrace material published or distributed on the internet, and ordering all Internet Service Providers (ISPs) operating in Babbage to eliminate any user access to material which would violate section 117. Within two weeks of the Declaration, all but one of the ISPs operating in Bbbage employed restrictive blocking software to comply with the legal prohibition in section 117. Such software also prohibited users from accessing sites of historical and medical interest, and blocked other sites neither pornographic nor defamatory in intent.

Babbage OnLine (BOL), the dominant ISP in the Babbagian market and a subsidiary of a Turingian-based company, Turingia OnLine (TOL), refused to comply with the Presidential Declaration on grounds articulated by TOL's Chief Executive Officer, namely its inconsistency with the international right to freedom of expresssion. Charges were laid and proceedings successfully brought against BOL and TOL. In order to protect its property against forfeiture, BOL closed down its operations in Babbage and removed its assets.

President Revuluri warned that Babbage would not permit TOL to escape responsibility for its actions.

On December 24 1999 a computer programmer illegally hacked into TOL's computer system, erased the data which comprised TOL's publically available websites and deleted the system programmes that controlled TOL's worldwide network. The effect was to deny TOL's subscribers access to the internet for three days, for which TOL was later required to reimburse its customers in the amount of US$50 million.

On 27 December 1999, once the TOL website had been restored, a hidden computer virus was activated. The virus disrupted normal computer operations, resulting in the loss of unsaved data. Certain files containing words commonly used in hate speech were deleted. In addition, an e-mail indicating the political motivations of the group was sent to all subscribers. The International Babbagian Cyber-Patrol (IBCP) later claimed responsibility for the attack.

On December 29 1999, President Revuluri issued a proclamation in which he conferred orders of merits on the members of the IBCP, thanked and praised the group and in addition promised them a full amnesty from prosecution in the Babbagian courts.

Following the IBCP attack, Joesphine Shidle, the Minister of Justice of Turingia, confirmed that no action was planned by the Turingian government by way of response. She did, however, publicly state her opinion that should a Turingian citizen inconvenience the government of Babbage through non-violent means, Turingia would have no jurisdiction to prosecute. Subsequently, David Gabrius, a Turingian citizen, hacked into the Babbage Rail Transit Authority (BRTA) and deleted its operating system. The effect of this was to eliminate all automated rail traffic control functions for two days, reducing traffic control to radio contact. In the immediate confusion following in the wake of the 'hack', two trains travelling in opposite directions on a heavily-used mountain pass crashed into each other, causing fatalities. Turingia reiterated its decision not to prosecute Gabrius.

Following a joint request by the BRTA Administrator and the Minister of Justice of Babbage, Tara Elis, that Gabrius come to Babbage to assist with the repair of the BRTA, and on the express assurance that he would not face prosecution if he did so, Gabrius agreed to go to Babbage. A plane was chartered by the Government of Babbage to transport Gabrius from Turingia. However, the request for help was in fact a deliberate ruse constructed for the purpose of luring Gabrius to Babbage, and on arrival at Babbage International Airport, the Babbagian national police were waiting to arrest Gabrius. Despite objections by Turingia as to the manner of the arrest and to the right of Babbage to assert jurisdiction over Gabrius, Gabrius was charged, put on trial and convicted for the murder of the 200 victims of the train collision and sentenced to 20 years imprisonment.

Under mounting international pressure, Babbage and Turingia have agreed to submit this dispute to the International Court of Justice.

QUESTIONS PRESENTED

1. Whether Babbage's legislation exceeds its jurisdiction at international law?

2. Whether Babbage's legislation violates the right to freedom of expression at international law?

3. Whether Babbage is responsible for an internationally wrongful act in respect of the IBCP's hacking?

4. Whether Babbage is obliged to provide compensation for the IBCP's interference with TOL's contractual rights under the law of expropriation?

5. Whether the luring of Gabrius to Babbage violates Turingia's sovereignty?

6. Whether the luring of Gabrius to Babbage violates his human rights?

SUMMARY OF THE PLEADINGS

I. Babbage's legislation is inconsistent with the right to freedom of expression found in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which Babbage has signed but not yet ratified. Babbage is bound by Article 18 of the Vienna Convention on the Law of Treaties not to act so as to defeat the purpose and object of the ICCPR, which it has done by imposing broad restrictive provisions on the publication of indecent materials, impinging on a fundamental human right. Alternatively, Babbage's legislation has breached a right to free speech that exists independently at customary international law. Whilst the right, whether founded in treaty or custom, is not absolute and may be subject to reasonable limitations assessed on the criteria of necessity and proportionality, the Babbagian legislation fails on these criteria, principally because it is overly broad in its reach and is not the least intrusive means of achieving the legitimate objective. Hence, it exceeds what is an acceptable restriction of the right at international law.

II. Babbage is responsible for the loss suffered by TOL because the IBCP's 'cyberactivities' are both attributable to Babbage and in breach of international obligations owed by Babbage. A state may become responsible for acts *ex post facto* where the conduct of a state is such that it may be seen to have adopted and acknowledged the acts as its own. The contents of the Presidential Proclamation constitute adoption and acknowledgement of the activities of the IBCP for the purposes of attribution. The IBCP attack on TOL, specifically the actions of hacking into TOL and destroying data, violated the customary prohibition on cybercrimes. The same actions can also be conceptualised as an expropriation of TOL's capacity to fulfil its contractual obligations, necessitating TOL's US$50 million reimbursement of subscribers. Babbage must make reparations for the loss accordingly.

III. Turingia is not responsible for the damage sustained by the BRTA, as it is not responsible for the private actions of Gabrius against the BRTA. While a state may be held responsible for the acts of individuals in a variety of circumstances, none of these are applicable to the instant case. The statement of the Minister cannot amount to prior authorisation for the purposes of attribution, as it does not evidence the requisite degree of association. Nor can the failure to prosecute Gabrius constitute an implicit acknowledgment or adoption so as to make Turingia subsequently liable for his acts. Moreover, the actions of Gabrius do not violate any relevant legal obligation. There is no international prohibition on terrorism, nor can Gabrius' acts fall within established prohibitions such as the use of force or unlawful intervention. In any event, the actions may be viewed as legitimate countermeasures. Even if Turingia were responsible for the actions against the BRTA, this would not extend to liability for the damage sustained in the train collision, such an injury being insufficiently causally related to the initial act.

IV. The subsequent luring of Gabrius to Babbage was in clear breach of the territorial sovereignty of Turingia and as such is contrary to international customary law. Additionally, the luring contravened the customary prohibition on non-intervention in that it constituted a direct interference with Turingia's regulation of its sovereign legal and political affairs. Moreover, the luring was an arbitrary arrest which is in clear violation of Gabrius' human rights. The manner of the arrest qualifies as arbitrary because of the unpredictable, coercive nature of the arrest and its equivalence to forcible abduction. Further, Babbage is estopped from prosecuting Gabrius as it is bound by its prior assurance that it would refrain from doing so, that assurance having the requisite characteristics of a legally binding undertaking. In view of Babbage's wrongful conduct, Babbage is obliged to return Gabrius to Turingia.

I. BABBAGE'S BROAD RESTRICTIONS ON THE INTERNET VIOLATE INTERNATIONAL LAW

A. TURINGIA HAS *JUS STANDI* TO CHALLENGE BABBAGE'S BREACH OF AN INTERNATIONALLY RECOGNISED RIGHT TO FREEDOM OF SPEECH BEFORE THE INTERNATIONAL COURT OF JUSTICE

1. TOL has a right to impart information

Turingia can claim standing on the grounds that TOL, which we must infer is a national of Turingia, has a right to impart the types of information that have been restricted.[1] The TOL server in Turingia provides original content as well as transmitting non-original information.

2. The principles and rules regarding basic human rights are obligations *erga omnes*, thereby giving Turingia standing to intervene

This Court has held principles and rules concerning basic human rights to be obligations *erga omnes*, binding on all states and opposable against any state.[2] The entire international community is obliged to observe and protect human rights and all states have "a legal interest in their protection." Turingia thus has standing to intervene on behalf of a non-national to preserve human rights.

B. BABBAGE'S EXTENSION OF ITS LEGISLATION ONTO THE INTERNET EXCEEDS ITS JURISDICTION

1. The internet is a common space that is not amenable to jurisdiction

Babbage's exercise of jurisdiction over the medium of the internet is unreasonable given it is undefined territory at international law. It is similar to outer-space prior to its regulation.[3] Until a specific regime is formulated, Babbage should not act contrary to accepted

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[1] Promotion and Protection of the Right to Freedom of Opinion and Expression Report of the Special Rapporteur, A. Hussain, Commission on Human Rights, UNECOSOC, E/CN.4/1998/40.

[2] *The Barcelona Traction, Light and Power Co. Case,* (Belg. *v.* Sp.) (1970) ICJ 3 at 32.

[3] M Balsano, "An International Legal Instrument for Cyberspace? A Comparative Analysis with the Law of Outer Space" in Padirac (ed.) *The International Dimensions of Cyberspace Law,* UNESCO (2000) at 128-130.

jurisdictional principles. If this Court were to extend prescriptive jurisdiction into cyberspace, it would be formulating rather than declaring law, contrary to its Statute.[4]

2. In any case, Babbage cannot fulfil any conventional jurisdictional requirements

Any enforcement of Babbage's legislation entails a necessary breach of law, because it is inconsistent with all five conventional principles of prescriptive jurisdiction.[5]

Neither the nationality principle nor the subjective territorial principles apply to publishers in foreign countries. Whilst some effects of the proscribed acts occurred within Babbage, any territorial connection is too oblique for the purposes of the objective territoriality principle. The passive nationality principle is far from accepted at international law and, even if established, the exercise of this would be disproportionate to the gravity of the crime. The acceptance it has gained has been largely confined to terrorism and other internationally condemned crimes.[6] The security principle could not be extended to protect "public morals" without broadening the principle so as to assert jurisdiction over an indeterminate range of offences, especially in the context of the internet. This would undermine state sovereignty.

C. Babbage's legislation is in violation of Article 19 of the International Covenant on Civil and Political Rights

1. Article 18 of the Vienna Convention on the Law of Treaties binds Babbage

Article 19 of the ICCPR protects freedom of expression. Babbage has signed but not ratified the ICCPR. Pursuant to Article 18 of the Vienna Convention, which Babbage has ratified, it may not curtail free expression, so as to defeat the object and purpose of the ICCPR.

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[4] Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, TS 993.

[5] C Blakesley, "Extraterritorial Jurisdiction" in Bassiouni (ed.) *International Criminal Law* (1999).

[6] *S. S Lotus* (Fr *v.* Turk.) (1927) PCIJ (Ser. A) No. 10 p92; *US v Yunis* (No.2) 681 F. Supp 896 (1988) (upheld on appeal).

Violating a seminal right such as freedom of expression, strikes at the object and purpose of any international human rights instrument. Its seminal character has been affirmed in domestic constitutions and by various institutions in the international community, including the United Nations General Assembly (UNGA) which declared it to be "the touchstone of all freedoms to which the United Nations is consecrated.[7] It has been further recognised as underpinning democracy itself.[8]

Here, the breach of Article 19 is so broad as to breach several other rights, including the rights to cultural participation, scientific advancement, and arbitrary interference with correspondence. Such a wide-ranging breach threatens the object and purpose of the ICCPR.

Further, the equivalent of Article 18 obligations at customary law requires parties to do nothing which may diminish the significance of the Treaty's provisions before its entry into force.[9] In restricting Article 19 in such a broad manner, Babbage has done this.

D. FREEDOM OF EXPRESSION IS A RECOGNISED HUMAN RIGHT

The right to freedom of expression, including the rights to receive and impart information "regardless of frontiers", is embodied in both the Universal Declaration of Human Rights and the ICCPR[10]. Customary international law requires the co-existence of "settled" state

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[7] Canadian Charter of Rights and Freedoms; UNESCO, *Report of the Experts' Meeting on Cyberspace Law*, Monte Carlo, Principality of Monaco, 29-30 September 1998, CII-98/CONF.601/CLD.1; UN GAOR, 1st Sess., pt. 2 at 95, UN Doc. A/64/Add. 1 (1947).

[8] *Compulsory Membership Case*, Inter-American Court of Human Rights, Advisory opinion OC-5/85 of Nov. 13, 1985.

[9] *Megalidis v Turkey,* 8 Recueil des Decisions des Tribunaux Mixtes 386 (1928).

[10] Article 19 of the Universal Declaration of Human Rights 1948, GA Res 217A, UN GOAR, 3d Sess, UN Doc A/810 (1948); Article 19 of the International Covenant on Civil and Political Rights, opened for signature 19 Dec 1996, 999 UNTS 171 (the "ICCPR").

practice and *opinio juris.*[11]

The willingness of states to submit to reports by the United Nations Special Rapporteur and the fact that a diverse majority of states provide constitutional protection for freedom of expression also evidences strong *opinio juris* .[12] In addition to its recognition in international human rights instruments, a formidable corpus of regional instruments evidence broad state acceptance of the right to freedom of expression. [13]

E. BABBAGE'S LEGISLATION FALLS OUTSIDE THE REASONABLE LIMITS IMPOSED BY CUSTOMARY INTERNATIONAL LAW

The right to freedom of expression is not absolute, as recognised by the international instruments which restrict it. National and transnational judicial bodies both recognise that it is subject to the requirements of necessity and proportionality.[14]

i. A restriction must be necessary in order to achieve a legitimate purpose.

Babbage restricts material it deems "offensive" and "contrary to public morals". The European Court of Human Rights (ECtHR)has included information that may "offend, shock or disturb the State or any sector of its population" within the category of protected free speech.[15] In dealing with protected speech, Babbage cannot meet the necessity test unless the

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[11] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v.US) (1986) ICJ 14; *North Sea Continental Shelf* (F.R.G. *v.* Den. & Neth.) (1969) ICJ 44 at para 77.

[12] See, for example, 1st Amd of the United States Constitution; Canadian Charter of Rights and Freedoms, Article 29, Constitution of the Federal Republic of Estonia, Article 100.

[13] Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), The American Convention on Human Rights ("ACHR"), the Inter-American Declaration of Principles on Freedom of Expression and Article 9 of the African Charter on Human and People's Rights 21 I.L.M. 59 (1981) (signed June 27, 1981).

[14] ICCPR, supra n10; Human Rights Committee Decisions European Court of Human Rights and the Supreme Court of the United States; *Robert Faurisson v. France*, Communication No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993(1996), para 8.

[15] *Handyside v. UK* 1 EHRR 737 (1979); *Lingens v. Austria* 8 EHRR 407(1986).

restrictions are proportionate to some compelling interest. Notwithstanding Babbage's local conditions, the ECtHR has preferred objective judicial assessment of necessity over subjective state assessments.[16]

ii. A restriction must be proportional to its legitimate objective

To be proportionate, the objective must be achieved by the least intrusive means possible. Babbage's code is unacceptably broad. First, the legislation and the ISP's (Internet Service Provider) 'provider-end' filtering software removes user choice, and in doing so fails to distinguish between adults and children, which it must do.[17] Secondly, it does not make exceptions for material of scientific or artistic value, access to which is a right.[18]

The broad scope and vagueness of "offensive in nature to the public morals" leads to potentially indeterminate liability. In Babbage, this criminal prohibition has had a chilling effect,[19] resulting in private ISPs imposing overly broad filtering restrictions.[20] Both parties agree that sites that are neither pornographic nor defamatory in intent have been blocked. The measures taken by the ISPs are thus a direct consequence of the legislation, and are hence open to this Court's scrutiny.

Less intrusive means of restricting hate-speech and pornography were open to Babbage, such as providing a defence of reasonable compliance. As there can be no justification for restricting scientific material, literature and other non-defamatory material, Babbage must fail the proportionality test.

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[16] *The Sunday Times v United Kingdom* (No.2) 14 EHRR 229 at para 50 (1992).

[17] *ACLU v Reno* 929 F.Supp. 824 at 854, approved in 521 U.S. 844 (S Ct.).

[18] Article 27 of the ICCPR, supra n10.

[19] Section 117(a) of the Babbage Criminal Code.

[20] *Regardless of Frontiers*, Global Internet Liberty Campaign Report, 2001, 27 http://www.cdt.org/gilc/report.html

The restrictions must also be effective in achieving the desired purpose in order to be justified. The very nature of the internet means that blocking software can be circumvented, the information accessed and then disseminated by alternative means. Babbage's law is insufficiently effective to justify the restrictions on valuable material.

For Babbage's limitations to be "prescribed by law", the law must be clear enough for citizens to know with reasonable certainty the likely consequences of a particular action.[21] The vagueness of "offensive in nature to the public morals" prevents this.[22] This law's vagueness chills free expression.

2. The internet's impact justifies minimal restrictions

The ECtHR has recognised that what is an acceptable restriction on free expression varies with different media, and that the medium's "potential impact" is an important factor.[23] The internet is new and unique medium deserving of special protection.[24] Its interactive and pro-democratic character means that it should be subject to less restrictions than other media.[25]

Further, state practice favours minimal state regulation of the internet. This is appropriate as users largely elect the material they view. With the exception of child pornography, many states do not prohibit adult access to pornography in their internet and media legislation. Babbage has acted paternalistically in failing to give its citizens choice where the medium allows it.

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[21] *Sunday Time v. United Kingdom* (1979-1980) 2 EHRR 245 at paragraphs 47-48; *Autronic AG against Switzerland*, Council of Europe-European Commission of Human Rights, Appn No. 12726/87., Reported March 8 1989, para 67.

[22] *ACLU v Reno* supra.

[23] *Jersild v. Denmark*, Series A, no. 298, 19 EHRR 1 (1995).

[24] *ACLU v Reno* 929 F. Supp. 824.

[25] Ibid at 873 and 883.

II. BABBAGE IS RESPONSIBLE FOR THE LOSS SUFFERED BY TOL

Babbage is responsible for an internationally wrongful act, and has a duty to make reparations because the IBCP's hacking is (a) attributable to Babbage and (b) a breach of an international obligation owed by Babbage.[26]

A. THE CLAIM BROUGHT BY TURINGIA FOR THE DAMAGE TO TOL IS ADMISSIBLE

i. Turingia may exercise its right of diplomatic protection of TOL as TOL was (and still is) a national of Turingia at the time of the hacking

Companies may be nationals for the purpose of diplomatic protection.[27] There is a genuine and substantial connection between TOL and Turingia.[28] As a private company based in Turingia, it is likely that its place of incorporation and residency for taxation purposes, its head office and administrative organs are likely to be in Turingia.[29] This close and permanent connection is not weakened by TOL's commercial activities overseas.[30]

ii. There are no available and effective remedies open to TOL in Babbage

It is likely that the requirement that local remedies must be exhausted comes within the jurisdictional waiver. Alternatively, as litigants need only exhaust such remedies as are

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[26] Draft Article 2 of the "Text of the Draft Articles on State Responsibility for Internationally Wrongful Acts" in International Law Commission "Report of the International Law Commission: 53rd Sess. (23 April - 1 June and 2 July – 10 August 2001) UNGA Supplement No. 10 (A/56/10) [the "Draft Articles"]; *United States Diplomatic and Consular Staff in Tehran* (US *v.* Iran) (1980) ICJ 3 at 29

[27] I Brownlie *Principles of Public International Law*, (5th ed., 1998) 425

[28] *The Nottebohm* case (Second Phase) (Lich v. Guat.), (1955) ICJ 4 at 23; *The Barcelona Traction, Light and Power Co.* case, (Belg. v. Sp.) (1970) ICJ 3 at 42.

[29] *Barcelona Traction*, supra n28 at 42.

[30] Ibid. and Special Agreement between the Republic of Turingia (Applicant) and the Republic of Babbage (Respondent) on the differences between them concerning regulation of access to the internet [the "Compromis"] at para 5.

available and effective,[31] TOL has discharged its duty under the rule. There are no laws in force in Babbage dealing specifically with cybercrime. Although a remedy *may* exist in the general law, the transnational nature of the hacking and harm make any such remedy inappropriate.

Further, the Babbagian Proclamation on the IBCP and the readiness of President Revuluri to use his law-making powers regarding the internet are evidence that the Babbagian courts are, in effect, subordinate to the Babbagian executive on this issue. When the prevailing conditions make the courts subordinate to the executive, any domestic remedies are considered to be ineffective.[32]

B. THE ACTIONS OF THE IBCP ARE ATTRIBUTABLE TO BABBAGE

The IBCP's hacking into TOL should be attributed to Babbage as Babbage acknowledged, exploited and adopted the IBCP's acts.

i. The cumulative effect of Babbage's conduct amounts to an adoption of the hacking for which Babbage is responsible.

States may become responsible at customary international law for *acts ex post facto*.[33] Article 11 of the International Law Commission's Draft Articles on State Responsibility ("Draft Articles") recognises that acts of private persons shall be attributed to the state "to the extent that the State acknowledges and adopts the conduct in question as its own".

In this respect there must be more than a mere endorsement or acknowledgement.[34]

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[31] *Norwegian Loans Case* (Fr. *v.* Norway), (1957) ICJ 9; *Finnish Shipowners Arbitration* (Finland *v.* UK), (1934) 3 RIAA 1479 at 1504.

[32] CF Amerasinghe *Local Remedies in International Law* (1990) 196-7 and 242-4; *Browns* claim (1923) RIAA., vi, 120.

[33] Article 11 of the ILC's Draft Articles, supra n26; *United States Diplomatic and Consular Staff in Tehran* (US *v.* Iran) (1980) ICJ [the "Hostages" case] 3; *Lighthouses* arbitration (1956) RIAA, xii 155.

[34] *Hostages*, supra n33 at 30; Article 11 of the ILC's Draft Articles, supra n26.

Babbage expressed its support for the hacking in several ways. After the ICBP had publicly acknowledged responsibility for the hacking, President Revuluri granted them "full amnesty", and expressed Babbage's gratitude to the IBCP. In another unqualified and unequivocal act, the IBCP members were rewarded with Babbagian national honours. These acts, taken in sum, constituted an acknowledgement and adoption of the acts of the IBCP, if not a policy of adoption. The President's statement on 19 December 1999 may have encouraged the commission of acts against TOL. While states may publicly endorse acts without attracting responsibility for them, Babbage went beyond mere support by capitalising on and exploited the hacking for its national benefit. Exploitation, if not a necessary condition, is certainly sufficient.[35]

ii. An act may be adopted after it has been executed.

As recognised in Article 11 of the Draft Articles, states are *deemed responsible* for acts adopted *ex post facto* as if they were involved from the act's inception.[36] Article 11 is not qualified expressly or implicitly by any reference to a "continuous act".

The adoption doctrine must be both legally and logically distinct from authorisation.[37] Article 11 would be rendered redundant if only continuing acts could be adopted, as the rules of authorisation cover such acts from the point of state involvement. It is therefore consistent with the law on state responsibility to find that Babbage has adopted the hacking of the IBCP notwithstanding that the hacking had ended before its adoption.

iii. If a continuing act is required, Babbage's amnesty will apply to IBCP hacking in the future, thereby facilitating such conduct. Thus Babbage has effectively adopted this hacking ex ante.

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[35] See IA Shearer *Starke's International Law* (11th ed., 1994) 275.

[36] Commentary to Draft Article 11, supra n26. See too the *Hostages* case.

[37] Cf. Articles 8 and 11 of the ILC's Draft Articles, supra n26.

On its face, the grant of full amnesty applied not only to the 1999 hacking but to any future hacking committed by the ICBP. In effect, Babbage has thus adopted any such acts *ex ante*.

C. THE IBCP'S ATTACK ON TOL WAS AN INTERNATIONALLY WRONGFUL ACT

1. Babbage has breached the customary international law prohibition against cybercrime

i. There is a prohibition against cybercrime at customary international law.

Since the early 1990s, rapidly evolving state practice has established a customary prohibition on cybercrime. Prohibitions on unlawful access to and/or interference with computer data have now been enacted in at least 38 states.[38] The most recent multilateral development is the Convention on Cybercrime 2001,[39] which has already attracted the signatures of 32 states since being opened for signature in November 2001.[40] The evident willingness of states to rapidly assume international legal obligations in this field is compelling evidence of both the momentum and extent of state practice and convergent *opinio juris*. Such *opinio juris* is also expressed by those transnational institutions that emphasise the need to fight cybercrime.[41]

Although state practice regarding cybercrime is less noticeable outside of developed Western states, the comparative technological ascendancy of the West has simply generated a greater incidence of cybercrime warranting regulation. In this regard, evidence of customary law is properly to be ascertained by reference to those states "specially affected" by cybercrime.[42]

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[38] S Scholberg, "The Legal Framework - Unauthorized Access to Computer Systems: Penal Legislation in 42 Countries", www.mossbyrett.of.no/info/legal/html.

[39] Convention on Cybercrime (ETS No. 185), Budapest, Open for signature 23.11.2001

[40] See http://conventions.coe.int/Treaty/EN/searchsig.asp?NT=185&CM=&DF=

[41] OECD Export Committee Recommendation, 1973; European Commission report on hacking, 2001; Resolution 3 European Ministers of Justice, June 2000.

[42] *North Sea Continental Shelf*, supra n11 at 42-3.

ii. Babbage breached the prohibition against cybercrime

The two activities consistently proscribed in both domestic and international legal provisions on cybercrime are unlawful access to, and interference with, data. These prohibitions therefore represent the irreducible core of customary law.[43] The IBCP breached international law twice by both illegally accessing and deleting TOL's data.[44]

2. The hacking attributed to Babbage was an act of expropriation

Subject to limitations, states have the right to expropriate foreign-owned property at international law.[45] Expropriation encompasses acts that fall short of transferred ownership or possession.[46] Babbage has deprived TOL of its capacity to fulfil its subscription contracts by interfering with its informational assets.

i. The concept of property for expropriation purposes includes contractual rights.

Expropriation has been recognised as extending to "any right which can be the object of a commercial transaction, *i.e.* freely bought and sold, and thus has a monetary value".[47] This definition from *Amoco*, the culmination of the Iran-US Claims Tribunal's jurisprudence on contractual expropriation is widely supported.[48] Babbage has expropriated TOL's contractual rights by interfering with its capacity to fulfil these contracts.

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[43] See, for example, Articles 2 and 4 of the Convention on Cybercrime, supra n39; Article 321-1 to 321-4 French Penal Code; Section 202a, 303a-b German Penal Code; Ch. 426 Electronic Commerce Act (Malta); Section 33 Republic Act 8792 (Philippines).

[44] Compromis, supra 30, at para 14.

[45] Resolution on Permanent Sovereignty over Natural Resources 1962 GA. Res. 1803, GAOR, 17th Sess., Supp. 17, 15; Brownlie, supra n27 at 535.

[46] MN Shaw, *International Law* (4th ed., 1997) 575.

[47] *Amoco International Finance Corp. v. Iran*(1987) 15 Iran-US CTR 189 at para 108.

[48] *Mobil Oil Iran Inc v Iran* (1987) 16 Iran-US CTR. 3 at 25; *Anglo-Iranian Oil Co* case (UK *v.* Iran) (1951) ICJ, 83 as per UK government pleadings; *Starrett Housing Corp. v. Iran* (1984) 23 ILM 1090; *Shufeldt Claim* (US *v.* Guatemala) (1930) 2 RIAA 1083 at 1097.

Alternatively, if the Court considers that contractual expropriation must be contingent on some physical interference, Babbage's deletion of TOL's data was such an interference. TOL was thereby deprived of the ability to honour its contractual obligations.[49]

ii. Measures falling short of direct divestiture qualify as 'expropriations'.[50]

'Constructive expropriation' is widely recognised in case law and state practice.[51] This occurs when the "events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that deprivation was not merely ephemeral".[52] Here TOL was deprived of its informational assets, an interference constituting a taking for the purposes of expropriation because TOL was prevented from enjoying its property.[53] TOL's ability to rebuild its assets from backed-up data does not diminish the interference in any way. The "reality of [the] impact" of the interference and its "effects" on TOL are more important than the government's intent and the form of the interference.[54]

While Babbage expropriated TOL's property in Turingia, the territorial location of expropriation is not determinative. Although expropriation is typically associated with the nationalization context,[55] the same principles must apply to other interferences causing a

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[49] *Starrett Housing*, supra 48.

[50] For example, *Sedco Inc. v. N.I.O.C* (First Interlocutory Award) (1985) 9 Iran-US CTR 248; *Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia* 86 ILR 45.

[51] 1964 *BPIL*, 200.

[52] *Tippetts v TAMS-ATTA* (1985) 6 Iran-US CTR 219 at 225.

[53] Article 10(3)(a) of the 1961 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) 55 *AJIL* 228-59; *Starrett*, supra n48; *Third US Restatement on Foreign Relations Law*, vol II, para. 712.

[54] *Tippetts*, supra n52 at 226

[55] For example, *Starrett* supra n48, *Tippetts* supra n52, *Amoco* supra n47.

deprivation of property. By its nature cyberspace knows no territorial limitations and international law must adapt to this new medium.

iii. Babbage must compensate Turingia for the full market value of TOL's failure to provide consumer services.

Expropriation has always required full market value compensation.[56] Although several UNGA resolutions in the 1960s and 70s refer to a more flexible standard of "appropriate compensation",[57] consideration of the "content and conditions of [their] adoption"[58] reveal their inadequacy as evidence of new customary international law. These resolutions received insufficiently widespread support, especially amongst capital-exporting states, to indicate the emergence of a new standard.[59] Moreover, the act of expropriation in the present case falls outside the ambit of these resolutions, which were intended to apply to the nationalisation of natural resources.[60] On this basis, Babbage must compensate Turingia US$50 million, the full market value of the lost subscription services.

D. TURINGIA IS ENTITLED TO $50M DAMAGES TO COMPENSATE IT FOR THE TOL LOSS

Having breached an international obligation, Babbage has a duty to make reparations which "wipe out all the consequences of the illegal act" and restore the *status quo ante*.[61] But for the hacking, TOL would not have been required to pay out US$50m to its customers.

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[56] *Chorzow Factory* (Indemnity) (Ger. *v.* Pol.)(1928) PCIJ, Ser. A, No.17; *Sedco,* n50; *Amoco,* n47 571-574

[57] GA Resolutions 1803, 3171, 3281.

[58] *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* 35 ILM 809 at 826 (para 70).

[59] See *Texaco v. Libya* (1977) 53 ILR 389 at 488-9; *Sedco* supra n50.

[60] *Sedco*, supra n50 at 634.

[61] *Chorzow Factory,* supra n56; *Spanish Zone in Morocco Claims* (1925) 2 RIAA, ii 615 at 641; Shaw supra n46 at 641.

III. TURINGIA IS NOT RESPONSIBLE FOR THE DAMAGE CAUSED TO BABBAGE RAIL TRANSIT AUTHORITY (BRTA), NOR FOR ANY HARM RESULTING FROM SUCH DAMAGE

A. THE ACTS OF DAVID GABRIUS ARE NOT ATTRIBUTABLE TO BABBAGE

Gabrius is not formally affiliated with the Turingian government. Prima facie, the acts of a private individual are not attributable to the state under international law.[62] Further, Gabrius' conduct cannot be attributed to Babbage.

i. Turingia did not authorise Gabrius' acts

Authorisation requires acts to be done under the instruction, direction or control of the state.[63] The Turingian Minister of Justice's statement on 29 December 1999 did not authorise Gabrius' hacking. It was simply an expression of opinion as to a lack of jurisdiction to prosecute, a point reiterated after the attack.[64] A high degree of association between the state and a private action is required to engage state responsibility.[65] If the heavy US involvement in *Nicaragua* was insufficient in this regard, the general and ambiguous statement of the Minister surely cannot qualify as an authorisation.[66] Even where a variable degree of control has been recognised, "overall control going beyond the mere financing and equipping of such forces" was still required.[67]

Even if the statement is construed as a promise of amnesty, this was limited to acts causing an inconvenience to the government of Babbage, similar to that caused by the IBCP.

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[62] Commentary to Draft Articles, supra n26 at 103.

[63] Article 8 of the ILC's Draft Articles, supra n26..

[64] Compromis, supra 30 at para. 22.

[65] *Nicaragua*, supra n11.

[66] Ibid at paragraphs 106-109.

[67] Ibid at 1546.

The deletion of an entire railroad network's operating system falls outside the scope of any authorisation.

ii. Turingia did not adopt Gabrius' conduct

Turingia's failure to prosecute Gabrius does not amount to acknowledgement and adoption of his conduct as its own.[68] Even if this could be seen as endorsing Gabrius' conduct, this is insufficient to constitute an adoption.[69]Accordingly, Turingia cannot be held responsible for the actions of Gabrius.

B. GABRIUS' CONDUCT DID NOT CONSTITUTE A BREACH OF A RELEVANT INTERNATIONAL OBLIGATION

1. There is no customary international prohibition on terrorism

Whilst certain categories of terrorist activities are the subject of specific conventions,[70] there is neither a comprehensive convention on terrorism *per se* nor even an agreed definition of the term. [71] Significantly, the Statute of the International Criminal Court, which purports to be declaratory of customary international law, does not include terrorism as a discrete international crime.[72]

2. The actions of Gabrius were not an unlawful intervention

According to the principle of non-intervention, no state has the right "to intervene... in the

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[68] Article 11 of the ILC's Draft Articles, supra n26.

[69] The *Hostages* case, supra n33.

[70] For example, the International Convention Against the Taking of Hostages (1979) and the International Convention for the Suppression of Terrorist Bombings (1997).

[71] *Libyan Arab Republic* 726 F.2d 774 (DC Cir 1984).

[72] Article 7(1) of the Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9.

internal or external affairs of any other state".[73] States are prohibited from intervening in matters in which states are deemed to have free choice by virtue of state sovereignty.[74]

The acts directed against the BRTA were aimed neither at "the subordination of the exercise of [Babbage's] sovereign rights" nor the "undermining of its socio-political system".[75] Gabrius' acts do not fall within this prohibition.

i. The actions of Gabrius were not a use of force

Hacking into the BRTA computer network and deleting the operating system cannot be considered a use of force contrary to the prohibition in Article 2(4) of the UN Charter. Their prohibition only embraces the use of armed force against another state.[76] Non-armed acts, such as those of Gabrius, are outside the scope of the rule. The international community equates the use of armed force with acts of aggression, hardly the situation here.[77]

3. However, if the Court were to find the existence of an internationally wrongful act, the wrongfulness is precluded in the circumstances

i. Gabrius' acts constitute a lawful countermeasure

In certain circumstances, a state may take countermeasures against a state that would be unlawful were they not in response to a prior violation by that state.[78] While the Draft

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[73] Declaration on Friendly Relations supra see also Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States (1965) GA Res 2131(XX); *Nicaragua*, supra n11 at para 205.

[74] *Nicaragua,* supra n11 at para 205.

[75] GA Res 39/159 (1984).

[76] Goodrich, Hambro, Simons, *Charter of the UN* (3rd ed., 1969) 49.

[77] See, for example, The Declaration on the Definition of Aggression (GA Res 3314).

[78] *Gabcikovo-Nagymaros Project* (Hung. *v.* Slov.) 1997 ICJ 7 at 55; *Nauililaa* (Port. *v.* Ger.) (1928) 2 RIAA 1011 at 1025-1026; *Air Services Agreement of 27 March 1946* (Fr. *v.* US) (1979) 18 RIAA 416 at 443-446; Articles 22 and 49-54 the ILC's Draft Articles, supra n26.

Articles recognise only non-forcible measures,[79] the ICJ in *Nicaragua* "suggested" that proportionate forcible countermeasures would be available in response to acts involving the use of force.[80] Thus, even if Gabrius' hacking is deemed a "use of force", it is consistent with international law. Alternatively, if lawful countermeasures must be non-forcible, Gabrius' acts do not involve the use of force, in that they fall well short of the terms of Article 2(4) of the UN Charter.[81]

Since Babbage has breached several international obligations owed to Turingia, incuding the obligation to make reparations for a wrong, the preconditions for a lawful countermeasure are satisfied.[82]

Countermeasures must meet the requirement of proportionality to be justified.[83] It has been recognised that countermeasures taken in a similar field to the original act meet the proportionality requirement, even if these have a severe impact.[84] Similar reasoning may be applied to Gabrius' "hacking" which mirrored that of the IBCP. Importantly, the scope of the countermeasure extends only to the loss of automated rail traffic control. As the train collision and casualties were not 'caused' by the acts against the BRTA,[85] they are excluded from any assessment of proportionality.

C. INJURIES NOT CAUSED BY UNLAWFUL ACT

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[79] Article 50 of the ILC's Draft Articles, supra n26.

[80] *Nicaragua*, supra n11 at para. 210.

[81] Supra at page 16, point III.B.2.

[82] See supra, Part B; Articles 31, 49 and 52(3) of the ILC's Draft Articles, supra n26.

[83] Article 51 of the ILC's Draft Articles, supra n26.

[84] *Air Services Agreement of 27 March 1946,* supra n78.

[85] Infra, at page 18, point III.C.

Even if it has committed an international wrong, Turingia is only responsible for the injuries 'caused' by that violation. Causation may be satisfied in respect of damage to the BRTA computer system. In relation to the train collision and loss of life, however, there is no sufficiently direct, foreseeable or proximate relationship between Gabrius' acts and the injury to satisfy the requirements of causation at international law.[86] The crash was the culmination of a number of improbable circumstances.[87] The route was a mountain pass,[88] reducing visual contact between trains and emergency stopping time. Being a heavily used route there was less time to put into proper effect the default radio control system.[89] The absence of any effective fallback mechanism was itself improbable.

The damage and fatalities are sufficiently divorced from the initial "hacking" into the BRTA network so as to be categorised as "too indirect, remote and uncertain"[90] for Turingia to be held causally responsible.

IV. THE LURING OF GABRIUS VIOLATES THE SOVEREIGNTY OF TURINGIA

A. THE LURING OF GABRIUS TO BABBAGE VIOLATES THE TERRITORIAL SOVEREIGNTY OF TURINGIA

i. Extraterritorial criminal enforcement

The exercise of sovereign powers by one state in the territory of another is prohibited at customary international law.[91] In the absence of consent by the asylum state, pursuing

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[86] *Venable Claim* (1927) 4 RIAA 219 at. 225; *Naulilaa c*ase, supra n78 at 1031;

[87] *Nauliaa*, supra n78 at 1031.

[88] Compromis, supra n30 at para. 21.

[89] Ibid at 20.

[90] *Trail Smelter Arbitration* (1938, 1941) 3 RIAA 1095 at 1931.

[91] *S. S Lotus* (Fr *v.* Turk.) 1927 PCIJ (Ser.A) No.10, at 18; 1 *Oppenheim's International Law* (H. Lauterpacht 8th ed 1955) 295.

criminal enforcement measures such as the abduction of a suspect from within the territory of that state clearly contravenes this prohibition.[92]

ii. Male captus bene detentus does not undermine the prohibition

While some states' domestic courts have continued to assert jurisdiction over suspects obtained in breach of international law, states must "justif[y] their conduct by reference to a new right" at international law in order to modify or create exceptions to established customary law.[93] Domestic courts employing the *male captus bene detentus* doctrine have, however, tended to do so on the basis of domestic precedent rather than international law,[94] and have even acknowledged that conduct excused by the doctrine may be contrary to international law.[95] Thus, the *opinio juris* underpinning the customary prohibition on extraterritorial criminal enforcement remains undisturbed by this practice.

iii. Breach of Turingian territorial sovereignty - aeroplane and aircrew

The Ministerial signing of the assurance to Gabrius, the presence of the Babbagian law enforcement officers at the airport, and the hiring of the aircraft and crew by the government implicates senior Babbagian officials in the luring of Gabrius, thus engaging state responsibility for this luring. From the moment of the deceptive assurance, the criminal enforcement operation against Gabrius was effectively a continuous act. The participation of

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[92] P Michell "English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain" (1996) 29 *Cornell Int Law Jnl* 383 at 410; *Legal Opinion on the decision of the US Supreme Court in the Alvarez-Machain case*, Inter-American Judicial Committee (1992) 13 HRLJ 395. V Morris "The Work of the Sixth Committee at the 48th Session of the United Nations General Assembly" (1993) 88 AJIL 343 at 357-8.

[93] *Nicaragua*, supra n11 at para 207.

[94] See, for example, *United States v Alvarez-Machain* 504 US 655 (1992); *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546 per Kirby P.

[95] *Alvarez-Machain* (367 ILR) Rehnquist CJ at 455; *In re Hartnett* (1973) 1 OR 2d 206, 209.

the Babbagian-funded aircrew in this continuous operation ensured that a key element of Babbage's sovereign act was performed both over Turingian airspace[96] and on Turingian soil, thus violating Turingian territorial sovereignty.[97]

iv. Turingia did not consent to the transborder criminal enforcement

There is no breach of territorial sovereignty if the asylum state consents to the relevant transborder criminal enforcement action.[98] Turingian officials were unaware of the purpose of the Babbagian chartered flight and immediately protested on discovering the deception. As such, Turingia cannot be said to have waived the breach.

1. Babbage's unilateral execution of criminal enforcement measures violates the principle of non-intervention

i. Babbage has interferred with Turingia's prosecutorial and political integrity

The principle of non-intervention protects the power of states to make free choices about matters within their sovereign jurisdiction.[99] The pursuit of criminal enforcement measures is a sovereign act.[100] Political integrity is also to be respected at international law.[101] Turingia decided at the highest level of government that it had neither the jurisdiction nor the inclination to prosecute Gabrius.[102] Babbage's luring of Gabrius thus constitutes a direct interference with Turingia's regulation of its sovereign legal and political affairs.

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[96] *Nicaragua*, supra n11 at para 251.

[97] Cf. *Prosecutor v Slavko Dokmanovic, Decision on the Motion for Release by the Accused Slavko Dokmanovic*, No. IT-95-13a-PT, T. Ch. II, 22 October 1997.

[98] Michell supra n3 at 420.

[99] Supra page 15,

[100] Supra page 18.

[101] *Nicaragua*, supra n11 at para 202.

[102] Compromis, supra n30 at paragraphs 19 and 22.

ii. The equivalence of deception and coercion

Although the ICJ in *Nicaragua* referred to an element of coercion within the prohibition against non-intervention, it confined its exposition of principle to those elements necessary to the case before it.[103] The sovereign freedom of state decision-making, the core principle protected by the prohibition,[104] may be imperilled equally by the use of force or fraud. Moreover, unlike consensual extradition processes, unilateral extraterritorial criminal enforcement measures such as abduction or luring inherently interfere in the internal affairs of other states. In fraudulently undermining high-level Turnigian legal and political decisions, Babbage subordinated Turingia's sovereign will in a manner inconsistent with the sovereign equality of states.[105]

B. THE LURING OF GABRIUS VIOLATES HIS HUMAN RIGHTS

1. Babbage was prohibited from arbitrarily arresting Gabrius at international law

Like freedom of expression, the prohibition against arbitrary arrest has crystallised into customary international law,[106] as evidenced by an equally formidable corpus of domestic and transnational human rights instruments.[107] Even if the prohibition is not a part of international custom, it is sufficiently fundamental to the ICCPR that its breach will necessarily entail a breach of Article 18 of the Vienna Convention.[108] Without such a

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[103] *Nicaragua*, supra n11 at para 205.

[104] Idem.

[105] Declaration on Friendly Relations, supra n73.

[106] See supra pages 3-4.

[107] See, for sample, Article 9 of the UDHR, supra n10; Article 9(1) of the ICCPR, supra n10; Article 7 of the ACHR, supra n13; Article 5(1) of the ECHR, supra n13; Article 9 of the Canadian Charter, supra n12; Section 22 of the New Zealand Bill of Rights Act 1990.

[108] See supra pages 2-3.

prohibition, freedom of expression, the rule of law and other incidents of a democracy are substantially undermined.

i. Babbage's arrest of Gabrius was "arbitrary"

Babbage's arrest of Gabrius was arbitrary, and hence contrary to international law, on four separate grounds. First, the arbitrariness criterion encompasses any legal deprivation that is unjust, unpredictable, manifestly unproportional, discriminatory, or inappropriate to the circumstances of the case.[109] It is difficult to imagine an arrest more unpredictable than one following an explicit governmental assurance of immunity.

Second, forcible abduction has been deemed manifestly arbitrary in the case law.[110] Nothing in principle distinguishes luring, as fraudulent inducement "robs the victim of the power of autonomous decision and action as surely as does physical coercion."[111] If viewed in the positive terms of the right to liberty, both luring and abduction deprive an arrested fugitive of the power to exercise that right in autonomous fashion. Thus Luring is 'arbitrary'.

Third, a continuum of coercion has been recognised as informing the prohibition on arbitrary arrest.[112] Unlike situations where police have been given leeway to exploit a criminal's own greed,[113] the Babbagian assurance was coercive in preying on Gabrius' goodwill and feeling of responsibility for the unfortunate events in Babbage. If the use of such 'moral' coercion is deemed consistent with international human rights norms, hackers will only be deterred from providing potentially valuable assistance to governments in the

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[109] *Dokmanovic*, supra n12 at 484; M Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (1993) at 173.

[110] *Dokmanovic*, supra n97 at 487.

[111] *In re Schmidt* [1995] 1 AC at 359 per Sedley J.

[112] *Dokmanovic* n97 at 483; Michell, supra n92 at 490-1.

[113] *Liangsiriprasert v. United States* [1991] 1 AC 225 at 243 (PC).

future. The deterrence of international co-operation is particularly unfortunate in the case of developing nations with simplistic technological infrastructure, like Babbage, who could well benefit from assistance provided by those responsible for any such damage.

Fourth, arrests circumventing established procedures for obtaining custody, such as extradition treaties, have also been deemed manifestly arbitrary.[114] Extradition processes contain important due process safeguards for the accused, and hence have an important human rights dimension.[115] By contrast, unilateral measures such as abduction or luring are completely unconstrained, the very definition of "arbitrary".[116] The absence of an extradition treaty between Babbage and Turingia cannot excuse the employment of unilateral, arbitrary measures.

2. The high court of Babbage breached a further aspect of the right

A necessary coroallary of the right to liberty, recognised in Article 9(4) of the ICCPR, is the right of an accused to get an order for release in the event of an arbitrary arrest. The refusal of the Babbagian high court on appeal to make such an order, despite the prior conduct of the criminal enforcement authorities, thus constitutes an independent breach of customary international law.

C. BABBAGE WAS ESTOPPED FROM PROSECUTING GABRIUS

1. Babbage may not resile from its legal undertaking

The ICJ has recognised the power of states to bind themselves to a course of conduct via unilateral undertakings.[117] To be legally effective, the undertaking must be given publicly,

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[114] *Dokmanovic*, supra n97 at 487; Nowak, supra n109 at 173.

[115] Michell, supra n92 at 437-8.

[116] Miriam-Webster's Collegiate Dictionary, www.m-w.com/cgi-bin/dictionary.

[117] *Nuclear Tests* case (Fr. *v.* N.Z., Austr.) (1974) ICJ 253 at para 43. *Nicaragua*, supra n11, para 259.

with an intention to be bound.[118] The intent behind an alleged undertaking must be assessed in the context of the principle of good faith, with the trust and confidence inherent in international co-operation implying that interested states may place confidence in unilateral declarations.[119] Ultimately, the substance and context of such statements determines their legal effect.[120]

i. Babbage was bound by its undertaking not to prosecute or harm Gabrius

The statement was publicly made by a Minister competent to speak for the Babbagian government on prosecutorial matters.[121] Even if Babbage never intended to be bound by its assurance, the unambiguous content of the statement is determinative. There was no reason for Gabrius to doubt the sincerity of the plea for assistance. In accordance with the principle of good faith, Babbage must be held to its public undertaking.

Although deemed unnecessary in the *Nuclear Tests* case,[122] any requirement for a valid offer and acceptance[123] would be satisfied on the facts. Gabrius clearly offered his services by way of consideration for the promise of immunity.

D. BABBAGE IS OBLIGED TO RESTORE GABRIUS TO TURINGIA

1. Babbage is obliged at international law to return Gabrius to Turingia

International law prescribes that the injured state should be returned to the *status quo ante* following a breach so as to "re-establish the situation which would...have existed if that act

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[118] *Nuclear Tests* case, supra n117 at para 43.

[119] Ibid. at para 46.

[120] Ibid. at para 51.

[121] Compromis, supra 30 at para 23. See *Nuclear Tests Case*, supra n117 at para 49.

[122] *Nuclear Tests Case*, supra n117 at para 43.

[123] See *Nicaragua*, supra n11 at para 261.

had not been committed."[124] An application of the preference expressed in *Chorzow Factory* for "[r]estitution in kind"[125] demands that Babbage return Gabrius, arrested in breach of Turingian sovereignty and Gabrius' human rights, to Turingia. The return of Gabrius would also be consistent with state practice in cases of illegal rendition.[126] Turingia's immediate protest also dispenses with any question of waiver of a claim to reconduction.[127]

CONCLUSION

Turingia respectfully asks this Court to declare and adjudge that:

1. Babbage's broad restrictions on access to Internet-available resources, its extension of its criminal code onto the Internet, and its application of the code to Turingia OnLine and Babbage Online, violate international law.
2. Babbage is responsible for the loss suffered by Turingia Online and is liable to pay damages in the sum of US$50 million.
3. Turingia is not responsible for the damage caused to the Babbage Rail Transit Authority or for any harm resulting from the such damage, in particular the train crash resulting in loss of life.
4. Babbage's luring, arrest, trial and conviction of Turingian citizen, David Garbrius violated international law.
5. David Gabrius must immediately be released and repatriated.

Respectfully submitted, Agents for Turingia.

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[124] *Chorzow Factory,* supra n56. See also *Texaco v Libyan Arab Republic*, supra n59 and Michell, supra n92 at 419.

[125] *Chorzow Factory*, supra n56 at 419.

[126] See Michell, supra n92 at 424-7 and accompanying footnotes.

[127] See I Brownlie, supra n 27 at 31; Michell, supra n92 at 420-427; Compromis, supra n 30 at para 25.