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 – RESPONDENT

First Place
Richard R. Baxter Award

Harvard Law School
United States (Team #881)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

International Treaties and Instruments

U.N. Resolutions and Documents

International Cases

National and Municipal Cases

National Statutes

Works of Publicists

Books and Treatises

Articles

Darrel Menthe, Jurisdiction in Cyberspace, 4 Mich. Telecomm. Tech. L. Rev. 69 (1998) 6

David Johnson & David Post, Law and Borders – The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367 (1996) 5

F.A. Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law 24

Hurst Hannum, The Status and Future of the Customary International Law of Human Rights, 25 Ga. J. Int'l & Comp. L. 287 (1996) 4

Jack Goldsmith, Against Cyberanarchy, 65 U. Chi. L. Rev. 1199 (1998) 8

Jan Klabbus, How to Defeat a Treaty's Object and Purpose Pending Entry Into Force: Toward Manifest Intent, 34 Vand. J. Transnat'l L. 283 (2001) 3

Jimmy Gurule, Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad, 14 Hastings Int'l & Comp. L. Rev. 457 (1994) 23

M. Cherif Bassiouni, Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition, 7 Vand. J. Transnat'l L. 25, 45 (1973) 22

Malvina Halberstam, International Kidnapping: In the Defense of the Supreme Court Decision in Alvarez-Machain, 86 Am. J. Int'l L. 736 (1992) 23

Margaret Bratt & Norbert Kugele, Who's in Charge?, 80 Mich. B.J. 42 (2001) 8

Melanie Laflin, Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options, 26 J. Legis. 315 (2000) 19

Michael Scharf, The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal, 49 DePaul L. Rev. 925 (2000) 20, 24

Robert Goldschmind, Promoting Equality in the Information Age: Dealing With Internet Hate .. 9

Sanjay Mody, National Cyberspace Regulation: Unbundling the Concept of Jurisdiction, 37 Stan. J. Int'l L. 365 (2001) 7

Stephan Wilske & Teresa Schiller, International Jurisdiction in Cyberspace: Which States May Regulate the Internet?, 50 Fed. Comm. L.J. 117 (1997) 7

Stephan Wilske & Teresa Schiller, Jurisdiction Over Persons Abducted in Violation of International Law in the Aftermath of U.S. v. Machain, 5 U. Chi. L. Sch. Roundtable 205 (1998) 21, 22

Viktor Mayer-Schonberger & Teree Foster, A Regulatory Web: Free Speech and the Global Information Infrastructure, 3 Mich. Telecomm. Tech. L. Rev. 45 (1997) 4

STATEMENT OF JURISDICTION

In accordance with Article 40(1) of the Statute of the International Court of Justice, the Republic of Turingia and the Republic of Babbage have submitted a special agreement to this Court for the settlement of all differences concerning regulation of access to the Internet. Pursuant to Article 36(1) of the Statute, this Court has jurisdiction over such disputes referred to it by the parties. Both parties have agreed to waive any objection to this Court's jurisdiction.

QUESTIONS PRESENTED

1. Does Turingia have *locus standi* to challenge the application of Babbage Criminal Code Section 117 and Presidential Declaration 901 to BOL? Have Babbage's criminal provisions violated any treaty or customary obligation in relation to the freedom of expression?
2. Is the application of these criminal provisions to BOL and TOL justified under international law rules of jurisdiction?
3. Is there state responsibility on the part of Babbage for the private acts of the IBCP? Is there state responsibility on behalf of Turingia by adopting the acts of David Gabrius or in failing to prevent his acts of cyberterrorism from arising within their territory?
4. Is there any customary norm that precludes the exercise of jurisdiction over David Gabrius in relation to the method of his arrest? Can jurisdiction be based upon the severe nature of the crime and/or the failure of Turingia to either extradite or prosecute David Gabrius to Babbage?

STATEMENT OF FACTS

The Republic of Babbage is a landlocked, developing state with a population of 10 million. Its population is ethnically and religiously diverse; 20 percent of its people are adherents of the Hortari religion. Since freeing itself from foreign subjugation in 1945, Babbage has struggled to overcome the twin historical legacies of colonialism and religious conflict. Democratic elections in 1993 ushered in a new era of ethnic and religious amity and signaled a renewed commitment to economic development. Babbage's broad-based coalition government has invested heavily in upgrading the country's basic infrastructure, realizing especially dramatic improvements in transportation and communications.[1] The Republic of Turingia is a wealthy, developed state with a population of 200 million.[2] Both Babbage and Turingia are party to the Charter of the United Nations, the Statute of the International Court of Justice, and the Vienna Convention on the Law of Treaties. Turingia is party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights; Babbage is a signatory to both Covenants but not ratified either.[3]

Since 1998, Babbage's citizens have been able to access the Internet and are free to choose between a number of local and multinational Internet service-providers (ISPs). While recognizing the Internet's myriad benefits, the Government of Babbage is aware that the Internet can also be a vehicle for distributing pornography and propagating hate speech aimed at inflaming ethnic and religious tensions. The latter threat is of particular immediacy to Babbage,

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[1] Compromis at ¶ 2.

[2] Compromis at ¶ 1.

[3] Compromis at ¶ 31.

whose history has been marred by ethnic and religious conflict.[4] Babbage's commitment to ethnic and religious tolerance is enshrined in Section 117 of its criminal code, which bans the publication of indecent material.[5]

In September 1999, in response to a growing number of overseas websites featuring pornographic content and hate speech directed at the country's Hortari minority, the President of Babbage issued a Proclamation extending Section 117 of its criminal code to materials published on the Internet.[6] ISPs operating in Babbage were requested to install blocking software capable of preventing local users from accessing pornographic or hate speech websites. Only Babbage OnLine (BOL), the wholly-owned local subsidiary of Turingia OnLine (TOL) and the country's dominant ISP, failed to comply with the Proclamation. Displaying little regard for Babbage's tragic history and the concerns of the Babbagian government, TOL refused to install blocking software of any kind.[7]

In response to TOL's disregard for Babbagian law, the Babbage Ministry of Justice brought charges against TOL. After a trial judged fair by all participants, TOL and BOL were found guilty of violating Section 177 of the criminal code. TOL and BOL were fined, and TOL's license to operate an ISP was revoked.[8] TOL refused to participate in the trial and spirited all of BOL's physical assets out of the country, preventing Ministry officials from enforcing the

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[4] Compromis at ¶ 2.

[5] Compromis at ¶ 4.

[6] Compromis at ¶ 6.

[7] Compromis at ¶ 8.

[8] Compromis at ¶ 11.

judgment.[9]

On December 24, 1999, the International Babbagian Cyber-Patrol, a group of computer programmers who oppose pornography and hate speech, gained access to TOL's computer system, erasing data and temporarily disrupting TOL's Internet service business.[10] A message implanted in the TOL system suggested that the attack had been provoked by TOL's refusal to eliminate hate speech on its websites. The Government of Babbage conferred an Order of Merit to members of the IBCP and decided not to prosecute those members of the IBCP who had participated in these acts.[11]

At a press conference immediately after the TOL disruptions, the Turingian Minster of Justice blamed the Government of Babbage and called upon Turingian computer pirates to attack Babbage's fledgling information technology infrastructure.[12] David Gabrius, a prominent Turingian hacker and political agitator attacked the computer system of the Babbage Rail Transit Authority (BRTA), crippling the railway's traffic control system. In the chaos following the attack two passenger trains collided, killing more than 200 people.[13] Despite the scale of the atrocity, Turingia stubbornly refused to prosecute Gabrius. BRTA officials invited Gabrius to come to Babbage to assist in efforts to repair the damaged rail system. Gabrius agreed, and on February 1, 2000 was arrested in Babbage and charged with murder.[14] After a year-long trial and

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[9] Compromis at ¶ 12.

[10] Compromis at ¶ 16-17.

[11] Compromis at ¶ 18.

[12] Compromis at ¶ 19.

[13] Compromis at ¶ 21.

[14] Compromis at ¶ 24.

an appeal to Babbage's highest court, Gabrius was found guilty of murder and sentenced to 20 years in prison.

In September 2001 Babbage and Turingia agreed to bring their dispute before the International Court of Justice and agreed to accept the decision of the Court as binding between them. On November 1, 2001 the Ambassadors of the Republic of Babbage and the Republic of Turingia at The Hague transmitted to the Register of the Court a joint Compromis agreeing to the stipulated facts of the dispute and confirming the Court's jurisdiction pursuant to Article 40 of the ICJ Statute.

SUMMARY OF PLEADINGS

The Case Concerning Regulation of Access to the Internet involves questions of freedom of expression, the international legal rules relating to prescriptive jurisdiction, intricate questions of state responsibility for acts of private individuals and groups, and the exercise of criminal jurisdiction over lured individuals.

First, it is argued that Babbage's Internet regulations over hate speech and pornography and their application to BOL and TOL are consistent with international law since there is no violation of any international legal rule relating to freedom of expression or jurisdiction. As to the freedom of expression, there is no breach of any applicable treaty obligation as Babbage has not ratified the ICCPR has not performed acts that would defeat the object and purpose of the treaty. Further, there is no customary norm relating to the freedom of expression because of the lack of consistent state practice. Even if there were such a norm, the Internet regulations are a legitimate restriction based on internationally recognized grounds.

With respect to regulation over TOL, the application of Babbage's law can be justified on the grounds of territoriality as the regulated conduct involved the transmission of information via TOL to computers within Babbage to users physically located within Babbage. Further, jurisdiction can also be based upon the "effects" doctrine, which is now an internationally permissible basis of jurisdiction. Further, subjective and vague considerations of Internet policy interests and balancing tests should not infect the analysis of the international legal question of whether jurisdiction can be asserted. Finally, it is argued that the restrictions involved in the present case do not present a threat to the international order as they are country-specific and have been successfully implemented by other ISPs.

In relation to state responsibility, Babbage argues that Turingia is responsible for the attack on the BRTA and that reparations should be made. This responsibility arises out of the

attribution of the acts of David Gabrius to Turingia under international law. First, there was a failure to take reasonable measures in a situation where wrongful conduct was likely to occur, as Turingia had intentionally incited its citizens to inflict harm upon Babbage. Further, there was a failure to exercise due diligence to prosecute David Gabrius, who was subsequently even granted an amnesty despite the grave character of his crimes. Moreover, there is a failure in taking preventive measures to stop terrorist acts from arising in a State's territory. All three of these grounds result in the attribution of David Gabrius's acts to the Republic of Turningia under international legal rules relating to state responsibility. Finally, the arguments of self-defense and countermeasures do not preclude Turingia's international responsibility.

On the contrary, Babbage is not liable for the acts of the International Babbagian Cyber-Patrol (IBCP) and their attack on the computer system of Turingia OnLine (TOL). As a procedural matter, there has been no exhaustion of local remedies in the courts of Babbage, which means that the case cannot properly be brought before this Court. Further, no state responsibility attaches to Babbage since it did not exercise control over the IBCP and did not transform the nature of the acts by merely conferring on them an Order of Merit. In addition, governmental authority was not exercised on behalf of Babbage by IBCP.

In relation to the arrest and conviction of David Gabrius, there is no customary international law rule that vitiates jurisdiction notwithstanding a luring of the accused. Further, the luring and subsequent exercise of jurisdiction is justified on the basis of Turingia's abuse of territorial sovereignty by shielding David Gabrius from international responsibility that is relevant in light of the recent terrorist events in the United States. Lastly, it is argued that the grave character of the crime committed can also justify jurisdiction on the basis of the "Eichmann exception".

PLEADINGS

I. BABBAGE'S CRIMINAL CODE PROVISIONS AND THEIR APPLICATION TO TOL AND BOL ARE CONSISTENT WITH INTERNATIONAL LAW

A. Matters of interpretation of domestic laws cannot be revisited by this Court

It is a general principle of international law that an interpretation of domestic laws by a national tribunal is binding on an international tribunal.[15] As such, determinations on exclusively domestic matters under Section 117 and Presidential Declaration 901 such as (i) the fact that an ISP qualifies as a "publisher" or "distributor" and (ii) that the regulated material qualifies as "Indecent Material" are outside the scope of challenge before this Court.

B. Turingia lacks the locus standi to question the application of Section 117 to BOL

A state that puts forward a claim before an international tribunal must show that it has the *locus standi* for that purpose.[16] Where the injury involves a private individual the State must show that the person concerned is its national.[17] As BOL's nationality is determined by the place of its incorporation, BOL is a national of Babbage and thus Turingia lacks *locus standi* to challenge the application of Section 117 to BOL unless some exception applies.[18] Although the right of diplomatic protection does not generally vest in the State of the shareholders' nationality,[19] some suggest that there is an exception to this rule where the right of diplomatic

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[15] Serbian Loans (Fr. v. Serb.), 1929 P.C.I.J. (ser. A), Nos. 20-21, at 46; Fisheries (U.K. v. Nor.), 1951 I.C.J. 181 (separate opinion of Judge McNair); and Nottebohm Case (Second Phase) (Liech. v. Guat.), 1955 I.C.J. 28-29. See also Ian Brownlie, Principles of Public International Law 40 (1998).

[16] Oppenheim's International Law ¶ 150 (Robert Jennings & Arthur Watts, eds.) (1992).

[17] Mavrommatis Palestine Concessions (Greece v. U.K.) 1924 P.C.I.J. (ser. A), No. 2, at 12; Panevezs-Saldutiskis Railway (Est. v Lith.), 1939 P.C.I.J. (ser. A/B), No. 76, at 17.

[18] Barcelona Traction, (Belg. v. Spain), 1970 I.C.J. 3, 42.

[19] Id. at 38-39.

protection vests in the State of the shareholders where the nationality of the injuring State and the corporation coincides. This should be rejected since (i) there is judicial authority against this exception;[20] (ii) allowing it would also tarnish the integrity of the original holding in Barcelona Traction,[21] and (iii) it ignores the traditional rule that a State is not guilty of a breach of international law for injuring one of its own nationals.[22] If such a doctrine exists (which is denied) it may well be restricted to claims where bad faith is evident on behalf of the injuring state. That is not the case here as the application of Section 117 was a legitimate exercise of national regulatory power by Babbage to protect its citizens and interests.

C. TOL's non-appearance its trial does not affect the validity of the judgment against it

Under Article 14(3)(d) of the ICCPR, a person accused of a crime has the right to be tried in their presence.[23] Apart from the fact that the ICCPR does not bind Babbage, under international law a trial *in absentia* (as in the case of TOL) is permitted provided that notice of the trial has been given sufficiently in advance and the accused declines, and thereby waives, the right to be heard.[24] As TOL did precisely this, the imposition of criminal liability on them notwithstanding their non-appearance is justified.

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[20] Id. (Separate opinions of Judges Morelli, Padilla Nervo, and Ammoun); Elettronica Sicula S.p. A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 83. (separate opinion of Judge Oda).

[21] Brownlie, supra note 15, at 495.

[22] Barcelona Traction, supra note 18 (separate opinion of Judge Jessup).

[23] International Covenant on Civil and Political Rights, U.N. Doc. A/6316, 999 U.N.T.S. 171 (1976), at art. 13(3)(d) [hereinafter ICCPR].

[24] See David Weissbrodt The Right to a Fair Trial 134 (2001). See also Mbenge v. Zaire, Comm'n 16 (1977), U.N. Doc. A/38/40 (1983), at 134; Gomez de Voituret v Uruguay, Comm' n 109 (1981), U.N. Doc. A/39/40 (1984), at 164.

D. Section 117 of the Babbage Criminal Code Does Not Violate Any Applicable Treaty Obligation In Relation to the Freedom of Expression

Babbage has not ratified either the ICCPR or the IESCR and is therefore not bound by their strict terms relating to the freedom of expression.[25] The only applicable treaty obligation under the Vienna Convention is to refrain from acts that would defeat the object and purpose of the treaties.[26] This exceptionally broad duty has never been successfully invoked before this Court or its predecessor and should not be invoked here.[27] In fact, there are many examples of States who are even parties to the ICCPR who have laws requiring ISPs to remove objectionable materials on public interest grounds.[28] In any event, Section 117 actually supports the object and purpose of both treaties by respecting basic principles of "human decency" and "dignity" by regulating pornography and hate speech.[29]

E. Section 117 Does Not Violate any Customary Norm Relating to Freedom of Expression

1. There no customary norm relating to freedom of expression

A rule of customary international law is only formed upon constant, consistent, and uniform state practice together with *opinio juris sive necessitas*.[30] It is difficult to conclude that the

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[25] See Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969), at art. 14 [hereinafter Vienna Convention]. See also ICCPR, supra note 23, at art. 48(2); International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/6316, 993 U.N.T.S. 3 (1976), at art. 26(2) [hereinafter ICESCR].

[26] Vienna Convention, supra note 25, at art. 18.

[27] Jan Klabbus, How to Defeat a Treaty's Object and Purpose Pending Entry Into Force: Toward Manifest Intent, 34 Vand. J. Transnat'l L. 283, 296-298 (2001).

[28] See, e.g., Broadcasting Services Amendment (Online Services) Act, 1999 (Austl.); Information and Communication Services Act, 1997, art. 1(5) (F.R.G.).

[29] See ICCPR, pmbl.; ICESCR, pmbl. See also Universal Declaration on Human Rights, U.N. Doc. A/810 (1948), at art. 1.

[30] See generally North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.) 1969 I.C.J. 3.

freedom of expression has reached this status because of divergent State practice and the existence of broad qualifications to the right.[31] National court decisions affirm the absence of "a body of law that establishes international standards with respect to speech on the Internet."[32]

2. Even if such norm exists, Section 117 is a justified restriction on the freedom of expression

Freedom of expression is not absolute and may be restricted on such grounds as "national security", "*ordre public*" or "the protection of health and morals."[33] The underlying purposes of preserving public morality and protecting social cohesion are accepted by parties to the ICCPR as legitimate restrictions on the freedom of expression. For example, the Draft Convention of Cybercrime has been proposed by the Council of Europe to control certain types of pornography on the Internet.[34] Further, under Articles 86 and 131 of the German Constitution, the Austrian Prohibition Act, and the Canadian Criminal Code, the dissemination of hate speech is prohibited.[35] Many other governments regulate or filter electronic communications that cross their territorial borders, even if such filters are not be technologically perfect, as in the present case.[36] In fact, under international law Babbage may not only have a right to restrict hate speech

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[31] Hurst Hannum, The Status and Future of the Customary International Law of Human Rights, 25 Ga. J. Int'l & Comp. L. 287, 298 (1996).

[32] Yahoo! Inc. v. La Ligue Contre Le Racisme et L'antisemitsme, 181 F.Supp.2d 1181, 1193 (N.D. Cal. 2001).

[33] ICCPR, at art. 19(3)(b); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 as amended by Protocol No. 11 (1998), at art. 10(2) (entry into force Nov. 21 1970) [hereinafter ECHR].

[34] Council of Europe Draft Convention on Cybercrime (2000), at art. 5.

[35] Criminal Code, R.S.C., ch. 33, 1976-1977, Ch. 33, §13(1) (1976-1977) (Can.). See generally Viktor Mayer-Schonberger & Teree Foster, A Regulatory Web: Free Speech and the Global Information Infrastructure, 3 Mich. Telecomm. Tech. L. Rev. 45 (1997).

but also a duty to so, as our case is akin to the situation in Rwanda where international law prohibited the use of hate speech to perpetuate violence and grave violation of human rights.[37] Equally, in light of its dark history of 500,000 Hortari mass killings, Babbage seeks to fulfill its international obligations by preventing hate speech from creating similar atrocities.

F. Extraterritorial jurisdiction over TOL is justified under international law

1. Jurisdiction over TOL is justified under the territoriality principle of jurisdiction

It is a basic rule of international law that a State has jurisdiction over all persons and things that are within its territory.[38] Jurisdiction is allowed where offenses are culminated within the State even if not begun there, or if a "constituent element" of the offense took place in the regulating State.[39] Therefore, the fact that TOL and its servers were physically located in Turingia does not preclude Babbage from exercising jurisdiction, as a "constituent element" of the offense under Section 117 involves the transmission of information via TOL to computers within Babbage to users physically located within Babbage being able to access infringing websites. This territorial approach has been adopted in a numerous decisions in the U.S. and in the well-known French Yahoo! Case, all of which affirm that the accessibility of a website alone

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[36] David Johnson & David Post, Law and Borders – The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367, 1371 (1996). But see Reno v. ACLU, 521 U.S. 844 (1997); Credence Fogo-Schensul, More than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms, 33 Gonz. L. Rev. 241 (1997).

[37] Alexander Dale, Countering Hate Messages That Lead To Violence: The United Nation's Chapter VII Authority To Use Radio Jamming To Halt Incendiary Broadcasts, 11 Duke J. Comp. & Int'l L. 109 (2001); William Schabas, Hate Speech in Rwanda: The Road to Genocide, 46 McGill L.J. 141 (2000)

[38] Oppenheim's International Law, supra note 16, at ¶ 137.

[39] The Case of the S.S. Lotus, 1927 P.C.I.J. (ser. A), No. 10, at 23 [hereinafter Lotus Case].

is a sufficient basis for jurisdiction.[40] Therefore, as a matter of territorial sovereignty, Babbage has jurisdiction over TOL.

2. Jurisdiction over TOL is also justified under the effects principle of jurisdiction

Under this principle, a State may prescribe rules for conduct outside of its territory that has substantial effect within its territory.[41] Babbage is entitled to jurisdiction over TOL as the activity subject to regulation has the severe effects of damaging the public morality and social cohesion within Babbage's territory. Where a State such as Babbage is particularly affected by the action to be regulated, there is a strong case for jurisdiction.[42]As a matter of international law, the effects principle is well established. In the Lotus Case, the PCIJ held that in relation to extraterritorial regulation States have a "wide measure of discretion" and that offences may be regulated if "one of the constituent elements of the offence, and more especially its effects" is felt within the regulating State.[43] Further, the "effects" doctrine is entrenched under the laws of the United States,[44] of more than ten nations of the EU,[45] and of Canada and Japan.[46] Most of the

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[40] See U.S. v. Thomas, 74 F.3d 701, 705 (6th Cir. 1996); Resuscitation Tech. Inc. v. Continental Health Care Corp., 1997 US. Dist. LEXIS 3523; California Software Inc. v. Reliability Research Inc., 631 F. Supp. 1356 (C.D. Cal. 1996); Heroes Inc. v. Heroes Foundation, 958 F.Supp. 1 (D.D.C. 1996); Inset Systems Inc. Instruction Set., 937 F. Supp. 161 (D. Conn. 1996); Maritz Inc. v. Cybergold Inc., 947 F. Supp. 1328 (E.D. Mo. 1996); Licra et UEJF v Yahoo! Inc & Yahoo! France, Superior Court of Paris, 22 May 2000.

[41] See Restatement (Third) of the Foreign Relations Law of the United States §402(1)(c) (1987).

[42] Darrel Menthe, Jurisdiction in Cyberspace, 4 Mich. Telecomm. Tech. L. Rev. 69 (1998).

[43] Lotus Case, 1927 P.C.I.J. at 23. See also William Dodge, Understanding the Presumption Against Extraterritoriality, 16 Berk. J. Int'l L. 85, 113-114 (1998).

[44] See Hartford Fire Insurance Co. v California, 509 U.S. 764 (1993); U.S. v. Aluminum Co. of America, 148 F. 2d 41 (2d. Cir. 1945); US v Nippon Paper Industrial Co., 109 F. 3d 1 (1st Cir. 1997).

criticism of the "effects" doctrine is outdated by at least 40 years and focused on excessive application rather than the integrity of the rule itself.[47] Traditionally associated with antitrust law, its application extends to numerous other contexts (including tax, employment, and criminal law) and therefore there is no reason why the "effects" doctrine cannot be applied for a State to regulate a foreign ISP.[48]

3. The balancing of interests is not required for jurisdiction under international law

The additional hurdle of establishing that jurisdiction is "reasonable" or favorable on a "balance of interests" has been proposed by the American Law Institute but has been uniformly rejected by the international community as a specifically American doctrine that uncertainty in the law and is "unhelpfully vague."[49] As such, the requirements proposed therein relating to reasonableness, including (i) notice of regulation; and (ii) evaluation of competing interests in the case of concurrent jurisdiction, are inapplicable to our case. Therefore, the assertion that the nature of the Internet prevents an ISP knowing *ex ante* where its transmissions will cause local harms is not relevant to the question of whether international law permits jurisdiction over a foreign ISP—in any event, both BOL and TOL had express notice by virtue of Presidential

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[45] Grossfillex-Fillistorf, (1964) 3 CMLR 237; Aniline Dyes Cartel, (1969) 8 CMLR 23; Imperial Chemical Industries v Commission, [1972] ECR 619; Woodpulp Case, [1988] ECR 5193; Re the LdPE Cartel, 1989 OJ (L 74) 21.

[46] See Restatement, supra note 41, at 403.

[47] Stephan Wilske & Teresa Schiller, International Jurisdiction in Cyberspace: Which States May Regulate the Internet?, 50 Fed. Comm. L.J. 117, 132 (1997).

[48] Sanjay Mody, National Cyberspace Regulation: Unbundling the Concept of Jurisdiction, 37 Stan. J. Int'l L. 365, 371-377 (2001).

[49] See Restatement, supra note 41, at 403(2). But see Brownlie, supra note 15, at 381.

Declaration 901 of their non-compliance with Section 117.[50] With respect to concurrent jurisdiction, since jurisdiction need not be exclusive, the fact that multiple States (including Babbage) may exercise regulatory authority over foreign ISPs does not in itself render such authority illegitimate.[51] Under international law, there are numerous activities such as transborder pollution, consumer protection regulation of transnational contracts, and international drug activities where multiple States permissibly exercise jurisdiction.[52]. Babbage's regulation of TOL is equally legitimate.

4. State practice supports Babbage's assertion of jurisdiction over a foreign ISP

In the French Yahoo! Case,[53] the Court held that French law required Yahoo! Inc. to take all measures necessary to remove access to Nazi related material from its websites. This was the case notwithstanding the fact that Yahoo!'s services were aimed principally toward U.S. users, its servers were located in the U.S., and that such measures would violate the First Amendment of the U.S. Constitution.[54] It asserted jurisdiction on the basis of (i) the ability of its citizens to access such websites in France and (ii) the detrimental effects the material had within France. Equally, Babbage may also legislate on these grounds over TOL.

Further, in the CompuServe case, the Bavarian Justice Ministry required CompuServe (a U.S. ISP) to block all access to discussion groups that violated German anti-pornography laws, notwithstanding the fact that CompuServe users worldwide would be denied access. Since in the

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[50] Jack Goldsmith, Against Cyberanarchy, 65 U. Chi. L. Rev. 1199, 1243-44 (1998); Compromis, at ¶ 6-8.

[51] Brownlie, supra note 15, at 314.

[52] Goldsmith, supra note 50, at 1240.

[53] Licra et UEJF v Yahoo! Inc & Yahoo! France, Superior Court of Paris, 22 May 2000.

[54] Margaret Bratt & Norbert Kugele, Who's in Charge?, 80 Mich. B.J. 42, 44 (2001).

present case, the relevant blocking software specifically targets users within Babbage and was successfully implemented by all other Babbage ISPs, it follows that the concern that ISPs will effectively be regulated by the "most restrictive State" is not relevant.[55] In the telecommunications context, in the LibertyNet case the Supreme Court of Canada asserted jurisdiction notwithstanding the fact that hate speech emanated from outside Canada since the reception of the hate speech was in Canada.[56] In relation to the Internet, the Court would have jurisdiction notwithstanding the fact that the information was transmitted from abroad or was hosted on an overseas server.[57]

5. Jurisdiction over TOL relating to hate speech is justified under the protective principle

The protective principle permits a State to grant extraterritorial effect to legislation criminalizing conduct that is detrimental to national security, political independence, or other State interests.[58] If states are entitled to legislate extraterritorially under the protective principle against activities such as violation of immigration policies[59] and the foreign supply of narcotics,[60] Babbage is equally entitled to protect itself from hate speech disseminated on the Internet which has the potential to damage the political viability of Babbage in light of its unique

[55] Compromis at ¶ 7.

[56] See Canada (Human Rights Commission) v. Canadian LibertyNet, [1998] 1 SCR 626.

[57] See Robert Goldschmind, Promoting Equality in the Information Age: Dealing With Internet Hate, at 72, at http://www.cjc.ca/pdf/10bc.pdf.

[58] Iain Cameron, The Protective Principle of International Criminal Law 2-3 (1994). See also Harvard Draft Convention on Jurisdiction with Respect to Crime, 25 Am. J.Int'l L. Supp. 439 (1935), at art. 7-8.

[59] See Naim-Molan v AG for Palestine [1948] AC 351, 370-1; Rocha v. U.S. 32 I.L.R. 112 (1960)

[60] See Universal Jurisdiction over Drug Offences I.L.R. 74, 166 (1976); U.S. v Gonzalez, 80 Am. J. Int'l L. 653, 655 (1986).

history.

II. THE REPUBLIC OF BABBAGE IS NOT LIABLE FOR ANY INJURY TO TOL

A. TOL has not exhausted local remedies

Exhaustion of local remedies is normally a prerequisite to jurisdiction for this Court.[61] While the Compromis contains the statement that both States have waived "any objection to the Court's jurisdiction", exhaustion of local remedies is relevant to the admissibility of a claim only after jurisdiction has been assumed.[62] Further, in the ELSI Case, this Court held that the requirement of exhaustion of local remedies is too "important principle of customary international law [to] be held to have been tacitly dispensed with."[63] Since TOL has not exhausted the remedies available to it in the Babbagian courts, its complaint is not properly before this Court.

B. The acts of the IBCP are not attributable to the Republic of Babbage

Even if this Court finds that Turingia is entitled to bring its claim, Babbage is not liable for the acts of the IBCP, a group of independent citizens who acted without the consent of the Babbagian Government.

1. Babbage did not exercise control over the IBCP

Applicants may argue that the IBCP's acts are attributable to Babbage based on the test for "effective control" set forth by this Court in the Nicaragua Case.[64] In the Nicaragua Case "United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras" was insufficient "for the purpose of attributing

[61] Brownlie, supra note 15, at 496-497.

[62] See Compromis at ¶ 30; Brownlie, supra note 15, at 479.

[63] Elettronica Sicula S.p. A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 42. See also Brownlie, supra note 15, at 496-498; Malcolm Shaw, International Law 568 (1997).

[64] Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.) (merits), 1986 I.C.J 14 at ¶ 115.

to the United States the acts committed by the contras."[65] This test is also affirmed under Article 8 of the International Law Commission Draft Articles on State Responsibility (Draft Articles). The Compromis establishes that Babbage had no knowledge of IBCP's activities against TOL.[66]

2. Babbage did not ratify the acts of the IBCP

According to the narrow principle of ex-post ratification, state responsibility may attach when a State acknowledges and adopts actions as its own, as opposed to merely expressing support.[67] President Revuluri indicated his verbal support for activities of the IBCP and made the gesture of conferring upon them a state honor.[68] Verbal praise and state honors are expressions of endorsement granted without the intention or effect of transforming the honored conduct into the state's own conduct, since attribution is only appropriate where the "acknowledgement and adoption" is "unequivocal and unqualified."[69]

In Diplomatic and Consular Staff in Tehran (Iran Case),[70] this Court set forth a strict test for attribution based on *ex post* approval, holding that attribution was appropriate where Iran endorsed, maintained, and decided to perpetuate wrongful acts by private citizens.[71] Thus, some action by the State to perpetuate or maintain the wrongful private conduct is necessary for

[65] Nicaragua, 1986 I.C.J. at ¶ 115; Prosecutor v. Tadic, Case No. IT-94-1, (1999) ¶ 117

[66] Clarifications at ¶ 5.

[67] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 11 (November 2001) [hereinafter DASR]; International Law Commission, Commentaries on Responsibilities of States for Internationally Wrongful Acts 121-122 (November 2001) [hereinafter Commentaries].

[68] Clarifications at ¶13, Compromis at ¶ 18.

[69] Commentaries, supra note 67, at 120, citing Lighthouses Arbitration (Fr. v. Greece) 12 R.I.A.A 155 (1956).

[70] United States Diplomatic and Consular Staff in Tehran (Iran v. U.S.), 1980 I.C.J 3.

[71] Diplomatic and Consular Staff in Tehran, 1980 I.C.J. at 35.

attribution. President Revuluri's statements, and even his promise to the IBCP of an amnesty[72], fall well below this threshold since amnesty does not itself perpetuate the wrongful act against another State as its effect is not prospective. The activities of the IBCP cannot be attributed to Babbage under the Iran Case rule because Babbage has taken no affirmative steps to perpetuate or maintain the IBCP's actions.

3. The IBCP was not exercising governmental authority

Under international law, state responsibility attaches where a person or group in fact exercises elements of governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.[73] However, this principle should be construed narrowly, and be applied in "cases [that] occur only rarely, such as during revolution, armed conflict, or foreign occupation, where the regular authorities dissolve" or are disintegrating,."[74] Nothing in the Compromis indicates that this principle should apply where a fully-functioning government is alleged to have delegated power to private citizens, as such a situation is more properly regulated by the "control" test discussed above.

Furthermore, President Revuluri's statement that TOL would not "escape responsibility for its violation of Babbagian Law" does not transform any subsequent action taken by private parties into fulfillment of Babbage government policy, particularly since the President did not say that no further government action was planned, as Turingian Justice Minister Shidle did on December 29, 1999.[75] It is implausible that every statement by a government leader decrying a

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[72] Compromis at ¶ 18.

[73] DASR supra note67, at art. 9.

[74] Commentaries, supra note 67, at 109.

[75] Compromis at ¶ 19.

particular state of affairs should be interpreted as an invitation for private parties, without consulting the government, to take action in the government's name.

The case of Yeager v. Iran provides further evidence that the IBCP's actions cannot be characterized as the exercise of government functions. The facts of Yeager took place in the clearly distinguishable context of collapse of a state apparatus and the assumption of governmental function by private citizens. Furthermore, in Yeager the Tribunal Iran had knew about and acquiesced to the exercise of governmental authority by private citizens, while, in contrast, Babbage had no prior knowledge of the IBCP's activities." [76] As a result, the Yeager case provides no basis on which to find that the conduct of the IBCP should be attributed to Babbage as an exercise of governmental authority.

III. THE REPUBLIC OF TURINGIA IS RESPONSIBLE FOR THE ATTACK ON THE BABBAGE RAIL TRANSIT AUTHORITY (BRTA), INCLUDING THE DAMAGE TO PROPERTY AND THE LOSS OF LIFE RESULTING FROM THE COLLISION, AND TURINGIA SHOULD MAKE REPARATIONS FOR THOSE INJURIES

A. Turingia has committed an internationally wrongful act against the Babbage

An act is considered internationally wrongful to the extent that "there exist[s] a violation of a duty imposed by an international juridical standard."[77] When a State commits an internationally wrongful act, responsibility is "established immediately."[78] As a member of the United Nations, Turingia is bound by the United Nations Charter to "settle [its] international disputes by peaceful means."[79] By attacking the computer systems of the BRTA, Turingia resorted to violent means

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[76] See Yeager v. Iran, 17 Iran-U.S. Cl. Trib. Rep. 92 at ¶ 43 (1987); Clarifications at ¶ 5.

[77] Dickinson Car Wheel Company (U.S. v. Mex.), 4 R.I.A.A. 669, 678 (1931).

[78] Phosphates in Morocco, Preliminary Objections, (Italy v. Fr.) 1938 P.C.I.J. (ser. A/B), No. 74, at 28.

[79] U.N. Charter, art 2, para 3

that endangered international peace and security, constituting an internationally wrongful act against Babbage. Furthermore, Turingia committed the internationally wrongful act of "permitting the use of [its] territory in such a manner as to cause injury" to Babbage when it invited and solicited Turingian citizens to launch attacks against Babbage, resulting in damage to the BRTA and the loss of 200 lives.[80]

B. The need for exhaustion of local remedies does not bar Babbage's claim

Exhaustion of local remedies is not required for Babbage's claim for damages for injury to the BRTA, since the BRTA is an agency of the Babbagian government, and thus the act is a "direct injury" to Babbage.[81] To the extent that exhaustion of local remedies may be required under Babbage's diplomatic protection claim for the loss of life of its citizens, no effective local remedies are available.[82] However, even if this Court determines exhaustion of local remedies is a requirement for both the BRTA's claim and the claim of the citizens killed in the collision, Babbage has no effective local remedies. International tribunals have held that in some circumstances the ineffectiveness of local remedies can be presumed where the challenged act is that of a high government official.[83] Since Turingia, through its high government official, Minister of Justice Shidle, has explicitly refused to prosecute David Gabrius for the murder of over 200 Babbagian nationals—describing the matter as "closed"—it is unreasonable to require Babbage to then make a futile claim against Turingia for reparations for this same act, since the

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[80] See Corfu Channel (merits), (UK v. Alb.), 1949 I.C.J. 4, 22 (1949), Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1941), Compromis at ¶ 19, 21.

[81] See Clarifications at ¶ 11; Corfu Channel 1949 I.C.J. at 4; Brownlie, supra note 15, at 496.

[82] See Brownlie, supra note 15, at 496-498; Shaw, supra note 63, at 568; Mavrommatis Palestine Concessions (Greece v. U. K.), 1924 P.C.I.J. (ser. A), No. 2, at 12.

[83] See Forests in Central Rhodopia (Greece v. Bulg.), 3 R.I.A.A. 1405, 1420 (1931).

rule is intended to promote judicial economy.[84]

C. David Gabrius' crimes are attributable to the Republic of Turingia

1. The Republic of Turingia is liable for the actions of David Gabrius because it did not exercise reasonable control in a situation where wrongful conduct was likely to occur

In the Corfu Channel Case, this Court held that States are obligated to prevent, or at a minimum, warn of, dangerous situations that they know threaten others.[85] Other cases impose a broader obligation on States to take preventative steps where wrongful conduct by private citizens is likely. In the Zafiro Case the Tribunal held that actions by private individuals may be attributable where a State fails to exercise reasonable diligence to prevent internationally wrongful conduct that it knows or should know is very likely to occur.[86]

On December 29, 1999 Turingian Minister of Justice Shidle made a public statement in which she invited Turingian hackers to attack Babbage. Particularly after her comments were widely and publicly interpreted as "irresponsible,"[87] Turingia knew or should have known that her comments had created a situation in which internationally wrongful conduct was likely to occur, and that her government had a duty to exercise some control over the situation. Specifically monitoring David Gabrius would be one such reasonable step, since he is well-known, high-profile hacker who has been arrested several times by the Turingian government itself.[88] By failing to take any action to control a dangerous situation that it itself created,

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[84] See Compromis at ¶ 21-22; Brownlie, supra note 15, at 497.

[85] See Corfu Channel, 1949 I.C.J. at 22.

[86] Zafiro Case (Gr. Brit. v. U.S.), 6 R.I.A.A 160, 163-164 (1925). See also Spanish Zone of Morocco (Gr. Brit. v. Spain), 2 R.I.A.A. 615, 642-643 (1923); Shaw, supra note 63, at 550.

[87] Compromis at ¶ 19.

[88] Clarifications at ¶ 6; Compromis at ¶ 20.

Turingia made itself liable for the actions of David Gabrius.

2. Turingia is liable for the crimes of David Gabrius because it has failed to exercise due diligence in prosecuting him

International law places upon states a duty to exercise diligence in investigating crime and prosecuting offenders. Both the Janes Case and the Iran Case impose liability on a state for breaching its duty to investigate and punish crime committed by private citizens against a foreign national.[89] Similarly, other arbitral decisions have imposed liability on states for knowingly sheltering persons who had committed crimes against a foreign national.[90]

Turingian Minister of Justice Shidle has claimed that the Turingian government declined to prosecute Gabrius because it determined that the Turingian government did not have jurisdiction to prosecute.[91] However, this claim is clearly pretextual. It is not plausible that Shidle could be confident that Turingia would not have jurisdiction to prosecute anyone who made a computer attack against Babbage without first knowing details of the attack. When Shidle reiterated her refusal to prosecute Gabrius, her reference to her earlier, pretextual refusal to prosecute, and the fact that the decision took the Turingian government less than four days, again indicate that Turingia in reality decided to grant impunity in violation of its international obligation to exercise due diligence in prosecuting him.[92]

3. Turingia is liable for the crimes of David Gabrius because it has failed to exercise due diligence to prevent terrorism

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[89] Janes Case (U.S. v. Mex.), 4 R.I.A.A. 82, 87 (1925); Diplomatic and Consular Staff in Tehran, 1980 I.C.J. at 31. See also Claim of Dexter (U.S. v. Mex.), in 8 Whiteman Digest of International Law 755-56 (1967).

[90] Texas Cattle Claims (U.S. v. Mex.), in 8 Whiteman Digest of International Law 751 (1967).

[91] Compromis at ¶ 19.

[92] Clarifications at ¶13, Compromis at ¶ 22-23.

An act constitutes international terrorism when the agent of one state commits "acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public."[93] Even though it may have been committed from a great distance, Gabrius' attack on the BRTA and its passengers still falls within this definition, as it almost certainly has led to a state of terror among Babbagians. A number of United Nations resolutions and international conventions, though not directly binding on Turingia, are evidence that customary international law imposes a duty on states not to support or allow terrorist activities on their territory.[94] These resolutions and conventions collectively evidence of state practice with opinio juris.[95] By soliciting and inducing the terrorist attack by David Gabrius, Turingia violated this international duty.

D. Turingia's attack on the BRTA constitutes neither an exercise of proportional countermeasures or self defense by Turingia

International law recognizes that in limited circumstances a State may apply countermeasures

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[93] International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind, art. 24 (1991).

[94] See, e.g., G.A. Res. 39/159, U.N. GAOR 39th Sess., U.N. Doc. A/RES/39/159 (1984); G.A. Res. 53/108, U.N. GAOR, 53rd Sess., U.N. Doc. A/RES/53/108 (1999); G.A. Res. 54/110. UN GAOR. 54th Sess., U.N. Doc. A/Res/54/110 (2000); S.C. Res., U.N. SCOR, 54th Sess., 4053d mtg., U.N. Doc. S/RES/1269 (1999). See also.Hague Convention for the Suppression for the Unlawful Seizure of Aircrafts, art. 6, 22 U.S.T. at 1645-46, Dec. 16, 1970; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, art. 6, 24 U.S.T. at 570, Sept. 23, 1971; Convention Against the Taking of Hostages, art. 6, 18 I.L.M. at 1458, Dec. 17, 1979. See also European Convention on the Suppression of Terrorism, opened for signature Jan. 27, 1977, 4 E.T.S. 41, reprinted in 15 I.L.M. 1272-76 (1976); International Convention for the Suppression of Terrorist Bombings, Jan. 9, 1998, reprinted in 87 I.L.M. 249 (1998).

[95] See North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.) 1969 I.C.J. 3, 38, 42-44.

in response to an internationally wrongful act.[96] However, the exercise of countermeasures must be proportional to the harm done to the injured state.[97] The countermeasures employed, namely the crippling of the Babbagian railroad system and the reasonably foreseeable killing of 200 people,[98] were out of proportion with the consequences of the IBCP hacking and virus.[99] The full devastation caused by Turingia's response must be considered when weighing the proportionality of Turingia's response, since Turingia recklessly invited private parties to attack Babbage without employing any effective precautions to make sure the scope of the response stayed within the bounds it specified.[100]

Furthermore, the wrongfulness of the computer attack on Babbage cannot be excluded by an argument that Turingia was acting in self-defense in accordance with Article 51 of the UN Charter.[101] Turingia's right of self-defense was not triggered because the IBCP hacking, which did not involve the use of weapons by either regular or irregular armed forces, did not constitute an "armed attack", a necessary precondition for use of the invocation of the right of self-defense.[102] Further, the use of force in self-defense must be limited according to principles of

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[96] DASR supra note 67, at art. 22. See also Gabcikovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7, 55; Air Services Agreement of 27 March 1946 (US v. Fr.), 18 R.I.A.A. 416, 443 (1979).

[97] DASR supra note 67, at art. 51. See also Air Services Agreement, 18 R.I.A.A. at 443.

[98] Compromis at ¶ 20, 21.

[99] Compromis at ¶ 14-16.

[100] Compromis at ¶ 19.

[101] U.N. Charter, art 51.

[102] Nicaragua, 1986 I.C.J. at ¶ 195.

proportionality, discussed above, and necessity.[103] The attacks on the Babbage computer networks were not necessary to halt the IBCP's actions against TOL because these actions had already ceased and there was no indication they were to recommence.

E. The Republic of Turingia must make reparations to Babbage for the damage and loss of life caused by the acts of David Gabrius

Since the acts of the David Gabrius are attributable to Turingia, Turingia is internationally responsible for these actions and must "compensat[e] for the damage caused by the act."[104] Since Turingia cannot perform *restitutio in integrum*, monetary damages are the appropriate remedy.[105]

IV. BABBAGE'S ACTIONS IN THE ARREST, TRIAL, AND CONVICTION OF GABRIUS WERE CONSISTENT WITH INTERNATIONAL LAW

A. International law makes a distinction between forcible abduction and luring

International law recognizes that there is a distinction between forcible abduction and the luring of an accused criminal.[106] Luring is less problematic since it does not involve the use of force or a flagrant violation of territorial sovereignty and it minimizes risk of injury, damage, or incident in the host state.[107] In the present case, Babbage did not use force or did it violate

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[103] Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.) (merits), 1986 I.C.J 14 at ¶ 194.

[104] Chorzow Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A), No. 17, at 46-48. See also DASR supra note 67, at art. 35-36.

[105] Chorzow Factory, 1928 P.C.I.J at 46-48.

[106] Prosecutor v. Dokmanovic, Case No. IT-95-13a-PT, Decision on the Motion for Release (October 22, 1997), in 2 Substantive and Procedural Aspects of International Criminal Law (Documents and Cases), 1531 (Gabrielle McDonald & Olivia Swaak-Goldman, eds., 2000). See also Jordan Paust, et al., International Criminal Law 436-454 (2000).

[107] Melanie Laflin, Kidnapped Terrorists: Bringing International Criminals to Justice Through Irregular Rendition and Other Quasi-Legal Options, 26 J. Legis. 315 (2000); See also

territorial sovereignty, in contrast to the facts in U.S. v Alvarez where the U.S. agents arranged for Mexican agents to forcibly kidnap the suspect on Mexican soil. Even if (which is denied) a breach of territorial sovereignty can be established, state responsibility may be settled by satisfaction or compensation, without the repatriation of the individual.[108]

B. International law does not foreclose jurisdiction when an individual is lured to trial

1. Substantial State practice and judicial decisions favors asserting jurisdiction

In the Dokmanovic case decided by the ICTY, it was held that the luring of the accused to stand trial in The Hague was consistent with international law and did not violate the territorial sovereignty of the FRY.[109] This is the only decision made by any international tribunal relating to luring and particular weight should be attached to it.[110] The Court found that there is "strong support in national systems" for the notion that luring does not vitiate jurisdiction, noted that in the international order there is no singular acceptable method to apprehend subjects, and emphasized that no extradition treaty existed.[111] Babbage and Turingia have not concluded an extradition treaty that would cover this scenario or a specific treaty to prohibit transnational abductions as now exists between Mexico and the United States.[112] Therefore, no treaty obligation can be invoked to vitiate jurisdiction. In addition, numerous national decisions support the assertion of jurisdiction notwithstanding a luring. United States courts have uniformly

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Michael Scharf, The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal, 49 DePaul L. Rev. 925, 970 (2000).

[108] Geoff Gilbert, Transnational Fugitive Offenders in International Law 339 (1998).

[109] Dokmanovic, Case No. IT-95-13a-PT, at ¶ 57.

[110] Statute of the International Court of Justice, art 38(1)(d).

[111] Dokmanovic, Case No. IT-95-13a-PT, at ¶ 68, 75.

[112] Treaty to Prohibit Transborder Abductions, Nov. 23, 1994, U.S.-Mex., 31 U.S.T. 5059.

upheld jurisdiction notwithstanding fraudulent lurings from Lebanon, Libya, and the Bahamas respectively.[113] This position is also reflected in the jurisprudence of common law countries such as Canada and England.[114] The position of certain civil law countries is also in favor of exercising jurisdiction. Italian, Belgian and Dutch courts refuse to divest themselves of jurisdiction in the case of an irregular rendition.[115] In Germany, two Federal Constitutional Court decisions specifically dealing with international law concluded that there was no rule of custom prohibiting jurisdiction over abducted persons.[116] These are important cases because of the Court's in-depth treatment of international law questions and strong reputation in this area.[117] In relation to forcible abduction cases, the decisions in Eichmann[118] and in U.S. v. Alvarez-Machain[119] support Babbages's case by affirming the *mala captus bene detentus* doctrine, meaning that a "violation of law does not affect the validity of the subsequent exercise of jurisdiction over them".[120] This doctrine has strong historical roots as a Roman law principle

[113] United States v Yunis, 681 F. Supp. 909 (D.D.C. 1988); United States v Wilson, 721 F. 2d 967 (4th Cir. 1983); United States v Reed, 639 F. 2d 896 (2nd Cir. 1981).

[114] Re Hartnett & the Queen, 1 O.R.2d 206, 209 (Ont.1973); Re Schmidt, [1995] 1 App. Cas. 339

[115] Achille Lauro Seajackers, in Geoff Gilbert, Transnational Fugitive Offenders in International Law 360 (1998); Geldof v. Meulemeister and Steffen, 31 I.L.R. 385 (Cr de Cass. Belg.1960); RHK v. The Netherlands, 100 I.L.R. 412 (HR Neth. 1985).

[116] 39 Neue Juristische Wochenschrift 1427, 3021 (1986).

[117] Stephan Wilske & Teresa Schiller, Jurisdiction Over Persons Abducted in Violation of International Law in the Aftermath of U.S. v. Machain, 5 U. Chi. L. Sch. Roundtable 205, 227 (1998).

[118] Attorney-General of Israel v. Eichmann, 36 I.L.R. 277 (S. Cr. 1962) (Isr.).

[119] U.S. v. Alvarez-Machain, 505 U.S. 655 (1992). See also Ker v. Illinois, 119 U.S. 436 (1886); Frisbie v. Collins, 342 U.S. 519 (1952).

[120] Brownlie, supra note 15, at 320.

that has been applied by municipal courts over the past 100 years.[121] In light of the above state practice and judicial decisions, there is no customary rule against asserting jurisdiction over a lured individual.

2. There is also no opinio juris to support the proposition that jurisdiction must be declined over a lured criminal

With respect to cases apparently against the exercise of jurisdiction, national decisions of England, Australia and New Zealand,[122] indicate that courts have no compulsory obligation decline jurisdiction but rather have mere discretion to do so.[123] Confirming this fact, one Court stated that it is vested with an "undoubted jurisdiction" over such cases, subject to discretion.[124] The subjective and uncertain nature of this practice is inconsistent with the requirement of opinio juris that a law must be believed by the State to be mandatory, not discretionary, as a matter of international law.[125] This problem is accentuated by the high standard required to establish opinio juris indicated by this Court in the Nuclear Weapons Advisory Opinion where even 50 years of non-recourse to nuclear weapons was insufficient. [126]

C. Jurisdiction may be exercised based on Turingia's provision of safe-haven for international criminals and the failure to prosecute and/or exercise due diligence in relation to an international crime

Turingia has (i) breached its obligations to prohibit the provision of safe-haven to terrorists

[121] M. Cherif Bassiouni, Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition, 7 Vand. J. Transnat'l L. 25, 45 (1973).

[122] R v. Horseferry Road Magistrates Court (Ex P Bennett), House of Lords, [1993] 3 All ER 138; Levinge v Director of Custodial Services, (1987) 9 NSWR 546; R v Hartley, [1978] 2 NZLR 199.

[123] Wilske & Schiller, supra note 117 at 229.

[124] Levinge, 9 NSWR , at 556-557.

[125] Mark Villiger, Customary International Law and Treaties 47 (1997).

[126] Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, at ¶67.

and/or supporting terrorist activity,[127] (ii) abdicated from its duty to exercise "due diligence" in preventing the commission of terrorist acts within its territory and (iii) failed in its duty to either extradite or prosecute (*aut dedere aut judicare*) international criminals.[128] A formal extradition request would have been superfluous in the circumstances as Turingian Minister of Justice had already stated that the "matter is closed".[129] Babbage only resorted to luring in light of the futility of an extradition request, a factor international law recognizes.[130] Furthermore, the abovementioned breaches amount to an abuse of the right of territorial sovereignty and justifies the luring as a method of apprehending the accused, as the right of territorial sovereignty can not be used as a pretext to escape international obligations.[131] In other contexts, state responsibility also attaches for similar abuses of territorial sovereignty.[132]

D. Jurisdiction may also be exercised based on universal jurisdiction with respect to the grave character of the crime committed by David Gabrius

There is strong support for the exercise of jurisdiction irrespective of the method of capture where the case involves universally condemned offences, even amongst those most critical of

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[127] See supra, text accompanying notes 93 - 95.

[128] M. Cherif Bassiouni & Edward Wise, Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite in International Law (1995). See also Janes Case, 4 RIAA at 82, 87 (1925).

[129] Compromis at ¶ 22.

[130] Benjamin Cardozo, When Extradition Fails Abduction is the Solution 55 Am. J. Int'l L. 127 (1960).

[131] Jimmy Gurule, Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad, 14 Hastings Int'l & Comp. L. Rev. 457, 491 (1994). See also Malvina Halberstam, International Kidnapping: In the Defense of the Supreme Court Decision in Alvarez-Machain, 86 Am. J. Int'l L. 736, (1992)

[132] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, arts. 5-7, 78 U.N.T.S. 277, 21 I.L.M. 220). See also Draft Code of Crimes Against the Peace and Security of Mankind, supra note 93, at p. 1594.

exercising jurisdiction.[133] The underlying rationale is based upon universal jurisdiction and the need for the international community to take a stand against nations that provide safe-havens to international criminals.[134] The crimes committed by David Gabrius amounts to a very serious international offence as more than 200 exclusively Babbage citizens were killed as a direct result of his Internet attack on BRTA's rail network.[135] This "cyber-terrorism" attack must also be interpreted in light of international community's condemnation of terrorism and safe-haven States, recently re-confirmed after the September 11th incident in the United States.[136]

E. No applicable human rights norms entitle Turingia to repatriation of Gabrius

The remedy for a breach of human rights of an individual lies in a civil suit against the offending government, not in repatriation.[137] This is because the injury is to the individual and not the State and it is for the individual to institute proceedings within the offending State's courts. No such suit has been lodged before Babbage courts. In any event, the strict provisions of

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[133] See Rosalyn Higgins, Problems and Process: International Law and How We Use It 472, 478-479 (1994); F.A. Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in Further Studies in International Law (F.A. Mann, ed.1990); Michael Scharf, Prosecutor v. Slavko Dokmanovic: Irregular Rendition and the ICTY, 11 Leiden J. of Int'l Law 369 (1998).

[134] Paul Michell, English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain, 29 Cornell Int'l L.J. 383, at fn. 205 (1996).

[135] Compromis at ¶ 21.

[136] S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001). See also EU: Joint Declaration by the Heads of State and Government of the European Union, the President of the European Parliament, the President of the European Commission, and the High Representative for the Common Foreign and Security Policy (September 14, 2001)

[137] Alvarez-Machain v. United States 266 F.3d 1045 (9th Cir. 2001). See also Canadian Cabinet Issues Order Allowing Victim of US Kidnapping to Reinstate Tort Action, Int'l Enforcement L. Rep., May 1997.

the ICCPR do not bind Babbage,[138] and it has been agreed by the parties and independently confirmed that the trial of David Gabrius was conducted in conformity of international law.[139]

V. CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Respondent, the Republic of Babbage, respectfully requests this Honorable Court to find, adjudge, and declare as follows:

1. That Babbage's Criminal Code provisions relating to the Internet and their application to TOL and BOL are consistent with international law;
2. That Babbage is not responsible for any injury caused to TOL and that Turingia is responsible for the attack on the BRTA and the consequent loss of life and;
3. That Babbage's actions concerning the arrest, trial, and conviction of David Gabrius were consistent with international law.

Respectfully submitted,

Agents for the Respondent

[138] Vienna Convention, supra note 25, at art. 14.

[139] Compromis at ¶ 26; Clarifications at ¶ 16.