No. 385A

2002 PHILIP C. JESSUP INTERNATIONAL MOOT COURT COMPETITION

IN THE INTERNATIONAL COURT OF JUSTICE AT THE PEACE PALACE THE HAGUE, NETHERLANDS

Case Concerning Regulation of Access to the Internet

REPUBLIC OF TURINGIA
Applicant

v.

REPUBLIC OF BABBAGE
Respondent

SPRING TERM 2002

MEMORIAL FOR THE APPLICANT

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CASE CONCERNING REGULATION OF ACCESS TO THE INTERNET

I. 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.

II. 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, which was 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 Presidential 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 Babbage 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 which were 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 expression. 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 50 million dollars.

On December 27, 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 merit on the members of the IBCP, thanked and praised the group, and also promised them a full amnesty from prosecution in the Babbagian courts.

Following the IBCP attack, Josephine 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 hacking, two trains traveling 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 absence of any 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.

III. 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?

IV. SUMMARY OF THE PLEADINGS

1. 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, thereby 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.

2. 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 the state is such that it may be seen to have adopted and acknowledged the acts as its own. The contents of the Presidential proclamation constituted an 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 conceptualized as an expropriation of TOL's capacity to fulfill its contractual obligations, necessitating TOL's US$50 million reimbursement of subscribers. Babbage must make reparations for the loss accordingly.

3. 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 various circumstances, none is applicable to the present case. The statement of the Minister cannot amount to prior authorization 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, and Gabrius' acts cannot fall within established prohibitions on the use of force or unlawful intervention. In any event, the actions may be viewed as legitimate countermeasures. Furthermore, 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.

4. The subsequent luring of Gabrius to Babbage was in clear breach of the territorial sovereignty of Turingia and as such was 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 was in clear violation of Gabrius' human rights. The manner of the arrest qualified as arbitrary because of the unpredictable, coercive nature of the arrest and its

equivalence to forcible abduction. Babbage is also estopped from prosecuting Gabrius because 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.

A. Babbage's Broad Restrictions on the Internet Violate International Law

1. Turingia Has *Jus Standi* Before the International Court of Justice to Challenge Babbage's Breach of an Internationally Recognized Right to Freedom of Speech

a. *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.

b. *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 to the Internet Exceeds its Jurisdication

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 that it is undefined territory at international law. It is similar to outer space prior to its regulation.[3] Until a specific regime is formulated,

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1. G.A. Res. 1997/26, U.N. GAOR, 54th Sess., at 5, U.N. Doc. E/CN.4/1998/40 (1998), *available at* http://www.unhchr.ch/Huidocda/Huridocda.nsf/TestFrame/7599319f02ece82dc1256608004 (last visited Oct. 4, 2002).

2. Barcelona Traction, Light and Power Co. Ltd. (Belg. v Spain) (1970) ICJ 3, 42 (Feb. 1970).

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 (2000).

Babbage should not act contrary to accepted 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 fulfill 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 territoriality principles applies to publishers in foreign countries. While 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 jurisdiction on this basis would be disproportionate to the gravity of the crime. Such acceptance as 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 18 of the Vienna Convention on the Law of Treaties

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.

Violating a seminal right, such as freedom of expression, strikes at the object and purpose of any international human rights instrument. The fundamental character of this right has been affirmed in domestic constitutions and by various institutions in the international community, including the United

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4. Statute of the International Court of Justice, Ch. III, art. 59, *available at* http://www.un.org/Overview/Statute/contents.html (last visited Oct. 4, 2002).

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, at 82 (Sept. 1927); *United States v. Yunis*, 681 F Supp 896 (D.D.C. 1988).

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 recognized 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 obligations at customary law corresponding to Article 18 require parties to do nothing which may diminish the significance of a 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 Recognized Human Right

Customary international law requires the co-existence of settled state practice and *opinio juris*.[10] 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. [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 evidences strong *opinio juris*.[12] In addition to its recognition in international human rights instruments, a formidable corpus of regional instruments evidences broad state acceptance of the right to freedom of expression.[13]

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7. G.A. Res., UN GAOR, 1st Sess, at 2, UN Doc A/64 (1947); *available at* http://laws.justice.gc.ca/en/charter/ (last visited Oct. 4, 2002); Canadian Charter of Rights and Freedoms, Constitution Act, 1982, *available at* http://laws.justice.gc.ca/en/charter/ (last visited Oct. 4, 2002); Report of the Experts' Meeting on Cyberspace Law, G.A. Res. 36, U.N. GAOR, 29th Sess., at 5, U.N. Doc. CII/USP/ECY/99/01 (1998).

8. Compulsory Membership, Inter-American Court of Human Rights, Advisory opinion OC-C5/85 (Nov. 13 ,1965).

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

10. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v U.S.), 1986 ICJ 14 (June 1986) [hereinafter Nicaragua]; N. Sea Continental Shelf (W. Ger. V. Den., W. Ger. V. Neth.) 1969 ICJ 3 (Feb. 1969).

11. G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948), *available at* http://un.org/Overview.rights.html (last visited Oct. 4, 2002); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXII), U.N. GAOR, Supp. No.16, U.N. Doc. A/6316 (1976) *available at* http://www1.umn.edu/humanarts/instree/b3ccpr.htm (last visited Oct. 4, 2002) [hereinafter ICCPR].

12. *See* U.S. CONST. amend. I, art. 1; Canadian Charter of Rights and Freedoms, *supra* note 7, at art.29; EST. Const. ch. VI, art. 100.

13. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 1, 1998, art. 10 [hereinafter Convention]; American Convention on Human Rights "Pact of San Jose, Costa Rica," art. 13, *available at* http://www.oas.org/juridico/english/Treaties/b-32.htm (last visited Oct. 4, 2002); Inter-American

E. Babbage's Legislation Falls Outside the Reasonable Limits Imposed by Customary International Law

The right to freedom of expression is not absolute, as recognized by the international instruments which restrict it. Both national and transnational judicial bodies recognize that it is subject to the requirements of necessity and proportionality.[14]

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

2. A restriction must be proportionate 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 ISPs' "provider-end" filtering software remove user choice, and in doing so fail to distinguish between adults and children, which they must do.[17] Secondly, they do not make exceptions for material of scientific or artistic value, access to which is a right.[18]

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

Declaration of Principles on Freedom of Expression, http://www.cidh.oas.org/declaration.htm (last visited Oct. 4, 2002); African [Banjul] Charter on Human and Peoples' Rights, art. 7, *available at* http://www1.umn.edu/humanrts/instree/z1afchar.htm (last visited Oct. 4, 2002).

14. ICCPR, *supra* note 11; Human Rights Committee Decisions; Convention, *supra* note 13; Supreme Court of the United States; *Faurisson v. Fr., Communication* No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996), *available at* http://www1.umn.edu/humanrts/undocs/html/VWS55058.htm (last visited Oct. 4, 2002).

15. *Handyside v. U.K.*, 1 Eur. Ct. H.R. 737, at proc. 50 (1976); *Lingens v. Aus.*, 8 Eur. Ct. H.R. 407, at proc. 41 (1986).

16. *Sunday Times v. U.K.* (no. 2), 14 Eur. Ct. H.R. 229 (1992).

17. *ACLU v. Reno* 929 F Supp 824 at 854 (E.D. Pa. 1996).

18. ICCPR, *supra* note 11.

The 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.

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, and 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.

3. The Internet's impact justifies minimal restrictions

The ECtHR has recognized 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 a new and unique medium deserving of special protection.[24] Its interactive and pro-democratic character means that it should be subject to fewer restrictions than other media.[25]

Further, state practice favors 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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19. Babbage Criminal Code, § 117(a).

20. Regardless of Frontiers, Global Internet Liberty Campaign Report, 2002, at 27, *available at* http://www.cdt.org/gilc/report.html (last visited Oct. 4, 2002).

21. *Sunday Times v. U.K.*, 2 Eur. Ct. H.R. 245 (1979); Autronic AG v. Switz., *available at* http://www.hudoc.echr.coe.int/hudoc/ViewHtml (last visited Oct. 4, 2002).

22. *ACLU v. Reno*, 929 F. Supp. at 854.

23. *Jersild v. Den.*, 19 Eur. Ct. H.R. 1 (ser. A) No. 298 (1995).

24. *ACLU v. Reno*, 929 F. Supp. at 854.

25. *Id.* at 873, 883.

V. 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

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

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 in Turingia.[29] This close and permanent connection is not weakened by TOL's commercial activities overseas.[30]

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

The requirement that local remedies must be exhausted may come within the jurisdictional waiver. Alternatively, as litigants need only exhaust such remedies as are 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

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26. Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission, 53rd Sess., G.A. Supp. No. 10 (A/56/10) (2001); United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, at 29 (May 1980).

27. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 425 (5th ed. 1998).

28. Nottebohm (Second Phase) (*Liech. v. Guat.*), 1955 I.C.J. 4, at 23 (Apr.1955); Barcelona Traction, Light and Power Co. Ltd., 1970 I.C.J. at 42.

29. Barcelona Traction, Light and Power Co. Ltd., 1970 I.C.J at 42.

30. *Id.*; 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 (Compromis), ¶ 5.

31. Norwegian Loans (*Fr. v. Nor.*), 1957 I.C.J. 9, at 38-39 (July 1957); Finnish Shipowners Arbitration (*Fin. v. U.K.*), 3 R.I.A.A. 1479, at 1504 (1934).

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.

1. 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) recognizes 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] 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 honors. 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 December 19, 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 capitalizing on and exploiting the hacking for its national benefit. Exploitation, if not a necessary condition, is certainly sufficient.[35]

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

As recognized in Article 11 of the Draft Articles, a state is *deemed responsible* for an act adopted *ex post facto* as if it was involved from the act's

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

33. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 26; United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3; Lighthouses Arbitration (1956) R.I.A.A., xii, 155.

34. United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3; Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 26.

35. United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3. *See also* United States Diplomatic and Consular Staff in Tehran, *supra* note 26

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 authorization.[37] Article 11 would be rendered redundant if only continuing acts could be adopted, as the rules of authorization 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.

3. 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

On its face, the grant of full amnesty applied not only to the 1999 hacking but also 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

a. *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 thirty-eight states.[38] The most recent multilateral development is the Convention on Cybercrime 2001,[39] which has already attracted the signatures of thirty-two 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

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36. *See* J.G. STARKE & I.A. SHEARER, STARKE'S INTERNATIONAL LAW 275 (11th ed. 1994).

37. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 26.

38. Stein Schjolberg, *The Legal Framework-Unauthorized Access to Computer Systems: Penal Legislation in 44 Countries, at* www.mossbyrett.of.no/info/legal/html (last visited Oct. 4, 2002).

39. Convention on Cybercrime-Budapest, ETS No. 185, *at* http://book.coe.int/GB/CAT/LIV/HTM/11860.htm (last visited Oct. 4, 2002).

40. *See* Convention on Cybercrime, *at* http://conventions.coe.int/Treaty/EN/searching.asp?NT=185&CM=&DF= (last visited Oct. 4, 2002).

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]

b. *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 fulfill its subscription contracts by interfering with its informational assets.

a. *The concept of property for expropriation purposes includes contractual rights*

Expropriation has been recognized as extending to "any right which can be the object of a commercial transaction, ie, 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

41. OECD Expert Committee Recommendation, 1973; Resolution No. 3 on the Fight Against Cyber-Crime, *available at* http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Conferences_and_high-level (last visited Oct. 4, 2002).

42. N. Sea Continental Shelf, 1969 I.C.J. at 42-43.

43. *See* Convention on Cybercrime-Budapest, *supra* note 39; Art. 3211-3321 of the French Penal Code; German Penal Code §§ 203, 303(a), (b); Electronic Commerce Act, ch. 426 (2002) (Malta); Republic Act No. 8792, sec. 33 (2000) (Phil.).

44. Compromis, supra 30, at 14.

45. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, *available at* http://www.unhchr.ch/html/menu3/b/c_natres.htm (last visited Oct. 4, 2002); BROWNLIE, *supra* note 27 at 535.

46. M. SHAW, INTERNATIONAL LAW 575 (4th ed. 1997).

47. *Amoco Int'l Fin. Corp. v. Iran*, 15 Iran-U.S. CTR 189, at ¶ 108 (1987).

supported.[48] Babbage has expropriated TOL's contractual rights by interfering with its capacity to fulfill these contracts.

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 honor its contractual obligations.[49]

b. *Measures falling short of direct divestiture qualify as "expropriations"*[50]

"Constructive expropriation" is widely recognized 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 deprivation of property. By its nature cyberspace knows no territorial limitations and international law must adapt to this new medium.

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48. *Mobile Oil Iran Inc. v. Iran*, 16 Iran-U.S. CTR 3, at 25 (1987); Anglo-Iranian Oil (*U.K. v. Iran*), 1951 I.C.J. 89 (July 1951), as per the United Kingdom's government pleadings; *Starrett Housing Corp. v. Iran*, 23 I.L.M. 1090, 1115 (Sept. 1984); Shufeldt Claim (*U.S. v. Guat.*) 2 R.I.A.A. 1083, at 1097 (1930).

49. *Starrett Housing Corp.*, 23 I.L.M. at 1115.

50. For example, *Sedco Inc., v. NIOC*, 9 Iran-U.S. CTR 248 (1985); *Kalamazoo Spice Extraction Co., v. Provisional Military Gov't of Socialist Eth.*, 86 I.L.R. 45 (1984).

51. 1964 BPIL 200.

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

53. Draft Convention on the International Responsibility of States for Injuries to Aliens, 55 A.J.I.L. 548, 553 (1961); Starrett Housing Corp., 23 I.L.M. at 1115; Third U.S. Restatement on Foreign Relations Law, vol. II, ¶ 712.

54. Tippetts, 6 Iran-U.S. CTR at 226.

55. For example, *Starrett Housing Corp.*, 23 I.L.M. at 1116-117; Tippetts, 6 Iran-U.S. CTR at 226; Amoco, 15 Iran-U.S. CTR at ¶ 108.

c. *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 1970s 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 nationalization of natural resources.[60] On this basis, Babbage must compensate Turingia fifty million dollars, 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 fifty million dollars to its customers.

VI. 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 imputed to Turingia.

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56. Chorzow Factory (*Ger. v. Pol.*), 1928 P.C.I.J. (ser. A) No. 17, at 46-48 (Sept. 1928); Sedco Inc., 9 Iran-U.S. CTR at 248; Amoco, 15 Iran-U.S. CTR at ¶ 108.

57. G.A. Res. 1803, 17 U.N. GAOR, Supp. No. 17, U.N. Doc. A/5217 (1962) *available at* http://www1.umn.edu/humanrts/instree/c2pnsr.htm (last visited Oct. 5, 2002), G.A. Res. 3171, U.N. GAOR, 28th Sess., at 239, U.N. Doc. A/9400 (1974), G.A. Res. 3281, U.N. GAOR, 29th Sess., at 255, U.N. Doc. A/RES/3281 (1975).

58. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 826 (July 1996).

59. *See Texaco v. Libya*, 53 I.L.R. 389, at 488-89 (1977); Sedco Inc., 9 Iran-U.S. CTR at 248.

60. Sedco Inc., 9 Iran-U.S. CTR at 634.

61. Chorzow Factory, 1928 P.C.I.J. (ser. A) No. 17, at 46-48; Spanish Zone in Morocco Claims 2 R.I.A.A., ii, 615, at 641 (1925); SHAW, *supra* note 46, at 641.

62. Commentary to Draft Articles, *supra* note 26, at 103.

1. Turingia did not authorize Gabrius' acts

Authorization requires acts to be done under the instruction, direction or control of the state.[63] The Turingian Minister of Justice's statement on December 29, 1999 did not authorize 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 authorization.[66] Where a variable degree of control has been recognized, "overall control going beyond the mere financing and equipping of...forces" is 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 of a kind similar to that caused by the IBCP. The deletion of an entire railroad network's operating system fell outside the scope of any authorization.

2. 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, it 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

While certain categories of terrorist activities are the subject of specific conventions,[70] there is neither a comprehensive convention on terrorism *per se*

63. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 26.

64. Compromis, *supra* note 30, at ¶ 22.

65. Nicaragua, 1986 I.C.J. at 97-98.

66. *Id.* at 60-62.

67. *Id.*

68. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 26.

69. United States Diplomatic and Consular Staff in Tehran, *supra* note 26.

70. International Convention Against the Taking of Hostages (1979), *available at* http://www.undcp.org/odccp/terrorism_convention_hostages.html (last visited Oct. 5, 2002); International Convention for the Suppression of Terrorist Bombing (1998), *available at* http://www.undcp.org/odccp/terrorism_convention_terrorist_bombing.html (last visited Oct. 5, 2002).

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 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 their 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.

3. 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. That 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, which is hardly the situation here.[77]

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

a. *Gabrius' acts constituted 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

71. Libyan Arab Republic 726 F2d 774, 785 (DC Cir 1984).

72. Rome Statute of the International Criminal Court, 1998, *available at* http://www.un.org/law/icc/statute/99_corr/cstatute.htm (last visited Oct. 5, 2002).

73. U.N. Declaration on Intervention, 5 I.L.M. 374, 375-76 (Mar. 1966); United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, 9 I.L.M. 1292, at 1296 (Nov. 1970); Nicaragua, 1986 I.C.J. at 107.

74. Nicaragua, 1986 I.C.J. at 107.

75. Inadmissibility of the Policy of State Terrorism and any Actions by States Aimed at Undermining the Socio-political System in Other Sovereign States, *available at* http://www.un.org/documents/ga/res/39/a39/a39r159.htm (last visited Oct. 5, 2002).

76. GOODRICH, HAMBRO, & SIMONS, CHARTER OF THE UNITED NATIONS 49 (3rd ed. 1969).

77. *See* G.A. Res. 3314, *available at* http://jurist.law.pitt.edu/3314.htm (last visited Oct. 5, 2002).

state.[78] While the Draft Articles recognize 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, including the obligation to make reparations for a wrong, the preconditions for a lawful countermeasure are satisfied.[82]

To be justified, countermeasures must meet the requirement of proportionality.[83] It has been recognized 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

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

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78. Gabcikovo-Nagymaros (Hung. v. Slovk.), 1997 I.C.J. 7, at 55-56 (Sept. 1997); Nauililaa (Port. v. Ger.), 2 R.I.A.A. 1011, at 1025-26 (1928); Air Serv. Agreement (Fr. v. U.S.), 18 R.I.A.A. 416, at 443-46 (Mar. 1979); Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 26.

79. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 26.

80. Nicaragua, 1986 I.C.J. at 109-110.

81. *Id.* at 19.

82. *See* Nicaragua, 1986 I.C.J. at 107, Part B; Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 26.

83. Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 26.

84. Air Serv. Agreement, 18 R.I.A.A. at 443-46.

85. *Infra* p.17, point III C.

86. Venable Claim, 4 R.I.A.A. 219, at 225 (1927); Naulilaa, 2 R.I.A.A. at 1031.

87. Naulilaa, 2 R.I.A.A. at 1031.

88. Compromis, *supra* note 30, at ¶ 21.

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 categorized as "too indirect, remote and uncertain"[90] for Turingia to be held causally responsible.

VII. THE LURING OF GABRIUS VIOLATED THE SOVEREIGNTY OF TURINGIA

A. The Luring of Gabrius to Babbage Violated the Territorial Sovereignty of Turingia

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

2. Male captus bene detentus does not undermine the prohibition

While some states' domestic courts have continued to assert jurisdiction over suspects seized in breach of international law, states must "justify their conduct by reference to a new right" at international law in orer 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

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89. *Id.* at ¶ 20.

90. Trail Smelter Arbitration, 3 R.I.A.A. 1095, at 1931 (1938, 1941).

91. S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10, at 34-35; OPPENHEIM;S INTERNATIONAL LAW 295 (H Lauterpacht 8th ed. 1955).

92. Paul Michell, Article, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT'L L.J. 383, 410 (1996); Legal Opinion on the Decision of the U.S. Supreme Court in the Alvarez-Machain Case, Inter-American Judicial Committee 13 H.R.L.J. 395 (1992); Virginia Morris and M. –Christiane Bourloyannis-Vrailas, *Current Development: The Work of the Sixth Committee at the Forty-Eighth Session of the UN General Assembly*, 88 A.J.I.L. 343, 357-78 (1994).

93. Nicaragua, 1986 I.C. J. at 108-09.

94. *See* United States v. Alvarez-Machain, 505 U.S. 655 (1992); Levinge v. Dir. Of Custodial Serv., 9 N.S.W.L.R. 546 (Ca. 1987).

95. Alvarez-Machain, 505 U.S. at 667; In re Hartnett 1 O.R. 2d 206, 209 (1973).

prohibition on extraterritorial criminal enforcement remains undisturbed by this practice.

3. 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 implicate senior Babbagian officials in the luring of Gabrius, thus engaging state responsibility for the luring itself. From the moment of the deceptive assurance, the criminal enforcement operation against Gabrius was effectively a continuous act. The participation of the Babbagian-funded aircrew in this continuous operation ensured that a key element of Babbage's sovereign act was performed both in Turingian airspace[96] and on Turingian soil, thus violating Turingian territorial sovereignty.[97]

4. 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] However, 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 its sovereign rights.

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

a. *Babbage has interfered with Turingia' s prosecutorial and political integrity*

The principle of non-intervention protects the authority 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 constituted a direct interference with Turingia's regulation of its sovereign legal and political affairs.

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96. Nicaragua, 1986 I.C.J. at 127-28.

97. *See Prosecutor v. Slavko Dokmanovic*, Decision on the Motion for Release by the Accused Slavko Dokmanovic, No. IT-95-13a-PT, T Ch. 11, 22 (Oct. 1997).

98. Michell, *supra* note 92, at 420.

99. *Id.* at 15.

100. *Id.* at 18.

101. Nicaragua, 1986 I.C.J. at 106.

102. Compromis, *supra* note 30, at ¶ 19, 22.

b. *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 imperiled 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 Turingian 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 Violated His Human Rights

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

Like freedom of expression, the prohibition against arbitrary arrest has crystallized into customary international law,[106] as evidenced by an equally formidable body of domestic and transnational human rights instruments.[107] Alternatively, 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 violation of Article 18 of the Vienna Convention on the Law of Treaties.[108] Without such a prohibition, freedom of expression, the rule of law and other incidents of a democracy are substantially undermined.

a. *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

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103. Nicaragua, 1986 I.C.J. at 108.

104. *Id.*

105. United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, *supra* note 73.

106. *See Id.* at 3-4.

107. *See* UDHR, art. 9, *supra* note 10, ICCPR, supra note 11, at art. 9(1); African [Banjul] Charter on Human and Peoples' Rights, *supra* note 13; Convention, *supra* note 13, at art. 5(1); American Convention on Human Rights "Pact of San Jose, Costa Rica," *supra* note 13, at art. 7; Canadian Charter of Rights and Freedoms, *supra* note 12, at art. 9 *See* N.Z. Bill of Rights, art. 9, *available at* http://www.uniwuerzburg.de/law/nz01000_.html (last visited Oct. 6, 2002).

108. *See supra* at 2 and 3.

encompasses any legal deprivation that is unjust, unpredictable, manifestly disproportionate, 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.

Secondly, 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."

Thirdly, a continuum of coercion has been recognized 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, in the future hackers will only be deterred from providing potentially valuable assistance to governments. The deterrence of international co-operation is particularly unfortunate in the case of developing nations with simplistic technological infrastructures, like Babbage, which could well benefit from assistance provided by those responsible for any such damage.

Fourthly, arrests circumventing established procedures for obtaining custody, such as extradition treaties, have also been deemed manifestly arbitrary.[114] Extradition processes contain significant 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 corollary of the right to liberty, recognized in Article 9(4) of the ICCPR, is the right of an accused to obtain an order for release in the event of

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109. Prosecutor, No. IT-95-13A-PT, T Ch. 11 at 484; M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, at 173 (1993).

110. Prosecutor, No. IT-95-13A-PT, T Ch. 11 at 487.

111. *In re Schmidt* 1 AC at 359 per Sedley J (1995).

112. Prosecutor, No. IT-95-13A-PT, T Ch. 11 at 483; Michell, *supra* note 92, at 490-91.

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

114. Prosecutor, No. IT-95-13A-PT, T Ch. 11 at 487; Nowak, *supra* note 109, at 173.

115. Michell, *supra* note 92, at 437-38.

116. Miriam-Webster's Collegiate Dictionary, *available at* www.n-w.com/cgi-bin/dictionary.

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 recognized that states may bind themselves to a course of conduct via unilateral undertakings.[117] To be legally effective, the undertaking must be given publicly, 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]

a. *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 of 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.

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117. Nuclear Tests (*Aust. v. Fr.*), 1974 I.C.J. 253, 332-33 (Dec. 1974); Nicaragua, 1986 I.C.J at 130-31.

118. Nuclear Tests, 1974 I.C.J. at 332-33.

119. *Id.* at 334.

120. *Id.* at 336.

121. Compromis, *supra* note 30, at ¶ 23; *See also* Nuclear Tests, 1974 I.C.J. at 332-33.

122. Nuclear Tests, 1974 I.C.J. at 332-33.

123. Nicaragua, 1986 I.C.J. at 131-32.

D. Babbage is Obliged to Restore Gabrius to Turingia

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

International law stipulates 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 had not been committed."[124] An application of the preference expressed in *Chorzow Factory* for "[r]estitution in kind"[125] requires that Babbage return Gabrius, who was 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 rebuts any question of waiver of a claim to restitution.[127]

VIII. CONCLUSION AND PRAYER FOR RELIEF

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 to 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 fifty million dollars.

3. Turingia is not responsible for the damage caused to the Babbage Rail Transit Authority or for any harm resulting from such damage, in particular the train crash resulting in loss of life.

4. Babbage's luring, arrest, trial and conviction of a 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, 1928 P.C.I.J. (ser. A) No. 17, at 46-48. *See also* Texaco, 53 I.L.R. 389; Michell, *supra* note 92, at 419.

125. Chorzow Factory, 1928 P.C.I.J. (ser. A) No. 17, at 46-48.

126. Michell, *supra* note 92, at 424-27 and accompanying footnotes.

127. *See* BROWNLIE, *supra* note 27, at 31; Michell, *supra* note 92, at 420-27; Compromis, *supra* note 30, at ¶ 25.

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3. Convention on the Protection of Human Rights and Fundamental (European Convention) November 4, 1950, 213 UNTS 222
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5. International Covenant on Civil and Political Rights, 1966
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8. *Air Services Agreement of 27 March 1946* (1979) 18 RIAA 416
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16. *Finnish Shipowners Arbitration* (*Finland v. United Kingdom*) (1934) 3 RIAA 1479
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18. *Handyside v. United Kingdom* Ser A, No 24, 1 EHRR 737 (1979)
19. *Kalamazoo Spice Extraction Co.*v. *The Provisional Military Government of Socialist Ethiopia* 86 ILR 45
20. *Jerslid v. Denmark,* Ser A, No 298, 19 EHRR 1 (1995)
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