2002 PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

THE REPUBLIC OF TURINGIA V. THE REPUBLIC OF BABBAGE
THE CASE CONCERNING REGULATION OF ACCESS TO THE INTERNET

BENCH MEMORANDUM

CONFIDENTIAL

FOR JUDGES EYES ONLY

2002 Philip C. Jessup International Law Moot Court Competition

BENCH MEMORANDUM
TABLE OF CONTENTS

BENCH MEMORANDUM

PART I: GENERAL INFORMATION

I. INTRODUCTION

The purpose of this bench memorandum is to provide judges in the Philip C. Jessup International Law Moot Court Competition with a basic outline of the factual and legal issues relevant to the 2002 Compromis. This Bench Memorandum should be read in conjunction with the Compromis and the Corrections/Clarifications to the Compromis. The Compromis is intended to present the competitors a balanced problem, such that each side has strengths and weaknesses in its case.

This memorandum is not meant to be an exhaustive treatise on the issues raised by the facts, but rather an outline of the most relevant arguments and authorities parties may draw upon. As the memorandum is intended to give only a basic outline of the issues, it should not be surprising that a judge, in evaluating either a memorial or an oral argument, will encounter arguments and authorities that are not discussed in this memorandum. The omission of any such arguments and authorities from this memorandum does not suggest that they are not relevant or credible.

While there are a number of sub-issues which might be raised on these facts, the following questions must be addressed by the teams:

(1) Whether Babbage's restrictions on access to Internet content, and the application of those restrictions to Babbage OnLine, violate international law.

(2) Whether Babbage is liable for the losses incurred by Turingia OnLine as a result of the hacking attack by the IBCP.

(3) Whether Turingia is responsible for the harm resulting from the train crash in Babbage, which was caused by David Gabrius's hacking into the BRTA.

(4) Whether Babbage's luring of Mr. Gabrius to Babbagian territory for trial violated international law.

The problem includes tangential issues, some of which are discussed in this memorandum. The teams should not be penalized for missing them or credited unduly for noticing them.

Citations: Some teams inevitably are at a disadvantage, as are some countries, with respect to access to well-equipped law libraries. The issues in this Compromis are addressable with generally available materials and careful reading of the facts. The teams should be candid about the existence of apparently adverse, significant authority.

II. JUDGING THE JESSUP

There are differing opinions as to the role of a judge in a moot court competition. On the one hand, there are those who believe that a judge should do whatever necessary to ensure that the competitors complete their entire presentation. At the other extreme are those who believe that competitors are tested only when they spend their entire allocation of time responding to questions from the judges. It is left to each judge to find a balance between these two extremes.

There is no "correct" position on this issue. However, many observers agree that judges should at least ask questions of a sufficient difficulty and in a sufficient quantity to prevent the competitors from merely reading a rehearsed speech. In any event, a rehearsed presentation is not particularly interesting from the judges' standpoint, and, when asked, competitors have indicated that they do not enjoy passive benches.

Judges in the Jessup Competition play a different role than those in the real world. Jessup Judges must assess the validity of the participants' arguments, the persuasiveness of their presentation and the thoroughness of their preparation. Judges are expected primarily to judge the performance of the participants as outlined by the criteria noted on the judging forms for the written and oral aspects of the competition. Once submitted, participants may not revise their written Memorials. As they advance through the competition, however, participants are sure to revise their argumentative style and legal presentation. It is important that judges in the oral rounds keep this fact in mind, as their questions and responses to the participants should be formulated so as to encourage that learning process. MOST IMPORTANTLY, JUDGES MUST NOT ANNOUNCE THE WINNER OF A ROUND UNLESS THE ROUND IS AN ADVANCED ROUND.

There are certain tactics judges in the oral rounds can employ to test a competitor's flexibility without unduly interfering with the competitor's performance. These include asking a competitor to resolve apparent internal contradictions between her position and that of her partner; or asking about the particular remedy sought for a particular international delict. In these ways, a judge can make a meaningful contribution to a performance without being unduly intrusive. A judge should refrain as much as possible from insisting upon an answer to a question when it appears as if a competitor has already made a good faith effort to respond. In the final analysis, a moot court competition should, as much as possible, emulate a real courtroom to maximize the learning experience for the competitors. Just as there is no truly "correct" judging style in a courtroom, there is no correct judging style in a moot court competition.

As concerns the legal arguments to be made by the competitors, it is important to keep in mind that the competitors choose neither the problem nor the side of the issue that they argue. In spite of every attempt to make the Compromis factually and legally equal as between the parties, inevitably international law favors one side or

the other. As such, a competitor may be forced into making a weak legal argument. This by itself should not be held against the competitor. On the other hand, if the competitor incorrectly states the law, incorrectly cites a holding, or is unaware of an obvious source of relevant international law, a judge should bring it to the attention of the competitor through questioning and scoring.

It appears that, in the past, judges who do not have a strong background in international law have hesitated to ask questions during the oral rounds for fear that such questions are too fundamental. It is important, however, to have fundamental questions asked to ensure the competitors have an understanding of the basic issues and are not merely regurgitating memorized details. Further, in a real courtroom, it is often the case that a judge is not expert in the substantive law at issue. Pertinent fundamental questions are as appropriate as the more complex questions.

The following are some specific suggestions for questioning:

- Frequently utilize questions that call for a "yes" or "no" answer. The questions test a competitor's ability to answer directly, and the questions themselves tend to be shorter and more concise.

- Avoid asking rhetorical questions or making statements.

- Avoid lengthy debates with the competitors. As much as possible, the interaction between the competitors and the bench should be in question and answer format.

- Do not focus all of your questioning on one competitor or team. Try as much as possible to interject evenly throughout the round.

- Avoid detailed questioning about a co-counsel's argument. Each competitor should, at the beginning of their presentation, outline the points he or she will cover. Although it is sometimes difficult to avoid questioning on a co-counsel's argument, such questioning should be general in nature when necessary.

- Avoid extensive questioning after time has expired, which requires in part being cognitive of the time elapsed for a particular presentation (which will be constantly updated by the courtroom bailiff).

- If there is a competitor in the round who is not a native English speaker, it is important to word questions carefully. It is especially important in these instances to avoid asking questions with overly complex sentence structures.

III. SYNOPSIS

This case encompasses several disputes between the Republic of Turingia, a large, developed state with a long history of Internet usage, and the Republic of Babbage, a less-developed country led by a democratically-elected government which consists of a

majority of members of the Hortari religious group. Babbage has only seen widespread private Internet usage in the last three years, and is only now addressing the regulatory issues involved in Internet usage.

In September 1999, Mr. Sendhil Revuluri, the President of Babbage, issued a Presidential Declaration which extended Section 117 of the Babbage Criminal Code to the Internet. Section 117 prohibited the publication or dissemination of "Indecent Material." In his Presidential Declaration extending the statute, Revuluri announced that all Internet Service Providers operating in Babbage must install "blocking software" to eliminate all access to "Indecent Material" or lose their business licenses and face criminal charges.

The largest Internet Service Provider in Babbage is Babbage OnLine (BOL), a Babbage corporation which is a wholly-owned subsidiary of Turingia OnLine (TOL), a Turingia corporation. All Internet Service Providers in Babbage except for BOL promptly complied with the Presidential Declaration, by installing "blocking software" that blocked Web pages with certain words or pictures. In October 1999, the Chief Executive Officer of TOL publicly announced that his group of companies, including BOL, would not abide by the Presidential Declaration. The CEO stated that it would be impossible to block "Indecent Material" without blocking useful material as well (for example, medical information pages that might contain pictures of the human body). He also said that the directive was in violation of the "international right to freedom of expression."

In November 1999, the Babbage Ministry of Justice brought charges against BOL and TOL, alleging publication of Indecent Material on the Internet, as defined by Section 117 and the Presidential Declaration, for its failure to affirmatively block access to Indecent Material. Counsel for BOL challenged the validity of Section 117 and the Presidential Declaration, and also argued that it was neither the author nor an active distributor of Indecent Material. TOL declined to participate in the case. BOL and TOL were convicted under the statute, and BOL's business license was revoked, a fine was imposed upon the two defendants, and all of BOL's computer equipment located within Babbage was ordered to be confiscated. On appeal, this decision was upheld by Babbage's highest court.

BOL left Babbage without paying its fine, taking all of its equipment with it. On December 24, 1999, an anonymous hacker broke into TOL's computer system, erasing all of the data which comprised TOL's publicly available websites, taking down its worldwide network, and placing a virus on its system. Although TOL was able to recreate its websites and bring its network back online in three days, TOL was required to reimburse its users $50 million for the three days lack of access to the Internet. In addition, when the network was re-established, the virus initiated a "screensaver," which displayed on the user's computer screen a well-known watercolor of Hortaris massacred in 1889. The virus also emailed a message to all of TOL's subscribers, which stated, "THE MISDEEDS OF TURINGIA ONLINE HAVE BEEN PUNISHED! DO NOT ALLOW THE CANCER OF HATE AND SOCIAL DEGRADATION TO SPREAD!" Shortly thereafter, TOL was able to remove the virus from its system and restore its website.

The International Babbagian Cyber-Patrol (IBCP), a group of hackers believed by INTERPOL and the Turingian authorities to be behind other attacks over the past seven years, took credit for the attack. IBCP's past attacks have been against disseminators of what IBCP considers hate speech and/or pornography. Although they could not identify the individuals responsible, Turingian authorities and TOL investigators also traced the attack to the IBCP.

On December 29, 1999, Babbage and Turingia each responded to the attack. Babbagian President Revuluri conferred upon the anonymous IBCP hackers the Babbage Order of Merit, calling them "heroes of a just and decent world," and promising the hackers a full amnesty from prosecution in Babbagian courts. Turingian Minister of Justice Josephine Shidle denounced the attack, blaming the Government of Babbage and President Revuluri in particular. She stated that the IBCP's hacking efforts "constitute an intentional attack on a Turingian business, on Turingian soil, and have caused damage to our government and our citizens. If any citizen of Turingia sees fit to inconvenience the government of Babbage similarly through non-violent, technological means, it is my opinion that we would have no jurisdiction to prosecute."

On January 10, 2000, David Gabrius, a Turingian citizen and world-famous computer hacker and freedom-of-information activist, hacked into the "rail traffic control network" of the Babbagian Rail Transit Authority (BRTA), deleting its operating system. The BRTA is a Babbagian government agency which is in charge of regulating and running all trains within Babbagian territory. The effect of the deletion was that all automated rail traffic control functions in Babbage were eliminated for two days; during this time, rail traffic control in Babbage was reduced to radio contact among individual trains and switching stations.

Twenty minutes after the deletion, and before the BRTA understood why their computers were not responding, two Babbagian passenger trains collided with one another, head-on, killing the crews and more than 100 passengers on each train. BRTA officials, assisted by international investigators, subsequently determined that the cause of the crash was confusion resulting from the sudden loss of BRTA network scheduling and routing orders.

Babbagian President Revuluri denounced the attacks, and blamed Minister Shidle's comments for encouraging the attack, calling upon her to detain and prosecute Gabrius. Minister Shidle replied that she did not feel Turingia had jurisdiction to prosecute. On January 15, the Minister of Justice of Babbage, Tara Elis, and the head of the BRTA, published an open letter to Mr. Gabrius, promising him that if he came to Babbage to assist in fixing the BRTA's computer system, "[he] will not face prosecution or come to any harm while [he is] in our country."

Gabrius agreed to come to Babbage and arrived in the capital of Babbage aboard a Babbagian-chartered plane on February 1. He was immediately arrested by the Babbagian National Police. In fact, his help was not even needed; the BRTA

Administrator had simply lured Gabrius to Babbage so he could be arrested and tried. The Ambassador of Turingia to Babbage promptly protested the arrest, accusing Babbage of luring Gabrius to Babbage under false pretenses in contravention of international law; the protests went unanswered.

Gabrius was tried and, on July 31, 2001, convicted of murder of the over 200 victims of the January 10 rail crash, and sentenced to 20 years in prison. Babbage's highest court upheld the conviction on appeal, specifically rejecting Gabrius's argument that Babbage violated his international human rights by luring him to Babbage.

At the request of the United Nations Security Council, and after twenty-one months of fruitless bilateral negotiations, the parties have agreed to submit these matters to the International Court of Justice. Both states have been members of the United Nations since 1945, are parties to the Statute of the International Court of Justice, and have signed and ratified the Vienna Convention on the Law of Treaties. Turingia is a 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 has not yet ratified either. There is no bilateral extradition treaty between them.

IV. SOURCES OF INTERNATIONAL LAW

A. General

Under Article 38 of its Statute, the International Court of Justice may consider the following sources of international law in order to decide disputes before it:

(1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(2) international custom, as evidence of a general practice accepted as law;

(3) the general principles of law recognized by civilized nations;

(4) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There is some dispute among commentators as to whether these four sources of international law are listed in order of importance. Although Article 59 of the ICJ Statute provides that "the decision of the Court has no binding force except between the parties and in respect of that particular case," the ICJ often cites its previous case law, and that of its predecessor, the PCIJ, as persuasive authority.

B. Treaties

According to Article 34 of the Vienna Convention on the Law of Treaties, generally, treaties are not binding on non-parties. However, Article 18 of the Vienna Convention provides that "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty. . ." pending ratification, unless it has "made its intention clear not to become a party to the treaty." Moreover, Article 38 of the Vienna Convention recognizes that a treaty may become binding on non-parties as customary international law. In addition, some parts of a treaty may become customary international law while other parts do not.

C. Customary International Law

Customary international law is comprised of two elements: widespread state practice and *opinio juris* (sense of legal obligation). Evidence of customary international law may be in the form of treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and practice of international organizations.

State practice simply means that a sufficient number of states behave in a regular and repeated manner that establishes a customary norm. State practice also may be evidenced by a sufficient number of States signing, ratifying, and acceding to a convention. There is some dispute among commentators as to whether the practice of a small number of states in a particular region can create "regional customary international law."

The second element of customary international law, opinio juris, requires that the subject state action be taken out of a sense of legal obligation, as opposed to domestic expediency. Put another way, opinion juris, is the "conviction of a State that it is following a certain practice as a matter of law and that, were it to depart from the practice, some form of sanction would, or ought to, fall on it." MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 4 (1985).

In *The North Sea Continental Shelf Cases* (1969), the ICJ stated that the party asserting the existence of a rule of customary international law bears the burden of proving its existence.

PART II: LEGAL ANALYSIS

I. DOES BABBAGE'S RESTRICTION ON ACCESS TO THE INTERNET VIOLATE INTERNATIONAL LAW?

With respect to the first argument, the competitors must determine whether Babbage's Section 117, as extended to the Internet by the Presidential Declaration, violates applicable international human rights law. In addition, the competitors must determine whether application of the law to Babbage OnLine and Turingia OnLine in this case violates international law.

Note that during this argument, the parties should be clear as to whether they are arguing about Section 117, which criminalizes the publication of "Indecent Material," or about the Presidential Declaration, which extends Section 117 to the Internet and which requires "blocking software."

A. Turingia's Standing With Respect to Section 117

As a preliminary matter, Babbage may raise the issue of whether Turingia lacks standing to espouse the claim of BOL, or TOL as the shareholder of BOL. In support of this, Babbage may cite the ICJ's 1970 case of *Barcelona Traction, Light and Power* (Belgium v. Spain), 1970 ICJ Rep. 3, which held that only the state of incorporation, and not the state of the nationality of shareholders, is permitted to espouse a claim on behalf of a corporation before the World Court. Turingia may respond by arguing that the ICJ departed from this stringent standard of standing in the 1989 case of *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 ICJ Rep. 3, in which the World Court permitted the United States to pursue a claim of damage to an Italian corporation (ELSI), which was wholly owned by two U.S. corporations (Raytheon and Machlett). ELSI may be distinguishable from the instant case, however, in that (1) the Italian corporation was insolvent and in the process of liquidation, so there was no extant corporate entity in Italy at the time the case was filed; and (2) the US-Italy FCN Treaty at issue in the case specifically granted the parties the right to pursue the claims of their injured shareholders before the World Court.

Turingia may also argue that it has standing because the obligation to protect freedom of speech – or perhaps freedom to receive information – is a right owed by a state to the international community as a whole. This is the doctrine of "obligations *erga omnes*." However, the list of *erga omnes* obligations enumerated by the ICJ in *Barcelona Traction* is quite short, limited to acts of aggression, genocide, slavery and racial discrimination. The Court also recognized the obligation to respect the right of a people to self-determination as *erga omnes* in the *East Timor Case* (Port. v. Aust.), 1995 ICJ Rep. 4, in which Portugal unsuccessfully sought to use the *erga omnes* nature of the obligation to give the court subject-matter jurisdiction over a dispute concerning the territory of East Timor.

In order to succeed on this point, Turingia must first prove that respect for freedom-of-speech (or freedom-to-receive-information) has risen to the level of these other rights. The panel should press Turingia on whether and why it should expand this short list and extend such a limited doctrine. It may be useful to the panel to consider the reasoning of the Court in *East Timor* in accepting Portugal's argument that self-determination was an obligation *erga omnes*:

> The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court [citations omitted]; it is one of the essential principles of contemporary international law.

B. International Human Rights Law Regarding Expression

The parties will begin by establishing the relevant rights under international law. Turingia will rely upon the "International Bill of Rights." First, Article 19 of the Universal Declaration of Human Rights, a non-binding resolution of the United Nations General Assembly, states "Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Turingia will point out that Article 19 of the International Covenant on Civil and Political Rights (ICCPR) guarantees "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." Turingia will also argue that Article 15(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes "the right of everyone . . . to enjoy the benefits of scientific progress and its applications," perhaps arguing that the restrictions contained in Section 117 deny its citizens the right to fully exploit the Internet or some resources available on it. Both Conventions require states to protect the rights guaranteed therein.

Babbage will respond, in the first place, that although it has signed both Conventions, it has not ratified either the ICCPR or the ICESCR. Under Article 18 of the Vienna Convention on the Law of Treaties, signatories are not bound by the letter of the signed treaty, but merely prohibited from taking any action which defeats the object and purpose of the treaty. The competitor should be prepared to explain the object and purpose of the ICCPR and the ICESCR. The preamble to each Convention cites the Universal Declaration on Human Rights, and states that one purpose is "whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights. . .." Babbage will also argue that the Universal Declaration of Human Rights is not a treaty, and as such is not directly binding as international law. The parties should be prepared to argue whether or not the freedom-of-expression provisions of the Universal Declaration and the ICCPR codify customary international law, drawing from the practice and constitutions of various states and the inclusion of freedom-of-expression language in other treaties and resolutions.

With respect to Article 19(2) of ICCPR, Babbage will point out that 19(2) is expressly limited by Article 19(3), which states

> "the exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

Turingia and Babbage must each then argue whether this Babbagian restriction on content is appropriate for inclusion under the caveats contained in Article 19(3). Faced with Article 19(3), Turingia may focus on the "necessary" requirement of the caveat. Turingia may question the necessity of Section 117 itself. In addition, Turingia will argue that the Presidential Proclamation, which required that "blocking software" be installed, had the effect of blocking a broad range of non-offensive sites.

If Babbage is able to sustain the validity under international law of Section 117, it will attempt to argue that the mere extension of Section 117 to the Internet, under the Presidential Proclamation, does not violate international law. However, the Presidential Proclamation also mandates specific action by Internet Service Providers, namely, the installation of "blocking software" which eliminates access to Indecent Material. Turingia will argue that the requirement of blocking software, which necessarily eliminates access to some non-proscribed material, renders an otherwise valid restriction unduly restrictive of expression, under Article 19(2) of the ICCPR.

C. Application of Section 117 to Turingia OnLine (TOL)

Pursuant to Section 117 of the Babbage Criminal Code (BCC), Babbage prosecuted TOL for the crime of placing indecent material on a TOL content server located in Turingia which could be accessed by citizens of Babbage via the internet through BOL. *See* Compromis at paras. 6 and 10, and Clarification No. 8. These facts were designed to elicit a discussion of whether the prosecution of TOL constituted an impermissible exercise of passive personality jurisdiction by Babbage.

There are six bases upon which states have asserted extraterritorial jurisdiction over persons and conduct occurring outside their borders: (1) under the "objective territorial principle," where the act occurred abroad but its effect was felt within the prosecuting state's territory (e.g., narcotics trafficking, antitrust violations); (2) under the "nationality principle" where the perpetrator is a national of the prosecuting state; (3) under the "passive personality principle," where the victim is a national of the prosecuting state; (4) under the "protective principle," where the act affects the essential security interests of the prosecuting state (e.g., espionage, visa fraud, terrorism); and (5) under the "universal principle," where the act is universally condemned (e.g., war crimes, crimes against humanity, genocide). See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

Turingia may argue that the prosecution of TOL was based on passive personality jurisdiction, which is considered the most controversial basis of extraterritorial jurisdiction. Courts of several countries and numerous commentators have rejected passive personality (except in the limited context of terrorist crimes) as an invalid basis for extraterritorial jurisdiction, for three reasons:

> First, passive personality jurisdiction is thought to intrude too deeply on the sovereignty of other states, such as the state in which the crime occurred or the offender's home state, both of which arguably have a more direct connection to the crime than the victim's home state. Second, passive personality has been criticized on the grounds that it deprives potential defendants of notice that their conduct is criminal, since the applicable rule of criminal law will depend on the victim's nationality. Under this view, it is unfair to subject a defendant to the substantive criminal law of the victim's home state, since no one can be presumed to know the criminal law of a state thousands of miles away. Third, critics of passive personality jurisdiction argue that it is impractical. They point out that many extradition treaties will not permit rendition of a fugitive [from his home state] to the victim's home state, and, in any event, that the victim's home state will be unable to prosecute for lack of fresh evidence and witnesses.

Geoffrey R. Watson, *The Passive Personality Principle*, 28 TEXAS INT'L L. J. 1, 14 (1993).

The International Court of Justice and its predecessor, the Permanent Court of International Justice, have dealt with this issue in only one case, the 1927 *Lotus Case*. In that case, France argued that Turkey could not validly assert jurisdiction to prosecute the Watch Officer of the *Lotus* for his negligence which allowed the French ship to collide with a Turkish vessel on the high seas, killing eight Turkish nationals. The dissenting Justices agreed with France on the ground that the assertion of jurisdiction based on the nationality of the victims was not acceptable under international law. A slim majority of the Court, however, found Turkey to have used objective territorial (effects) jurisdiction (under the theory that the Turkish vessel could be deemed Turkish territory), which was acceptable under international law, and thus the majority did not address the question of whether passive jurisdiction was valid or not. *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10. The case between Turingia and Babbage is the first case since *Lotus* to present this question to the ICJ.

Babbage may argue that the prosecution of TOL was based not solely on the passive personality principle, but also on (1) the objective territorial principle, since the negative effects of the indecent material were felt not merely by Babbage citizens but in Babbage territory; and (2) the protective principle, since the offensive web-based material was likely to incite violence between Babbage groups who have a recent history of ethnic violence. Compromis at para. 2. Further, Babbage may argue that despite its shortcomings, and the very few states that purport to exercise it, "passive personality" jurisdiction is not prohibited under Customary International Law. In support of this position, Babbage may cite the most famous line from the *Lotus case*,

in which the ICJ majority stated "Restrictions upon the independence of States cannot... be presumed" and that international law leaves to states "a wide measure of discretion which is only limited in certain cases by prohibitive rules." *Lotus* at 18.

As a final note, if Turingia attempts to argue that Babbage has denied TOL any rights guaranteed under the ICESCR in proscribing and prosecuting its conduct, Babbage may respond that the ICESCR, in particular, makes special provision for "developing countries." Article 2(3) states, "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

D. Application of Section 117 to Internet Service Providers (ISPs)

The final argument concerns the application of Section 117 to BOL and other mere Internet Service Providers (ISPs). As a pure ISP, BOL does not produce any Internet content of its own; it merely provides its subscribers with access to the Internet, and to all of the information contained on the Internet. The Presidential Declaration, however, imposes liability as a principal publisher upon an ISP if it does not take affirmative steps to prohibit access for its subscribers to Indecent Material. In arguing that this law improperly punishes ISPs, Turingia may argue that there is a general state practice imposing criminal sanctions only where an ISP provides original content which violates the criminal statute. In support of this, Turingia may point to criminal statutes in states with developed Internet legal regimes: in the United States, 47 U.S.C. 230(c)(1) states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider; the EU Directive on Electronic Commerce provide exemptions from liability for an ISP which transmits information where the ISP acts as a "mere conduit" (Article 12), where the ISP is merely "caching" information (Article 13), or, in certain limited circumstances, where the ISP is merely hosting a third-party's website (Article 14).

II. Are Babbage and Turingia Liable for the Actions of the IBCP and David Gabrius, Respectively?

The second and third grounds for relief are closely interrelated. Both Babbage and Turingia are attempting to argue that the other is liable under international law for the actions of purely private actors. Babbage must argue it is not liable for the actions of the private organization, the International Babbagian Cyber-Patrol (IBCP), without prejudicing its argument that Turingia *is* liable, on similar facts, for the actions of David Gabrius, a private hacker and political activist. Turingia must simultaneously support the opposite positions in both cases. A well-prepared competitor should be able to draw principled distinctions between the two arguments.

A. The Legal Standard for State Liability For Private Actors

The argument begins by establishing the appropriate general standards for state liability for the actions of private actors. The competitors will likely rely primarily upon two sources: prior caselaw of the International Court of Justice and the Draft Articles of State Responsibility, promulgated by the International Law Commission to the United Nations General Assembly. In addition, competitors may attempt to draw support from the fruits of the rapid movement in recent months on the international law concerning state responsibility for the actions of private terrorists.

1. Caselaw of the International Court of Justice

The International Court of Justice has addressed state responsibility in two cases. The first, 1986's *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, (judgment of June 27) focused on the liability of the United States for actions against the government of Nicaragua by the rebel Contra forces. In that case, the Court determined that "United States participation, even if preponderant or decisive in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua."

The Court also established a legal standard for attributing the acts of private actors to a state, stating, "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."

The second ICJ case was 1981's *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (Judgment of May 24). In this case, the ICJ considered whether Iran was liable for actions of Iranian students against the United States in connection with the seizure of the U.S. embassy. Even though the initial takeover was conducted by the students, the ICJ determined that responsibility could be imparted to Iran because it was clear from the evidence presented that the students were subject to the control of the Iranian government and would obey its instructions.

Subsequent support for the "control" test delineated by the ICJ can be found in the Opinion of the Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991 in the case of Prosecutor v. Dusko Tadic. That tribunal stated:

> "[I]t is neither necessary or sufficient merely to show that the VRS was dependent, even completely dependent, on the VJ and the Federal Republic of Yugoslavia for the necessities of war. It must also be shown that the VJ and the Federal Republic of Yugoslavia exercised the potential for control inherent in that relationship of dependency or that the VRS had otherwise placed itself under the control of the government of the Federal Republic of Yugoslavia (Serbia and Montenegro)."

The Appeals Chamber, however, reversed this part of the trial court's judgment, on the grounds that the test in the *Nicaragua* case was not appropriate for finding individual criminal liability, as opposed to state liability.

2. The Draft Articles on State Responsibility

The Draft Articles on State Responsibility is a longtime project of the International Law Commission (ILC), an expert committee charged by the United Nations with development of principles of international law. The Draft Articles are intended to codify the international law principles of state responsibility.

The Draft Articles were last reported to the General Assembly during its 2001 53rd Session. Chapter II of the Draft Articles concerns "Attribution of conduct to a State," and is the portion upon which the competitors will primarily rely. Chapter II lists seven categories of conduct which may be attributable to a state, and describes the conditions under which such conduct may be so attributable:

(1) Conduct of organs of a State (Article 4);
(2) Conduct of persons or entities exercising elements of governmental authority (Article 5);
(3) Conduct of organs placed at the disposal of a State by another State (Article 6);
(4) Conduct directed or controlled by a State (Article 8);
(5) Conduct carried out in the absence or default of the official authorities (Article 9);
(6) Conduct of an insurrectional or other movement (Article 10); and
(7) Conduct acknowledged and adopted by a State as its own (Article 11).

The Draft Articles have never been presented in a form susceptible of state signature or ratification; They are simply reported periodically to the United Nations General Assembly. As such, a competitor seeking to base an argument on the Draft Articles must argue either that the specific provision cited is a codification of existing customary international law or that the work of the ILC, a commission of experts on the topic of state responsibility, is deserving of consideration as a "most highly qualified publicist" under Article 38(1)(d) of the Statute of the ICJ. If the student

chooses the latter route, the bench should be mindful that Article 38(1)(d) is merely "supplemental" to the other sources of international law.

If the competitor successfully introduces the Draft Articles as a source of international law, the panel should force the competitor to choose which Article or Articles (s)he is relying upon, and should not allow the competitor to conflate arguments which might support one Article which those that support another. In particular – reflecting a common conflated argument from the Regional and National Rounds – the panel should be mindful that Article 8 requires prior or concurrent action by the state (direction or control), while Article 11 requires subsequent action by the state (acknowledgment or adoption of actions already taken).

3. State Responsibility for Promoting or Harboring Terrorists

The Compromis was written in the spring and summer of 2001. In the period between the drafting of the Problem and the writing of this Bench Memorandum, there has been much movement on the issue of state responsibility for the actions of private individuals who may be described as "terrorists." Some competitors may attempt to interject these developments to support their cases for or against state responsibility for the actions of Mr. Gabrius and the IBCP.

(a) Definition of "Terrorism"

The first, and most difficult argument either side will face is successfully characterizing the private actors as "terrorists." There is no internationally-accepted definition of "terrorism," so the competitors must present and defend to the Court a proposed *ad hoc* definition, and a convincing reason why the Court should outpace the traditional sources of international law in creating (or "finding") such a definition.

In paragraph 3 of its Declaration on Measures to Eliminate International Terrorism (1994), the United Nations General Assembly stopped short of defining terrorism, but stated that "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable . . ." This implicit definition was reiterated in paragraph 5 of the Declaration to supplement the 1994 Declaration (1996).

In 1999, the General Assembly opened for signature the International Convention for the Suppression of the Financing of Terrorism. Once again sidestepping the task of defining "terrorism," the General Assembly, at Article 2(1), simply defined

as an "offense" any offense under a myriad of treaties referenced in the Convention. But the Convention also defines as an offense "Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." This latter definition, which requires an intent to cause death or serious bodily injury, would not appear to be helpful to any competitor attempting to prove "terrorism" under the fact patterns presented in the current case, though Gabrius's conviction of murder may open an avenue of counter-argument.

The competitors may also seek to define terrorism based on the recent statements of any number of heads of state. In so doing, they must be able to demonstrate that these statements have reached the level of customary international law, *i.e.* that they have gained widespread acceptance among the community of states and that they are intended to have international legal effect.

Once a definition of "terrorism" has been set out, the competitor must demonstrate that the IBCP or Mr. Gabrius qualifies as a "terrorist" under the definition. The discussion of these arguments is saved for Sections B and C, *infra.*

(b) State Responsibility for Acts of Terrorism

Once it has been demonstrated that the private actor is, in fact, a terrorist, the competitor must show that the state is responsible under international law for illegal support or encouragement of terrorism. This argument again involves two components: definition of illegal state acts in support of terrorism and demonstration that the illegal actions have been taken.

Section 5 of the General Assembly's Declaration on Measures to Eliminate International Terrorism contains the most comprehensive description of a state's purported obligations *vis a vis* international terrorism. The Declaration requires states to "take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism, in particular:

> (a) To refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and

> to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens;
>
> (b) To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of their national law;
>
> . . .
>
> (e) To take promptly all steps necessary to implement the existing international conventions on this subject to which they are parties, including the harmonization of their domestic legislation with those conventions;
>
> (f) To take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in subparagraph (a) above."

B. Application of the Standard to Babbage's Liability for the IBCP's Hacking

The Compromis makes it clear that the IBCP is not a state organ or under the control of Babbage, nor has it received any overt support, training, assistance from the Babbagian government. Therefore, Turingia must marshall the facts of the Problem to demonstrate that Babbage's actions (and inactions), taken *in toto*, rise to a level which justifies holding it accountable for the IBCP's actions.

Turingia will attempt to argue that Babbage subsequently ratified and accepted the actions of the IBCP. Sendhil Revuluri, the President of Babbage, awarded the anonymous IBCP hackers membership in the Babbage Order of Merit. In this proclamation, he expressly tied the honor to their actions against TOL, calling them "heroes of a just and decent world" and stating that "these unknown soldiers are due the thanks of the people of Babbage." He also promised the IBCP hackers a full amnesty from prosecution in Babbage's courts. Turingia may also draw an implication from the fact that the IBCP has been active internationally for over seven years that the government of Babbage had prior knowledge of the existence and activities of the group, but tolerated its presence because its actions were consistent with the aims of the Babbagian government.

Babbage will argue that the cumulative effect of these actions does not satisfy the demanding "control" test set out by the International Court of Justice. In this

respect, Babbage is quite clearly correct. With respect to the Draft Articles, Babbage will argue that, while President Revuluri's subsequent commendation of the IBCP may be approving "acknowledgment," at no time did Babbage adopt the action as its own, as required by Article 11 of the Draft Articles.

Turingia's strongest argument based upon Babbage's conduct may be under the emerging law regarding "harboring terrorists." However, Babbage will claim that IBCP's actions were not intended to create terror, but were in fact a one-for-one retribution for a perceived wrongful act by TOL, directed against the perpetrator of that wrongful act. Turingia may draw some strength for the terrorist intent of the act from the public statement displayed by the Turingian virus, which it may characterize as intended to discourage other ISPs from pursuing TOL's course of action.

C. Application of the Standard to Turingia's Liability for Gabrius's Actions

Likewise, the Compromis makes it clear that David Gabrius is a private individual, with no formal connection with the government of Turingia, and with no training or support from Turingia. Thus, Babbage must argue that Turingia's prior and subsequent statements, actions and inactions rise to a level that would impart responsibility for Gabrius's actions to Turingia.

Babbage will first point to the prior statements of Turingian Minister of Justice Josephine Shidle, who blamed the Babbagian government for the IBCP attack and, while foreclosing the option of formal response by the Turingian government, encouraged private citizens to retaliate. Shidle stated, "If any citizen of Turingia sees fit to inconvenience the government of Babbage similarly [to the IBCP attack] through non-violent, technological means, it is my opinion that we would have no jurisdiction to prosecute."

Babbage will argue that this statement was essentially an open offer of amnesty by a Turingian state official, acting in her formal capacity, in return for a computer hacker's attack against a state agency of Babbage. When Mr. Gabrius hacked into the BRTA's computer system, he was simply following Ms. Shidle's lead.

Babbage will attempt to distinguish Turingia's subsequent actions from its own, pointing out that Babbage does not know the identities of the individual hackers responsible for the TOL attack. Turingia, on the other hand, knew Mr. Gabrius's identity and his whereabouts. When asked by Babbage to arrest and try him, Turingia refused. Babbage will assert that this subsequent refusal to prosecute bolsters its position that Gabrius was, in fact, acting at the open request of the government of Turingia.

Turingia's main line of response resembles Babbage's response to the arguments surrounding the IBCP. Turingia will argue that the cumulative effect of its

actions fails to meet the high "control" standard of the ICJ. Although it is arguably a slightly closer argument than in the case of the IBCP, Turingia should clearly prevail in this defense. With respect to the Draft Articles, Babbage may be on stronger footing, given Minister Shidle's prior encouragement and tacit request for private action. Babbage may attempt to rely upon the acknowledgment-and-adoption provision or on the directed-by-the-state provision.

With respect to the terrorism argument, Babbage must demonstrate that Gabrius's action was motivated by a terroristic intent, and not mere one-for-one retribution. It would seem that Babbage cannot draw strength from the deaths of the crews and passengers, since Gabrius's actions may not have been specifically intended to cause those deaths.

III. DOES BABBAGE'S LURING OF DAVID GABRIUS FOR ARREST AND TRIAL VIOLATE INTERNATIONAL LAW?

According to the Compromis, Babbage government authorities lured Turingian national David Gabrius out of Turingia and into Babbage by requesting his assistance to repair the BRA computer network that he had damaged and by promising that he would not face prosecution, although his assistance was not in fact needed and the real intent was to arrest him upon entry into Babbage. *See* Compromis paras. 23 and 24. To effectuate the luring, the Babbage authorities chartered a plane which flew from Babbage into Turingia, where it picked up Gabrius, and then returned to Babbage, without disclosing the actual nature of the flight. *See* Clarification No. 15. These facts raise the question of whether Babbage violated international law through its luring operation, and if so, whether the repatriation of Gabrius is the required remedy.

A. The Legality of Luring

1. Violation of Territorial Integrity

Under international law, states and international organizations are permitted to exercise police powers inside the territory of another state only with the consent of the territorial state. This rule is derived from the ICJ's 1949 *Corfu Channel Case (U.K. v. Albania)*, 1949 I.C.J. 4, at 35, and its 1986 *Military and Paramilitary Activities Case (Nicaragua v. United States)*, 1986 I.C.J. 14, at 106. While neither of these cases dealt specifically with the conduct of foreign police or investigators in a state without its permission, the precedent is widely seen as prohibiting such action. Thus, the Restatement (Third) of the Foreign Relations Law provides that "a state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Section

432(2) (1987). This position was confirmed by the United Nations Sixth (Legal) Committee, whose members reached consensus that "international law prohibits a state from exercising its criminal jurisdiction beyond its territory as contrary to the sovereign equality and territorial integrity of states, unless the other state concerned has given its consent." V. Morris and M. Vrailas Bourloyannis, *The Work of the Sixth Committee at the Forty-Eighth Session of the U.N. General Assembly*, 88 AJIL 343, at 357-58 (1993). Similarly, the Working Group on Arbitrary Detention of the U.N. Commission on Human Rights has taken the position that a basic principle of international law and international relations is the "respect for the territorial sovereignty of States." *Report of the Working Group on Arbitrary Detention, U.N. Commission on Human Rights*, 50th Sess., Agenda Item 10, at 139-140, U.N. Doc. E/CN.4/1994/27 (1993). Citing the decisions of the ICJ mentioned above, the Working Group concluded that this principle prohibits a state from engaging in unconsented law enforcement activity in the territory of another state. Based on this authority, Turingia may argue that Babbage officials violated this principle by landing an airplane in Turingian territory in an effort to lure a Turingian national to Babbage without Turingia's knowledge or consent.

Babbage, in response, may point out that the Compromis does not indicate that any law enforcement officials were actually present on the chartered flight. Babbage may further argue that the principle of territorial integrity is not an absolute bar to unconsented extraterritorial law enforcement activity. International law permits a state, for instance, to enter another's territory in self-defense. Thus, a state's authorities may justifiably engage in an unconsented apprehension or luring in another state against terrorists which pose a continuing threat and which are being given sanctuary in the latter state. *See Draft Articles on State Responsibility*, [1979] 2 (pt.1) Y.B. Int'l L. Comm'n 93-94; R. Lillich & J. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 Am. U. L. Rev. 217 (1977). Babbage may thus argue that the law enforcement operation was justified to prevent the continuing terrorist threat posed by David Gabrius.

2. Violation of Human Rights

When the United States Supreme Court affirmed the right of the United States to prosecute a Mexican citizen (Alvarez-Machain) who had been abducted from Mexico by agents of the United States, the U.N. Working Group on Arbitrary Detention concluded that "[the] detention of Humberto Alvarez-Machain is declared to be arbitrary, being in contravention of ... Article 9 of the International Covenant on Civil and Political Rights ...." *Report of the Working Group on Arbitrary Detention, U.N. Commission on Human Rights*, 50th Sess., Agenda Item 10, at 139-140, U.N. Doc. E/CN.4/1994/27 (1993).

Article 9 of the Covenant on Civil and Political Rights provides that everyone has the right to liberty and security of person, that "no one shall be subjected to arbitrary arrest or detention," and that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." International Covenant on Civil and Political Rights, 23 March 1976, 999 U.N.T.S. 171, art. 9(1). The Human Rights Committee, which was established to monitor the implementation of the Covenant, has ruled on several occasions that transborder abductions violate Article 9 of the Covenant. *Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Supp. No. 40, at 176, 185, U.N. Doc. A/36/40 (1981). Interpreting a similar provision in the European Convention for the Protection of Human Rights, the European Court of Human Rights has stated that where state authorities are involved in a luring, the rights of the individual under the Convention are violated. *Stocke v. Germany*, ECHR Ser. A. No. 199, 19 March 1991 (Annex, Opinion of the Commission, at para. 167). See also Walker v. Bank of New York, Inc. (1993), 16 O.R. (3d) 596 (Gen. Div.) (Canadian trial court holding that Canadian citizen lured into U.S. for prosecution by force or fraud has been unlawfully "abducted")

Babbage may respond that, where there is no extradition treaty, a luring pursuant to a duly issued indictment is not an arbitrary arrest. Further, David Gabrius left Turingia voluntarily; no force or duress was employed.

B. Distinguishing Luring from Unlawful Abduction

As an extraterritorial law enforcement practice, luring is much more common, and less objectionable to many countries, than abductions. Unlike abduction by force, weapons are not used to get the suspect to the location where the arrest will occur. A luring can be accomplished telephonically, by fax or the internet (as in the instant case), thus physical presence of law enforcement authorities in the territory of the host state can be avoided. Therefore, the risk of injury, damage, or incident in the host state is minimized.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) recently had occasion to rule on the legality of luring in the case of Slavko Dokmanovic, a Croatian Serb indicted war criminal who was lured out of the Federal Republic of Yugoslavia (FRY) and into Croatia by an official of the Office of the International Prosecutor, where he was arrested and surrendered to the International Tribunal for trial. *Prosecutor v. Slavko Dokmanovic, Decision on the Motion for Release by the Accused Slavko Dokmanovic*, No. IT-95-13a-PT, T. Ch. II, 22 October 1997, at para. 7. The Defense argued that the case should be dismissed because "Dokmanovic was arrested in a 'tricky way,' which can only be interpreted as a

'kidnapping,'" and that "Dokmanovic's arrest violated the sovereignty of the FRY and international law because he was arrested in the territory of the FRY without the knowledge or approval of the competent State authorities." The ICTY rejected Dokmanovic's arguments, concluding that "the means used to accomplish the arrest of Mr. Dokmanovic neither violated principles of international law nor the sovereignty of the FRY." The ICTY distinguished the case from *Stocke v. Germany* (cited above) on the ground that the European cases involved violation of an extradition treaty, suggesting that luring is acceptable where (as in the case of David Gabrius) there exists no extradition treaty between the two states concerned.

Babbage will rely on the *Dokmanovic case* to justify its action. Turingia may attempt to distinguish *Dokmanovic* from the case of David Gabrius on three grounds: (1) In contrast to Gabrius, Dokmanovic was a national of the state he was lured into (Croatia) not lured out of (the FRY); (2) Dokmanovic was charged with committing crimes against humanity, whereas Gabrius was charged only with the common crime of murder; and (3) the *Dokmanovic case* involved a luring done by officers of an international tribunal established by a Chapter VII Resolution of the Security Council.

C. Is Repatriation the Appropriate Remedy?

While recognizing that international law prohibits unconsented abductions, the domestic courts of some countries employ the *mala captus bene detentus* principle, meaning a person improperly seized may nevertheless properly be detained. International precedent for the principle goes back to the abduction of Adolf Eichmann, the engineer of Hitler's "Final Solution," from Argentina by Israeli agents. The Security Council adopted a resolution recognizing that the abduction violated international law and requiring Israel to make "appropriate reparation" to Argentina. The resolution, however, did not require Eichmann's return, and Argentina settled for a simple apology given the universally condemned nature of Eichmann's crimes. Eichmann was subsequently tried, convicted, and executed in Israel without further objection by the international community. The so called "Eichmann exception" was applied by the French High Court in the 1985 *Barbie Case*, 78 I.L.R. 124, which also involved a Nazi accused of crimes against humanity.

In 1992, the U.S. Supreme Court reaffirmed application of the *mala captus bene detentus* principle in the case of *Alvarez-Machain*, a Mexican doctor abducted from Mexico by U.S. agents and prosecuted in the United States for the torture-murder of a DEA agent. *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992). The *Alvarez-Machain* case, however, has been met with widespread criticism throughout the international community. Less than a year after the *Alvarez-Machain* decision, the United Kingdom's House of Lords emphatically rejected the *mala captus bene detentus* rule as inconsistent with evolving

standards of human rights. *Regina v. Horseferry Road Magistrates' Court (Ex parte Bennett)*, [1994] 1 App. Cas. 42 (Eng. H.L. 1993). It is worth noting that on September 11, 2001, the U.S. Court of Appeals for the Ninth Circuit ruled that Mr. Alvarez-Machain was entitled to sue the United States for 20 million dollars for the U.S. violation of international law involved in his arrest. This suggests the availability of an alternative remedy for lurings and abductions that violate international law.

D. Estoppel, Unilateral Statements and Similar Doctrines

Turingia may attempt to use the letter to Mr. Gabrius in a subtly different way. Turingia may claim that, independent of the "luring" question, the negative promises made by the Babbagian Minister of Justice and the BRTA Chief Administrator prohibit Babbage, under some equitable doctrine or other independent rule of international law, from taking action inconsistent with those promises. That is, by publicly promising not to arrest Mr. Gabrius, Babbage is prohibited from then arresting him.

Turingia may claim that by promising not to arrest Mr. Gabrius, the Minister of Justice and/or the BRTA Administrator have bound Babbage not to arrest him. In this, Turingia is arguing that the statements created an independent legal obligation. Turingia may rely upon the *Nuclear Tests Case (Aust. v. Fr.)*, 1974 I.C.J. 253, in which Australia sought to enforce against France a unilateral statement by the President of France that his country would cease atmospheric testing of nuclear weapons in the South Pacific. The Court affirmed that the unilateral statements did create a new obligation, noting that despite the fact that no independent international obligation to cease atmospheric testing existed, "The President of [France], in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed."

In order to prevail on this argument, Turingia must demonstrate that the statements met the standard set out by the Court in the *Nuclear Tests Case*, namely:

> An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the decision to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

In the second instance, Turingia may attempt to rely upon the similar doctrine of "estoppel." Estoppel is a doctrine with roots in the equity courts of common-law systems. Estoppel states that once a party has accepted an obligation or circumstance by its conduct, it cannot proceed to challenge the validity of that obligation. In the international law context, estoppel has been described as an attempt to rationalize "two different legal traditions which had converged in

present day international law: the Romanist doctrine of the binding effect of unilateral promises and the common law tradition which did not recognize such binding effect but which, in order to fill the gap, had recourse to the doctrine of estoppel as a corollary of the principle of good faith." *Report of the International Law Commission*, at para. 532 (1999).

The principle of general equity in the interpretation of legal documents and relationships is one of the most widely cited "general principles" of international law. It should be noted as a preliminary matter that "equity" in this sense is a source of international law, brought before the court under Article 38(1)(c) of the Statute of the ICJ – that is, an *inter legem* application of equitable principles – and not a power of the Court to decide the merits of the case *ex aequo et bono*, under Article 38(2) of the Statute. The ICJ has upheld the application of equitable principles generally in, among other cases, the *North Sea Continental Shelf Cases* (1969); its predecessor, the Permanent Court of International Justice, recognized equitable principles as part and parcel of international lawin ; its predecessor, the Permanent Court of International Justice, recognized equitable principles as part and parcel of international law in *The Diversion of Water from the Meuse* (Neth. V. Belg.), P.C.I.J. Ser. A/B, No. 70, 76-78 (1937).

In order to prevail on an estoppel argument, Turingia must demonstrate that Babbage's conduct led Turingia to rely upon Babbage's undertaking not to arrest Mr. Gabrius.

Under either estoppel or unilateral-statement analysis, Babbage and Turingia must be able to discuss whether the Minister of Justice and the BRTA Administrator were acting within their official capacities and whether either has authority to bind the government of Babbage.

PART III: INDEX OF AUTHORITIES

Treaties, Conventions and Resolutions

Judicial Decisions

Publicists and Other Writings

Municipal Codes