

THE 2021-2022 PRICE MEDIA LAW

MOOT COMPETITION

EMILIA BOS AND SANTOS DARL

(APPLICANTS)

V

SARGON

(RESPONDENT)

MEMORIAL FOR APPLICANTS

4999 Words

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LIST OF ABBREVIATIONS

ACmHPR	American Commission on Human Rights
ACtHR	The African Court of Human and Peoples' Rights
ASEAN	Associations of Southeast Asians
CERD	The Committee on the Elimination of Racial Discrimination
CSP	Community Standards Policy
DPS	Democratic Party of Sargon
ECtHR	European Court of Human Rights
EU	European Union
HRC	United Nations Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
NOC	Natter Oversight Council
OB	Oversight Board
RSMA	Regulation of Social Media Act
SNF	Sargon National Front
UDHR	Universal Declaration of Human Rights
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council

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STATEMENTS OF RELEVANT FACTS

SOCIO-POLITICAL BACKGROUND

- [1] Sargon is a largely-populated island nation spanning 60 million people with democratic elections every four years. The incumbent government was the Sargon National Front ('SNF'), helmed by Emilia Bos. The main opposition party is The Democratic Party of Sargon ('DPS').
- [2] The primary religion, Phi, is followed by over 60% of the population. Opinion polls indicate that a slight majority of Phi adherents lean towards DPS. The remaining portion of the population generally identify as agnostic.
- [3] Sargonians heavily utilise 'Natter' as their primary source of social media. Natter has amassed over 25 million users, including Bos and 'spiritual leader' Philemon Gen. Natter's reach surpasses even the mainstream media.

NATTER AND NATTER MATTER

- [4] Natter's functions include texts, audios, pictorial, and video content. Users may 'follow' other users on Natter, along with 'sharing' and 'liking' material posted by other users.
- [5] A separate page, known as Natter Matter allows users to view subject matter relevant to them. This is processed by an algorithm that analyses the timing, popularity, and relevance of a certain post to user's selected topics of interest.
- [6] Natter is self-regulated by its Community Standards Policy ('CSP'), enforced through a user-powered reporting mechanism. The CSP covers, inter alia, hate speech in Section 4 and elections in Section 8. Natter is empowered to suspend or permanently block users violating the CSP via Section 20.
- [7] Some 1000 content moderators are authorised to remove material posted by users after a report. The content moderators are monitored by senior reviewers.

- [8] Senior reviewers have discretionary powers to prevent content from being shown by users on Natter Matter, and to temporarily suspend users for continuous or serious violations of the CSP.
- [9] An Oversight Council (‘**NOC**’) comprising 5 experts in various fields was established pursuant to Section 12 of the Regulation of Social Media Act. They are tasked at presiding over reviewing decisions taken under the CSP, particularly the permanent blocking of users motioned by senior reviewers or reinstatement of removed content appealed by users.

THE SARGON PRESIDENTIAL ELECTIONS LEAD-UP

- [10] The SNF featured Bos running for re-election, with Philemon Gen leading the opposition under the DPS. Both candidates promoted their campaign via Natter.
- [11] Bos, with a following of 4 million users, centred their campaign on economic development, access to jobs, and welfare. Bos and Gen were partisan in terms of the nation's religious trajectory. The former aims to ‘*respond to growing religious extremism*’, with the latter hoping to ‘*revitalise spirituality within Sargon*’. Gen boasted a following of 7 million users.
- [12] Bos had been vocal on promoting secularism in Sargon, with suggestions to abolish Phi teachings in public schools. This received attention from Natter users, with most praising Bos's stance.
- [13] This catalysed ‘hashtags’ on Natter such as #Phinished and #WeWereHereFirst.

NATTER’S RESPONSE

- [14] In wake of user complaints. posts containing #Phinished were taken down by Natter content moderators. Further, the Natter Matter algorithm was stayed with posts containing the hashtag #WeWereHereFirst.

[15] Santos Darl was among the individuals whose posts were taken down. Darl is a social media influencer with a following of over 400,000. A total of 55 posts, containing either #Phinished or #WeWereHereFirst combined with #VoteBos, were taken down by Natter in the span of three days.

THE SARGON PRESIDENTIAL ELECTION RESULTS AND AFTERMATH

[16] With 80% of the votes counted, Gen led with 51% of the votes in their favour. This drew speculations from Bos on Natter that the election was tainted by fraud.

[17] After a temporary suspension of vote counting, the Election Commission clarified that no signs of electoral fraud were present. With that, 200 Bos supporters rallied outside the Commission's headquarters.

[18] A Natter post from Bos, including the phrase 'STOP THE PHRAUD!' was met with the 200 supporters becoming more animated, with some throwing projectiles at law enforcement officials. The crowd was dispersed by riot police.

[19] Bos's post was removed and her Natter profile was suspended. The NOC resolved to permanently block Bos from Natter on the ground of her '*repeated violations of sections 4 and 8 of the CSP*'.

[20] Darl lodged a complaint to the NOC against the removal of his posts by Natter moderators on the basis that the '*systematic take-down*' was tantamount to a suspension. The Council dismissed the complaint on the ground that Darl violated Section 4 of the CSP.

LEGAL PROCEEDINGS

[21] Bos and Darl appealed against the NOC's decisions at the Supreme Court of Sargon on the ground that their freedom of expression under Article 10 of the Constitution of Sargon was impeded.

[22] On 1 July 2021, the Supreme Court dismissed their appeals.

[23] Consequently, Bos and Darl filed applications before the Universal Court of Human Rights on the ground that their rights under Article 19 read with Article 25(b) of the International Covenant on Civil and Political Rights were violated.

STATEMENT OF JURISDICTION

Emilia Bos, Santos Darl, and the State of Sargon, which is a party to the International Covenant on Civil and Political Rights ('**ICCPR**'), have submitted their dispute to the Universal Court of Human Rights ('**this Court**') concerning Articles 19 and 25(b) of the ICCPR.

On the basis of the foregoing, this Court is requested to adjudge the dispute in accordance with the rules and principles of international law, including any applicable declarations and treaties.

QUESTIONS PRESENTED

- I. Whether Sargon has violated Emilia Bos's rights under Article 19 read with Article 25(b) of the ICCPR by upholding the Natter Oversight Council's decisions to suspend Emilia Bos and permanently block her from Natter?
- II. Whether Sargon has violated Santos Darl's rights under Article 19 read with Article 25(b) of the ICCPR by upholding Natter's decision to remove every single post by Santos Darl from 31 May to 2 June 2021?

SUMMARY OF ARGUMENTS

I

Sargon violated Emilia Bos's rights under Article 19 of the ICCPR by upholding the Natter Oversight Council's decision to suspend and permanently block her from Natter. *First*, such restriction to Bos's rights was not provided by law because Natter's Community Standards Policy ('CSP') and Sargon's Regulations for the Social Media Act 2021 were not sufficiently precise and susceptible to arbitrariness and abuse. *Second*, the restriction was not necessary as Sargon failed to adduce any convincing and compelling evidence between Bos's Natter posts and threat to the rights of others or public order. *Third*, the restriction was not proportionate as Bos's statements did not amount to hate speech under the *Rabat Plan of Action* test, comprising of content, context, status, extent, intent, and imminence.

Further, Sargon violated Bos's right to be elected and the public's right to vote under Article 25(b) of the ICCPR. *First*, the suspension and permanent blocking of Bos on Natter impaired her right to stand in future elections by restricting her ability to conduct political campaigns and engage with voters. *Second*, the restriction was arbitrary and disproportionate as her Natter posts on election night occurred after voting had closed and constituted no risk of voter interference or suppression.

II

Sargon violated Santos Darl's rights under Article 19 of the ICCPR by upholding Natter's decision to remove all his posts from 31 May to 2 June 2021. *First*, the removal of Darl's posts was not provided by law because the CSP and the RMSCA were not sufficiently precise due to the vague and overly broad terminologies, particularly on '*religious extremism*'. Sargon's law also failed to indicate with sufficient clarity the scope of any discretion conferred upon

Natter on content moderation. *Second*, the restriction did not pursue legitimate aim and was not necessary. Darl's Natter posts contributed to a debate of public interest, particularly on the coverage of the June 2021 presidential elections between Bos and Gen. *Third*, the restriction was disproportionate because Darl's Natter posts did not constitute hate speech under the six-part *Rabat Plan of Action* and the systematic take-down of Darl's post had the effect of a suspension.

Further, Sargon violated the public's right to vote under Article 25(b) of the ICCPR. *First*, Darl's posts were political speech intended to arouse societal interest in the election. *Second*, Natter's removal of Darl's posts due to the usage of the hashtags #Phinished and #WeWereHereFirst was arbitrary. There were other least intrusive measures to reduce the reach and impact of Darl's posts, particularly by triggering an algorithmic pause and attaching labels.

ARGUMENTS

I. SARGON VIOLATED BOS’S RIGHTS UNDER ARTICLE 19 READ WITH ARTICLE 25(B) OF THE ICCPR BY UPHOLDING NOC’S DECISIONS TO SUSPEND AND PERMANENTLY BLOCK BOS FROM NATTER

[1] On 15 June 2021, NOC permanently blocked Bos from Natter¹ upon further escalation and suspension by a Natter senior reviewer.² Bos’s appeal against NOC’s decision was dismissed by Sargon’s Supreme Court.³ All domestic remedies have been exhausted.⁴

[2] Sargon’s judgment violated [A] the right to freedom of expression under Article 19 of ICCPR; and [B] right to a free and fair elections under Article 25(b) of the ICCPR.

A. SARGON VIOLATED THE RIGHT TO FREEDOM OF EXPRESSION UNDER ARTICLE 19 OF THE ICCPR

[3] The right to freedom of expression forms the cornerstone of every democratic society⁵ and is enshrined in regional human rights instruments worldwide, including Europe,⁶

¹ Facts [62].

² Facts [60].

³ Facts [70].

⁴ Facts [72].

⁵ HRC ‘General Comment No 34 Article 19: Freedom of Opinion and Expression’ (12 September 2011) CCPR/C/G34 (‘**GC34**’) [13]; *Hasanov and Majidli v Azerbaijan* App nos 926/14 and 9717/14 (ECtHR, 7 October 2021) (‘*Hasanov*’) [53]; *Ringer Axel Springer Slovakia, A.S. v Slovakia (no. 4)* App no 26826/16 (ECtHR, 23 September 2021) (‘*Ringer*’) [26]; *Ingabire Victoire Umuhoza v Republic of Rwanda* App no 003/2014 (ACtHPR, 24 November 2017) (‘*Umuhoza*’) [119]; *Vladimir Velichkin v Belarus* Communication no 1022/2001 CCPR/C/85/D/1022/2001 (HRC, 23 November 2005) (‘*Velichkin*’) [7.3].

⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 1950, entered into force 3 September 1953), art 10.

America,⁷ Africa,⁸ and Asia.⁹

[4] Whilst freedom of opinion is non-derogable,¹⁰ freedom of expression has special duties and responsibilities.¹¹ Nevertheless, any governmental interference of the latter freedom is only justified upon fulfilment of the universal three-part test of legality, necessity, and proportionality as applied by the HRC,¹² ECtHR,¹³ IACtHR,¹⁴ ACtHPR/ACmHPR,¹⁵ and social media companies (*i.e.* Facebook¹⁶).

[5] The permanent blocking of Bos was not [i] provided by law; [ii] in pursuance of a

⁷ American Declaration of the Rights and Duties of Man (adopted 2 May 1948), art 4; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), art 13.

⁸ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), art 9.

⁹ ASEAN Human Rights Declaration (adopted 18 November 2012), art 23; Arab Charter on Human Rights (adopted 22 March 2004, entered into force 15 March 2008), art 26.

¹⁰ GC34 (n 5) [9].

¹¹ GC34 (n 5) [21].

¹² GC34 (n 5) [22]; *Velichkin* (n 5) [7.3]; *Womah Mukong v Cameroon* Communication no 458/1991 CCPR/C/51/D/458/1991 (HRC, 10 August 1994) ('*Mukong*') [9.7]; *Malcom Ross v Canada* Communication no 736/1997 CCPR/C/70/D/736/1997 (HRC, 26 October 2000) ('*Malcom*') [11.2]; *Jong-Kyu Sohn v Republic of Korea* Communication no 518/1992 CCPR/C/54/D/518/1992 (HRC, 3 August 1995) [10.4].

¹³ *Avaz Zeynalov v Azerbaijan* App nos 37816/12 and 25260/14 (ECtHR, 22 July 2021) [99]; *Yezhov and Others v Russia* App no 22051/05 (ECtHR, 29 June 2021) ('*Yezhov*') [25]; *Milosavljevic v Serbia* App no 57574/14 (ECtHR, 25 May 2021) [47]; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) ('*Perinçek*') [124]; *Delfi AS v Estonia* [GC] App no 64569/09 (ECtHR, 16 June 2015) ('*Delfi*') [119]; *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 January 2015) [59]; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) ('*Ceylan*') [24]; *The Sunday Times v UK* App no 6538/74 (ECtHR, 26 April 1979) ('*Sunday Times*') [45]; *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976) ('*Handyside*') [49].

¹⁴ *Ivcher-Bronstein v Peru* Series C no 74 (IACtHR, 6 February 2001) [154]-[155]; *Francisco Martorell v Chile* Case 11.230 Report no 11/96 (IACtHR, 3 May 1996) [53]-[55]; *Hector Felix Miranda v Mexico* Case 11.739 Report no 5/99 (IACtHR, 13 April 1999) [43]; *Olmedo Bustos et al v Chile* Series C no 73 (IACtHR, 5 February 2021) ('*Olmedo Bustos*').

¹⁵ *Sebastien Germain Ajavon v Republic of Benin* App no 013/2017 (ACtHPR, 28 November 2019) [119], [122]-[123]; *Umuhoza* (n 5) [134]; *Lohé Issa Konaté v The Republic of Burkina Faso* App no 004/2013 (ACtHPR, 5 December 2014) ('*Konaté*') [125].

¹⁶ Case Decision 2020-003-FB-UA (OB, 28 January 2021) [8.3.1]; Case Decision 2021-004-FB-UA (OB, 26 May 2021) [8.3.1]; Case Decision 2021-011-FB-UA (OB, 28 September 2021) [8.3]; Case Decision 2020-007-FB-FBR (OB, 12 February 2021) [8.3.1].

legitimate aim; and; [iii] necessary and proportionate in pursuance of such aim.

i. The permanent blocking of Bos was unlawful

[6] The test of legality examines the ‘quality’ of the law,¹⁷ which may include parliamentary acts,¹⁸ administrative decrees,¹⁹ and unwritten law.²⁰

[7] The decision to permanently block Bos on Natter was grounded upon two provisions lacking this qualitative criterion: [a] Sections 4 and 8 of CSP were not sufficiently precise; and [b] Section 20 of CSP vested unfettered discretion to Natter.

a. Sections 4 and 8 of CSP lacked sufficient precision

[8] Laws must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly.²¹ The legal consequences of one’s action must be reasonably foreseeable.²² The level of precision required depends to a considerable degree on the content of the law in question, the field it is designed to cover, and the number and

¹⁷ *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) (‘*Kafkaris*’) [140]; *Satakunnan Markkinaporssi Oy and Satamedia Oy v Finland* [GC] App no 931/13 (ECtHR, 27 June 2017) (‘*Satakunnan*’) [142]; *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996) [29]; *Coeme and Others v Belgium* App nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96 (ECtHR, 18 October 2000) [145]; *Achour v France* App no 67335/01 (ECtHR, 29 March 2006) [42].

¹⁸ GC34 (n 5) [24]; *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) (‘*Kruslin*’) [28]; *Sunday Times* (n 13) [45].

¹⁹ *De Wilde, Ooms and Versyp v Belgium* App no 21906/04 (ECtHR, 18 June 1971) [93]; *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985) (‘*Barthold*’) [46].

²⁰ *Kruslin* (n 18) [29]; *Sunday Times* (n 13) [47]; *Chappell v UK* App no 10461/83 (ECtHR, 30 March 1989) [52]; *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994) [43].

²¹ *Selahattin Demirtas v Turkey (no 2)* [GC] App no 14305/17 (ECtHR, 22 December 2020) (‘*Demirtas*’) [250]; *Magyar Kétfarkú Kutya Párt v Hungary* App no 201/17 (ECtHR, 20 January 2020) (‘*Párt*’) [94]; *Delfi* (n 13) [120]-[122]; *Sunday Times* (n 13) [49]; GC34 (n 5) [25].

²² *Gachechiladze v Georgia* App no 2591/19 (ECtHR, 22 October 2021) (‘*Gachechiladze*’) [46]; *Ooo Informatsionnoye Agentstvo Tambov-Inform v Russia* App no 43351/12, (ECtHR, 18 August 2021) (‘*Tambov-Inform*’) [73]; *Satakunnan* (n 17) [143]; *Konaté* (n 15) [126].

status of those to whom it is addressed.²³

[9] The NOC permanently blocked Bos due to serious violations of Sections 4²⁴ and 8²⁵ of CSP.

[10] On hate speech, Section 4 of CSP provides a laundry list on what constitutes an ‘*attack against people*’, including ‘*violent or dehumanising speech, harmful stereotypes, statements of superiority or inferiority, expressions of contempt, disgust or dismissal, cursing, and calls for exclusion or segregation.*’²⁶ Such broad examples are tantamount to formulating a catch-all provision that would effectively prohibit all kinds of speech of a disparaging nature.²⁷

[11] On elections, Section 8 of CSP prohibits ‘*deliberate misrepresentation of the facts*’.²⁸ In pith and substance, such provision takes aim at ‘*disinformation*’ – a vague term which is ‘*extraordinarily elusive*’²⁹ and lacks any ‘*universally accepted definition*’.³⁰ National courts frequently strike down general legislations prohibiting legislation as

²³ *Satakunnan* (n 17) [144]; *Párt* (n 21) [98]; *Delfi* (n 13) [122]; *Kudrevičius and Others v Lithuania* App no 37553/05 (ECtHR, 15 October 2015) [110].

²⁴ Facts [63].

²⁵ Facts [64].

²⁶ Facts [14].

²⁷ *Norman v UK* App no 41387/17 (ECtHR, 6 July 2021) [62]-[66]; *Del Rio Prada v Spain* App no 42750/09 (ECtHR, 21 October 2013) [92]; *S.W. v UK* App no 20166/92 (ECtHR, 22 November 1995) (‘*S.W.*’) [35].

²⁸ Facts [14].

²⁹ UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, David Kaye’ (23 April 2020) A/HRC/44/49 [42].

³⁰ UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, Irene Khan’ (13 April 2021) A/HRC/47/25 [9].

unconstitutional (e.g. Canada,³¹ India,³² Uganda,³³ Zambia,³⁴ Zimbabwe,³⁵ and Gambia³⁶). Similarly, recent laws prohibiting ‘fake news’ on COVID-19 (e.g. Russia,³⁷ Hungary,³⁸ Azerbaijan,³⁹ Romania,⁴⁰ Bosnia and Herzegovina,⁴¹ and Armenia⁴²) have been strongly condemned.⁴³ Most notably, in February 2021, a newly-amended statutory provision prohibiting false statements about electoral candidates with the intent of affecting the election results⁴⁴ was deemed violative of freedom of expression⁴⁵ by the Canadian Ontario court.⁴⁶

³¹ *R v Zundel* [1992] 2 SCR 731; Criminal Code (RSC, 1985, c. C-46) (Canada), s 181.

³² *Shreya Singhal v Union of India* (2013) 12 SCC 73; Information Technology Act 2000 (India), s 66A(b).

³³ *Charles Onyango Obbo and Anor v Attorney General (Constitutional Appeal 2 of 2002)* [2004] UGSC 81; Penal Code Act (Cap 120) (Uganda), s 50.

³⁴ *Chipenzi v The People* [2014] ZMHC 112; Penal Code Act (Cap 87) (Zambia), s 67.

³⁵ *Chavunduka v Minister of Home Affairs* [2000] JOL 6540; Law and Order (Maintenance) Act (Cap 11:07) (Zimbabwe), s 50(2)(a).

³⁶ *Gambia Press Union v Attorney General SC Civil Suit No. 1/2014; Federation of African Journalists (FAJ) and others v The Gambia ECW/CCJ/JUD/04/18* (ECWCCJ, 13 March 2018); Criminal Code (Act no 25 of 1933) (Gambia), s 59.

³⁷ Federal Law on Amendments to the Criminal Code of the Russian Federation and Articles 31 and 151 of the Criminal Procedure Code of the Russian Federation (no 100-FZ of 1 April 2020) (Russia), art 1.

³⁸ Criminal Code (Act 100 of 2012) (Hungary), s 337(2).

³⁹ Law on Information, Informatization, and Protection of Information (Information Law) (3 April 1998) (amended by Law No. 30-VIQD on 17 March 2020) (Azerbaijan), art 13-2.

⁴⁰ Decree on the establishment of the state of emergency in the territory of Romania (no 195) (16 March 2020) (Romania), art 2.

⁴¹ Decree on Spreading of Panic and False News in a State of Emergency (19 March 2020) (Republika Srpska); Decision on Prohibiting Spreading of Panic and Disorder (7 April 2020) (Republika Srpska).

⁴² Decree on the State of Emergency (24 March 2020) (Armenia).

⁴³ UN Special Rapporteur on Freedom of Opinion and Expression and others, ‘Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda’ (3 March 2017) (**Joint Declaration 2017**) principle 2(a).

⁴⁴ Elections Act (SC 2000, c. 9) (Canada), s 91.

⁴⁵ Charter of Rights and Freedom (Canada), s 2(b).

⁴⁶ *Canadian Constitution Foundation v Attorney General of Canada* 2021 ONSC 1224 [75].

[12] *In casu*, the overbreadth of Sections 4 and 8 of CSP fails to meet the strict criterion of precision required of a general legislation affecting all members of the public.⁴⁷

b. Section 20 of CSP vests unfettered discretion on Natter

[13] Laws must clearly indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise.⁴⁸

[14] *First*, Sargon’s laws on social media regulation lack consistency.⁴⁹ Section 12 of RMSA requires social media platforms to establish an independent oversight body to curb ‘*hate speech, cyber-bullying, and religious extremism*’ without defining such terms.⁵⁰ More disconcertingly, Section 400 of PA merely criminalise hate speech but not the other two mischiefs.⁵¹

[15] *Second*, Natter’s moderation standards lack coherence.⁵² Bos’s account was suspended⁵³ and blocked⁵⁴ pursuant to Section 20 of CSP. However, Section 20 is

⁴⁷ *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) (‘*Kokkinakis*’) [39]; *Panaitescu v Romania* App no 8398/04 (ECtHR, 12 March 2013) [33]; *City of Chicago v Morales et al* 527 US 41 (1999); *Joseph Burstyn, Inc v Wilson* 343 US 495 (1952); *Romesh Thappar v The State of Madras* 1950 AIR 124.

⁴⁸ *Sanoma Uitgevers B.V. v The Netherlands* App no 38224/03 (ECtHR, 14 September 2010) (‘*Uitgevers*’) [82]; *Sunday Times* (n 13) [49]; *Tolstoy Miloslavsky v UK* App no 18139/91 (ECtHR, 13 July 1995) [37]; *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) (‘*Hasan*’) [84]; *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2002) [83]; *Gillow v UK* App no 9063/80 (ECtHR, 24 November 1986) [51]; *Rotaru v Romania* [GC] App no 28341/95 (ECtHR, 4 May 2000) [52]; *Liu v Russia* App no 42086/05 (ECtHR, 6 December 2007) [56]; *Al-Nashif v Bulgaria* App no 50963/99 (ECtHR, 20 June 2002) (‘*Al-Nashif*’) [119].

⁴⁹ *C.R. v UK* App no 20190/92 (ECtHR, 22 November 1995) [34]; *S.W.* (n 27) [36], *Streletz, Kessler and Krenz v Germany* App nos 34044/96, 35523/97 and 44801/98 (ECtHR, 22 March 2001) [50].

⁵⁰ Facts [21].

⁵¹ Facts [22].

⁵² Robyn Caplan, ‘Content or Context Moderation? Artisanal, Community-Reliant and Industrial Approaches’ (Data & Society, November 2018) <https://datasociety.net/wp-content/uploads/2018/11/DS_Content_or_Context_Moderation.pdf> accessed on 22 November 2021, 13; Organization for Economic Co-operation and Development (OECD), ‘OECD Council Recommendation on Principles for Internet Policy Making’, 13 December 2011, 7.

⁵³ Facts [60].

⁵⁴ Facts [63].

devoid of any details on the criteria of such sanctions.⁵⁵ It is unreasonable to expect average users to ‘*synthesise rules from across multiple sources*’ to fully appreciate the consequence of severe violations *i.e.* disabling of account.⁵⁶

[16] *Third*, Natter’s reviewers lack competence. Only a single member of the five-panel NOC is trained in religious studies,⁵⁷ whilst there is no eligibility requirement of expertise for senior reviewers.⁵⁸ This is in stark contrast of Facebook’s tailored training of its moderation team⁵⁹ and Oversight Board’s commissioning of independent researchers to provide expert assistance in specific cases.⁶⁰

[17] Due to such inherent legal deficiencies, the NOC’s decision-making is susceptible to bias⁶¹ and abuse.⁶²

ii. The permanent blocking of Bos was unnecessary

[18] Freedom of expression may only be restricted for (i) the respect of the rights or reputations of others, or (ii) protection of national security or of public order, or of

⁵⁵ Facts [15].

⁵⁶ Case Decision 2021-003-FB-UA (OB, 28 January 2021) [8.3(a)].

⁵⁷ Facts [53].

⁵⁸ Facts [16].

⁵⁹ Case Decision 2021-003-FB-UA (n 56) [8.3(c)].

⁶⁰ Case Decision 2020-003-FB-UA (OB, 28 January 2021) (n 16) [Procedural Note].

⁶¹ Facts [69]; Case Decision 2021-003-FB-UA (OB, 28 January 2021) (n 56) [8.3(c)]; OHCHR, ‘Mandate of Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye’ (24 April 2019) OL SGP 3/2019; OHCHR, ‘Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan’ (25 March 2021) OL MYS 5/2021.

⁶² Special Rapporteur 2020 (n 29) [40], [42]; [40], [42]; *Podkolzina v Latvia* App no 46726/99 (ECtHR, 9 April 2002) (*‘Podkolzina’*) [35]; Canada Commission on Democratic Expression, ‘Harm Reduction: A Six-Step Program to Protect Democratic Expression Online’ (Public Policy Forum, January 2021) <<https://ppforum.ca/articles/harms-reduction-a-six-step-program-to-protect-democratic-expression-online/>> accessed on 22 November 2021; Kate Klonick & Thomas Kadri, ‘Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech’ (2019) 93 Southern California Law Review 37.

public health or morals.⁶³ Such exceptions must be narrowly construed.⁶⁴ A direct and immediate connection between the expression and threat must be established⁶⁵ by convincing and compelling evidence.⁶⁶

[19] Aside from vague allusions to prevent further ‘*significant harm*’ by Natter users, the NOC⁶⁷ did not precisely specify any legitimate aim to permanently block Bos. Neither did Sargon’s Supreme Court furnish any compelling reason.⁶⁸

[20] Indeed, if the concern was to protect the electoral process and prevent disruption to the right to vote under Article 25 of ICCPR,⁶⁹ a temporary suspension would have sufficed. On 5 June 2021, Bos issued a public apology.⁷⁰ Although police investigation commenced, no further action was taken to prosecute Bos.⁷¹

[21] Hence, the permanent blocking of Bos from Natter lacked any legitimate aim.

iii. The permanent blocking of Bos was disproportionate

[22] Restrictions on freedom of expression must be interpreted narrowly on political

⁶³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (‘**ICCPR**’), art 19(3); GC34 (n 5) [23]; *Velichkin* (n 5) [7.3]; *Handyside* (n 13) [49].

⁶⁴ *Nemtsov v Russia* App no 1774/11 (ECtHR, 31 July 2014) (‘*Nemtsov*’) [72].

⁶⁵ GC34 (n 5) [35]; *Shin v Republic of Korea* Communication no 926/2000 CCPR/C/80/D/926/2000 (HRC, 16 March 2004) [7.2]; *Adimayo M. Aduayom v Togo* Communication nos 422/1990, 423/1990 and 424/1990 CCPR/C/55/D/422-424/1990 (HRC, 12 July 1996) [7.4].

⁶⁶ *Ouranio Toxo v Greece* App no 74989/01 (ECtHR, 20 October 2005) [36]; *Nemtsov* (n 64) [72]; *Makhmudov v Russia* App no 35082/04 (ECtHR, 26 July 2007) [64], [70].

⁶⁷ Facts [63]-[64].

⁶⁸ Facts [70].

⁶⁹ *Leonid Svetik v Belarus* Communication no 927/2000 CCPR/C/81/D/927/2000 (HRC, 8 July 2004) (‘*Leonid*’) [7.3]; *Melnychenko v Ukraine* App no 17707/02 (ECtHR, 19 October 2004) (‘*Melnychenko*’) [59]; *Matthieu-Mohin and Clerfayt v Belgium* App no 9267/81 (ECtHR, 2 March 1987) (‘*Matthieu-Mohin*’) [52].

⁷⁰ Facts [56].

⁷¹ Facts [57].

speech.⁷² Opinions which ‘*shock, offend or disturb*’ are part and parcel of any democratic society.⁷³

[23] Indeed, it is even more critical to allow opinions and information of all kinds to circulate freely in the period preceding elections.⁷⁴ Restraint on free speech shall not be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democracy tenets, and human rights.⁷⁵

[24] The principle of proportionality is embodied under both Article 19(3) of the ICCPR⁷⁶ and Article 10(5) of Sargon’s Constitution.⁷⁷ Permanently blocking Bos was not the least intrusive means to achieve the aim⁷⁸ of curbing [a] hate speech; or [b] disinformation.

a. Bos did not advocate hatred against Phi adherents

⁷² *Hasanov* (n 5) [53]; *Dlugolecki v Poland* App no 23806/03 (ECtHR, 24 February 2009) (‘*Dlugolecki*’) [36]; *Lopes Gomes Da Silva v Portugal* App no 37698/67 (ECtHR, 28 September 2000) [33]; *Sürek v Turkey (no 1)* App no 26682/95 (ECtHR, 8 July 1999) (‘*Sürek*’) [61]; *Vajnai v Hungary* App no 33629/06 (ECtHR, 8 July 2008) (‘*Vajnai*’) [47]; *Grebneva and Alisimchik v Russia* App no 8918/05 (ECtHR, 22 November 2016) [51], [58].

⁷³ *Editorial Board of Grivna Newspaper v Ukraine* App nos 41214/08 and 49440/08 (ECtHR, 16 April 2019) [84]; *Bédát v Switzerland* App no 56925/08 (ECtHR, 29 March 2016) (‘*Bédát*’) [48]; *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) (‘*Gündüz*’) [37]; *MGN Limited v UK* App no 39401/04 (ECtHR, 18 January 2011) [139]; *Hasanov* (n 5) [53]; *Umuhoza* (n 5) [143]; *Handyside* (n 13) [49]; *Vajnai* (n 72) [46].

⁷⁴ *Orlovskaya Iskra v Russia* App no 42911/08 (ECtHR, 21 February 2017) (‘*Orlovskaya*’) [110]; *Cheltsova v Russia* App no 44294/06 (ECtHR, 13 June 2017) [96]; *Dlugolecki* (n 72) [40]; *Bowman v UK* App no 24839/94 (ECtHR, 19 February 1998) (‘*Bowman*’) [42]; *Staniszewski v Poland* App no 20422/15 (ECtHR, 14 October 2021) (‘*Staniszewski*’) [47].

⁷⁵ *Mukong* (n 12) [9.7]; GC34 (n 5) [23].

⁷⁶ GC34 (n 5) [34]; *Marques v Angola* Communication no 1128/2002 CCPR/C/83/D/1128/2002 (HRC, 29 March 2005) [3.9]; *Faurisson v France* Communication no 550/1993 CCPR/C/58/D/550/1993 (HRC, 8 November 1996) [8]; *Olmedo Bustos* (n 14) [69].

⁷⁷ Facts [67].

⁷⁸ *Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02 and 26448/03 (ECtHR, 22 October 2007) (‘*Lindon*’) [45]; *Perna v Italy* App no 48898/99 (ECtHR, 6 May 2003) (‘*Perna*’) [39]; *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002) (‘*Nikula*’) [47]; *Lyashko v Ukraine* App no 21040/02 (ECtHR, 10 October 2006) (‘*Lyashko*’) [47]; *Animal Defenders International v UK* [GC] App no 48876/08 (ECtHR, 22 April 2013) (‘*Animal Defenders International*’) [105]; *Otegi Mondragon v Spain* App no 2034/07 (ECtHR, 15 March 2011) (‘*Olegi Mondragon*’) [49]; *Schweizerische Radio-Und Fernsehgesellschaft Srg v Switzerland* App no 34124/06 (ECtHR, 31 June 2012) [56].

- [25] The rising prevalence of discrimination against minorities has led many governments to enact legislations criminalising the ‘*advocacy of hatred*’ in accordance with Article 20(2) of ICCPR.⁷⁹
- [26] The term ‘*hatred*’ refers to the most severe and deeply felt form of opprobrium.⁸⁰ The six factors identified in the *Rabat Plan of Action*⁸¹ is the standard recognized by the CERD⁸², UN Special Rapporteurs,⁸³ and ECtHR.⁸⁴
- [27] *First, content* examines the degree to which the speech was provocative and direct, as well as the form, style, and nature of arguments deployed is to be considered.⁸⁵ Public debates on matters of general concern are to be afforded a margin of exaggeration or provocation.⁸⁶ Bos’s posts on the election day (4 June) was must be construed in context of her earlier post on the eve expressing concern that her supporters’ voices were being ‘*stifled by extremist forces that are intent on undermining democracy in Sargon*’ and

⁷⁹ CERD, ‘General Recommendation No 35 (Combatting racist hate speech)’ (26 September 2013) CERD/C/GC/35 (‘**GR35**’) [13], [46]-[47]; UNHRC, ‘Report of the Special Rapporteur on freedom of religion or belief, Ahmed Shaheed’ (5 March 2019) A/HRC/40/58 [29]; UNHRC, ‘Report of the Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt’ (23 December 2015) A/HRC/31/18 [55]-[56]; *Malcom* (n 12) [3.6]; *J.R.T. and the W.G. Party v Canada* Communication no 104/1981 CCPR/C/OP/2 (HRC, 6 April 1983) [8(b)].

⁸⁰ UNHRC, ‘Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence’ (11 January 2013) A/HRC/22/17/Add.4 [18], [29] (‘**Rabat Plan of Action**’); Special Rapporteur 2015 (n 79) [34].

⁸¹ Rabat Plan of Action (n 80).

⁸² GR35 (n 79) [15].

⁸³ UNGA, ‘Promotion and protection of the right to freedom of opinion and expression’ (9 October 2019) A/74/486 (‘**UNGA A/74/487**’) [14]; Special Rapporteur 2015 (n 79) [57].

⁸⁴ *Savva Terentyev v Russia* App no 10692/09 (ECtHR, 38 August 2018) (‘*Savva Terentyev*’) [66]; *Perinçek* (n 13) [204]-[206]; *Stomakhin v Russia* App no 52273/07 (ECtHR, 9 May 2018) (‘*Stomakhin*’) [96].

⁸⁵ *Savva Terentyev* (n 84) [39]; *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) (‘*Jersild*’) [31]; *Oberschlick v Austria* App no 11662/85 (ECtHR, 23 May 1991) (‘*Oberschlick*’) [57].

⁸⁶ *Mariya Alekhina and Others v Russia* App no 38004/12 (ECtHR, 17 July 2018) (‘*Alekhina*’) [212]; *Mamere v France* App no 12697/03 (ECtHR, 7 November 2006) [25]; *Steel and Morris v UK* App no 68416/01 (ECtHR, 15 February 2005) (‘*Steel*’) [90]; *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECtHR, 20 May 1999) (‘*Bladet*’) [59]; *Staniszewski* (n 74) [45]; *Ringer* (n 5) [41]; *Párt* (n 21) [162].

hope ‘*that the election tomorrow will be free and fair hope*’.⁸⁷ The statements ‘*election has been undermined by undemocratic and extremist forces. STOP THE FRAUD!!!*’⁸⁸ and ‘*They are going to let the religious extremists win. STOP THE PHRAUD!*’⁸⁹ are a far cry from calls for violence⁹⁰ and denigration of political opponents.⁹¹

[28] *Second, context* examines the prevailing social and political conditions,⁹² particularly the norms on freedom of expression in society.⁹³ Article 10(3) of Sargon’s Constitution guarantees the ‘*right to access and freely use the internet*’.⁹⁴ Such wide latitude is evinced by Gen’s equally provocative statements on Natter labelling non-Phi adherents as a ‘*degradation*’.⁹⁵

[29] *Third, status* examines the credibility of the speaker in the eyes of society and intended audience.⁹⁶ Bos was the erstwhile President of Sargon seeking re-election.⁹⁷ Nevertheless, her following of 5 million users on Natter⁹⁸ is overshadowed by Gen’s

⁸⁷ Facts [40].

⁸⁸ Facts [47].

⁸⁹ Facts [52].

⁹⁰ *Demirtas* (n 21) [328].

⁹¹ *Yavuz and Yaylah v Turkey* App no 12606/11 (ECtHR, 17 December 2013) [51].

⁹² *Gachechiladze* (n 22) [58]; *E.S. v Austria* App no 38450/12 (ECtHR, 25 October 2018) [50]; *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997) (‘*Zana*’) [51]; *Karasteleve and Others v Russia* App no 16435/10 (ECtHR, 6 October 2020) [39]; *Umuhoza* (n 5) [144]; *Perinçek* (n 13) [249]-[250]; *Gündüz* (n 73) [48]-[49].

⁹³ Case Decision 2021-011-FB-UA (n 16); Case Decision 2021-004-FB-UA (n 16) [8.2].

⁹⁴ Facts [67].

⁹⁵ Facts [33].

⁹⁶ *Rekvenyi v Hungary* App no 25390/94 (ECtHR, 20 May 1999) [34]; *Vogt v Germany* App no 17851/91 (ECtHR, 26 September 1995) [48]; *Chorherr v Autriche* App no 13308/87 (ECtHR, 25 August 1993) (‘*Chorherr*’) [25]; *Baka v Hungary* App no 20261/12 (ECtHR, 23 June 2016) [95]; *Perinçek* (n 13) [66].

⁹⁷ Facts [27].

⁹⁸ Facts [30], [35].

following of 7 million users.⁹⁹ It is disingenuous for Gen to escape censure but not Bos.

[30] *Fourth, extent* examines the means of dissemination, the size and the magnitude of the audience.¹⁰⁰ Both posts by Bos¹⁰¹ and Gen¹⁰² were shared by over a million users and featured on Natter Matter.

[31] *Fifth, intent* requires more than mere negligence or recklessness.¹⁰³ Whilst Bos's post at 1.05am (5 June)¹⁰⁴ may have instigated the violent behaviour of protestors outside the Election Commission,¹⁰⁵ Bos's prompt apology carries a sense of regret negating any intent to incite violence.¹⁰⁶

[32] *Sixth, imminence* requires 'a reasonable probability that the speech would succeed in inciting actual action against the target'¹⁰⁷ within the realm of foreseeability.¹⁰⁸ The protestors wore T-shirts and caps.¹⁰⁹ Bos could not have reasonably foreseen that an unarmed crowd would attempt to break through the building and throw rocks and

⁹⁹ Facts [32].

¹⁰⁰ Rabat Plan of Action (n 80) [29(e)]; *Delfi* (n 13) [30]; *Perinçek* (n 13) [251]; *Stomakhin* (n 84) [72]; *Alekhina* (n 86) [103].

¹⁰¹ Facts [41].

¹⁰² Facts [33].

¹⁰³ Rabat Plan of Action (n 80) [29(c)]; Special Rapporteur 2019 (n 79) [34]; *Nix v Germany* App no 35285/16 (ECtHR, 12 March 2018) [51], [52]; *Jersild* (n 85) [38].

¹⁰⁴ Facts [52].

¹⁰⁵ Facts [53].

¹⁰⁶ Facts [54].

¹⁰⁷ Rabat Plan of Action (n 80) [29(f)]; *Alekhina* (n 86) [103], [106]; *McLeod v UK* App no 24755/94 (ECtHR, 23 September 1998) ('*McLeod*') [38]; UN Strategy and Plan of Action on Hate Speech 'Detailed Guidance on Implementation for United Nations Field Presences' (UN, September 2020) 13; UNGA A/74/486 (n 83) [14(f)].

¹⁰⁸ *McLeod* (n 107) [38]; *Alekhina* (n 86) [103].

¹⁰⁹ Facts [51].

projectiles at the guards.¹¹⁰

[33] Accordingly, none of the six factors weigh towards finding Bos culpable for advocating hatred against Phi adherents or political opponents.

b. Bos’s innocent dissemination of disinformation did not justify permanent blocking

[34] Admittedly, Bos’s statements imply that the June 4 presidential election was tainted by voting fraud.¹¹¹ Nevertheless, this does not warrant permanent blocking from Natter.

[35] *First*, freedom of expression protects the reporting on elections ‘*even if is strongly suspected that this information might not be truthful*’.¹¹² At 12.15am, the Election Commission convened an emergency meeting and suspended all vote counting.¹¹³ At 12.35am, Bos posted that the ‘*Election Commission now suspects that FRAUD has been committed*’.¹¹⁴

[36] Such suspicion, albeit unfounded, was raised in the heat of moment when verification of its truth or falsity was not possible.¹¹⁵ The public enjoys a wide latitude to criticise governmental authorities even when such criticism lacks clear factual basis.¹¹⁶

[37] *Second*, instead of permanently blocking Bos, there were other available measures that could have been availed by Natter’s moderation team (in the order of severity): pausing

¹¹⁰ Facts [53].

¹¹¹ Facts [47], [50], [52].

¹¹² *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005) (‘*Salov*’) [113].

¹¹³ Facts [48].

¹¹⁴ Facts [49].

¹¹⁵ *Salov* (n 112) [114].

¹¹⁶ *Lombardo and Others v Malta* App no 7333/06 (ECtHR, 24 April 2007) [60]; *Kita v Poland* App no 57659/00 (ECtHR, 8 July 2008) [43]-[46]; *Kwiecień v Poland* App no 51744/09 (ECtHR, 9 January 2007) [54].

the algorithm to restrict Bos’s posts from appearing on Natter Matter¹¹⁷, removal of Bos’s posts,¹¹⁸ and suspending Bos not exceeding one month.¹¹⁹

[38] Indeed, the first option – known as a ‘*circuit breaker*’ – is the most effective (and least intrusive) tool to combat disinformation by buying time for human reviewers to fact-check the veracity of the content rather than instant removal.¹²⁰ Further, Natter failed to deploy other conventional tools utilised by social media companies (*e.g.* Facebook¹²¹ and Twitter¹²²) on labelling content with notices indicating different degrees of risks (*e.g.* Twitter – misleading information, disputed claims, and unverified claims).¹²³

[39] Hence, banning Bos for reacting badly at the heat of election night was disproportionate.

B. SARGON VIOLATED THE RIGHT TO VOTE AND BE ELECTED UNDER ARTICLE 25(B) OF THE ICCPR

[40] The right to vote and be elected at elections is enshrined under Article 25(b) of the ICCPR.¹²⁴ A free and fair election is critical to reflect the free will of electors in their

¹¹⁷ Facts [19].

¹¹⁸ Facts [17].

¹¹⁹ Facts [20].

¹²⁰ ‘Working Group on Infodemics, Policy Framework’ (Forum on Information and Democracy, November 2020) <https://informationdemocracy.org/wp-content/uploads/2020/11/ForumID_Report-on-infodemics_101120.pdf> accessed on 22 November 2021.

¹²¹ ‘How is Facebook addressing false information through independent fact-checkers?’ (Facebook Help Centre) <<https://www.facebook.com/help/1952307158131536>> accessed on 22 November 2021.

¹²² ‘Notices on Twitter and what they mean’ (Twitter Help Centre) <<https://help.twitter.com/en/rules-and-policies/notices-on-twitter>> accessed on 22 November 2021.

¹²³ Yoel Roth and Nick Pickles, ‘Updating our approach to misleading information’ (Twitter Blog, 11 May 2020) <https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html> accessed on 22 November 2021.

¹²⁴ ICCPR (n 63), art 25(b); *Mohamed Nasheed v Maldives* Communication nos 2270/2013 and 2851/2016 CCPR/C/122/D/2270/2013, CCPR/C/122/D/2851/2016 (HRC, 4 April 2018) [8.5].

choice of representatives¹²⁵ and facilitate peaceful transfer of political power.¹²⁶

[41] In turn, the freedom of expression forms one of the ‘*essential conditions for the effective exercise*’ of such right.¹²⁷ During election debates, it is of paramount importance that electoral candidates are accorded ‘*unhindered exercise of freedom of speech*’.¹²⁸

[42] As observed by the ECtHR in *Bowman*, both rights are closely inter-related and reinforce each other: ‘*Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system*’.¹²⁹

[43] Unlike freedom of expression,¹³⁰ restrictions to the right to vote and be elected under Article 25(b) is not limited to an exhaustive list of legitimate aims.¹³¹ Concomitantly, the test of compliance is two-fold: [i] interference with the free expression of opinion; [ii] arbitrariness and proportionality.¹³²

i. The permanent blocking of Bos impaired the free expression of Sargon electors during and after the June 2021 election

[44] The right to free and fair election has a dual dimension: the ‘*active*’ right to vote, and the ‘*passive*’ right to stand for elections.¹³³

¹²⁵ HRC, ‘General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service’ (12 July 1996) CCPR/C/21/Rev.1/Add.7 (‘GC25’) [9]; Organization for Security and Co-operation in Europe (OSCE), ‘Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE’ (29 June 1990), art 5.1; Protocol to the ECHR (entered into force 1 November 1998), art 3.

¹²⁶ ECOWAS Protocol on Democracy and Good Governance (adopted December 2001), art 1(b).

¹²⁷ GC25 (n 125) [12].

¹²⁸ *Kudeshkina v Russia* App no 29492/05 (ECtHR, 26 February 2009) [87].

¹²⁹ *Bowman* (n 74) [42].

¹³⁰ ICCPR (n 63), art 19(3).

¹³¹ *Ždanoka v Latvia* App no 58278/00 (ECtHR, 16 March 2006) (‘*Ždanoka*’) [115(b)].

¹³² *Ždanoka* (n 131) [115(c)]; *Podkolzina* (n 62) [33].

¹³³ *Ždanoka* (n 131) [115(e)]; *Melnychenko* (n 69) [57].

- [45] Generally, the right to vote is impaired by rules on voter eligibility. Whilst some rules may be rational (*e.g.* minimum age¹³⁴ and residence¹³⁵), others exceed beyond permissible limits (*e.g.* national origin¹³⁶ and bankruptcy¹³⁷). In turn, disqualification of candidates from the electoral roll is the most blatant form of denial of the latter right (*e.g.* ethnic origin¹³⁸ and linguistic competence¹³⁹).
- [46] Sargon did not directly deprive its citizens from voting nor disqualify Bos from being an electoral candidate. Nevertheless, the permanent blocking of Bos still had a ripple effect on the 4 June elections and future elections in Sargon.
- [47] Ultimately, the test is whether such measure has thwarted the free expression of the people¹⁴⁰ *i.e.* to debate public affairs, hold peaceful demonstrations, publish political material, and advertise political ideas, and criticise and oppose political actors.¹⁴¹
- [48] *First*, the dual rights of Bos and voters cover both the organisation of the electoral process prior or during voting, and also the review of the outcome and disputes concerning counting of votes and validation of election results.¹⁴² Dissatisfied parties

¹³⁴ *Hirst v UK* [GC] App no 74205/01 (ECtHR, 6 October 2010) (*'Hirst'*) [62].

¹³⁵ *Melnychenko* (n 69) [56].

¹³⁶ *Aziz v Cyprus* App no 69949/01 (ECtHR, 22 September 2004) (*'Aziz'*) [26]-[30].

¹³⁷ *Albanese, Campagnano and Vitiello v Italy* App nos 77924/01 and 77962/01 (ECtHR, 3 July 2006) [48]-[49].

¹³⁸ *Zornić v Bosnia-Herzegovina* App no 3681/06 (ECtHR, 15 July 2014) [43].

¹³⁹ *Podkolzina* (n 62) [36].

¹⁴⁰ *Matthieu-Mohin* (n 69) [52]; *Gitonas and Others v Greece* App nos 18747/91, 19376/92 and 19379/92 (ECtHR, 1 July 1997) (*'Gitonas'*) [39]; *Matthews v UK* App no 24833/94 (ECtHR, 18 February 1999) (*'Matthews'*) [63]; *Podkolzina* (n 62) [33].

¹⁴¹ *Leonid* (n 69) [8.6]; *Staniszewski* (n 74) [47]; *Orlovskaya* (n 74) [121]; *Dlugolecki* (n 72) [42]; *Matthieu-Mohin* (n 69) [47].

¹⁴² *Kovach v Ukraine* App no 39424/02 (ECtHR, 7 February 2008) [55]; *Namat Aliyev v Azerbaijan* App no 18705/06 (ECtHR, 8 April 2010) (*'Namat'*) [81]; *Kerimova v Azerbaijan* App no 20799/06 (ECtHR, 30 September 2010) (*'Kerimova'*) [54]; *Davydov and Others v Russia* App no 75947/11 (ECtHR, 20 May 2017) (*'Davydov'*) [274]; *Mugemangago v Belgium* App no 310/15 (ECtHR, 10 July 2020) (*'Mugemangango'*) [69]; *Velásquez-Rodríguez v Honduras* Series C no 4 (IACtHR, 29 July 1988) [166]-[167].

are free to raise complaints after the votes have been tabulated and released.¹⁴³

- [49] Due to serious doubts being raised over the legitimacy of the election by the public,¹⁴⁴ the Election Commission's denial of electoral fraud does not put an end to the matter.¹⁴⁵ Deplatforming Bos effectively took out the sting of her pursuit for investigation¹⁴⁶ and casts a '*chilling effect*' on Natter users from speaking out in support.¹⁴⁷
- [50] *Second*, Bos is indefinitely banned from Natter – Sargon's most popular social media platform.¹⁴⁸ This '*stacks the deck*' against her future aspirations to run for office in future¹⁴⁹ and hinders dissemination of her political ideas on matters of public interest¹⁵⁰ (e.g. growth of religious extremism and history curricula reform¹⁵¹).
- [51] Hence, the very essence of the electoral rights of Bos and Sargon citizens were being deprived of their effectiveness¹⁵² and rendered illusory.¹⁵³

¹⁴³ *Namat* (n 142) [78]; *Gahramanli and Others v Azerbaijan* App no 36503/11 (ECtHR, 8 January 2016) [73]; *Davydov* (n 142) [289]; *Mugemangago* (n 142) [79]; *Kerimova* (n 142) [54].

¹⁴⁴ Facts [45].

¹⁴⁵ Facts [55].

¹⁴⁶ Facts [56].

¹⁴⁷ *Goodwin v UK* App no 17488/90 (ECtHR, 27 March 1996) [39]; *Cumhuriyet Vafki and Others v Turkey* App no 28255/07 (ECtHR, 8 October 2013) ('*Cumhuriyet*') [62], [63]; *Dupuis and Others v France* App no 1914/02 (ECtHR, 12 November 2007) [48].

¹⁴⁸ Facts [7].

¹⁴⁹ GC25 (n 125) [15], [16]; *Ždanoka* (n 131) [74]; *Melnychenko* (n 69) [54].

¹⁵⁰ *Bowman* (n 74) [46].

¹⁵¹ Facts [30].

¹⁵² *Demirtas* (n 21) [387]; *Matthieu-Mohin* (n 69) [52]; *Matthews* (n 140) [63]; *Labita v Italy* App no 26772/95 (ECtHR, 6 April 2000) ('*Labita*') [201]; *Podkolzina* (n 62) [33]; *Py v France* App no 66289/01 (ECtHR, 11 January 2005) [45]-[47]; *Yumak and Sadak v Turkey* App no 10226/03 (ECtHR, 8 July 2008) ('*Sadak*') [31].

¹⁵³ *Podkolzina* (n 62) [35]; *Chassagnou and Others v France* App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999) [100]; *United Communist Party of Turkey and Others v Turkey* App no 19392/92 (ECtHR, 30 January 1998) [33].

ii. The permanent blocking of Bos was arbitrary and disproportionate

[52] Any restriction to Article 25(b) must pursue a legitimate aim.¹⁵⁴ There must be a reasonable relationship between the means employed and the aim pursued.¹⁵⁵ In *Labita*, the ECtHR held that mere suspicion of membership to organised crime did not justify striking of a criminal suspect from the electoral roll.¹⁵⁶

[53] Bos only started contemplating the possibility of electoral fraud at the stroke of midnight (5 June).¹⁵⁷ By then, polling had long closed at 4.00pm (4 June).¹⁵⁸ With no risk of Bos manipulating the free will of voters,¹⁵⁹ NOC did not need to suspend Bos from Natter at 2.00am (5 June).¹⁶⁰

[54] Admittedly, Bos's repeated posting, if not halted, risks instigating more protestors to swarm the Election Commission building.¹⁶¹ However, once the crowd became unruly, riot police were dispatched to arrest the troublemakers and disperse the entire crowd.¹⁶²

¹⁵⁴ *Labita* (n 152) [201]; *Vito Sante Santoro v Italy* App no 36681/97 (ECtHR, 1 October 2004) [54]; *Gitonas* (n 140) [39]; *Alajos Kiss v Hungary* App no 38832/06 (ECtHR, 20 August 2010) [37]; *Ahmed and Others v UK* App no 65/1997/849/1056 (ECtHR, 2 September 1998) [75]; *Sadak* (n 152) [31].

¹⁵⁵ *Enver Sahin v Turkey* App no 23065/12 (ECtHR, 2 July 2018) [54]; *Matthieu-Mohin* (n 69) [52]; *Aziz* (n 136) [28]; *Tanase and Chirtoaca v Moldova* App no 7/08 (ECtHR, 24 April 2010) [105]; *Gitonas* (n 140) [39]; *Matthews* (n 140) [63]; *Toplak and Mrak v Slovenia* App nos 24591/19 and 42545/19 (ECtHR, 26 October 2021) [111].

¹⁵⁶ *Labita* (n 152) [203].

¹⁵⁷ Facts [47]-[52].

¹⁵⁸ Facts [51].

¹⁵⁹ GC25 (n 125) [19]; *Namat* (n 142) [71]; *Hirst* (n 134) [62]; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights Cases, Materials and Commentary* (3rd edn OUP 2013) [22.49]; Manfred Nowak, *U.N. Covenant on Civil and Political Rights CCPR Commentary* (2nd edn NP Engel 2005) [25].

¹⁶⁰ Facts [54].

¹⁶¹ Facts [51].

¹⁶² Facts [53].

At 9am (5 June), Gen was formally declared as the Sargon’s new president.¹⁶³ Hours later at 5pm, Bos apologised for her statements.¹⁶⁴

[55] Deplatforming political leaders is only justified in serious cases.¹⁶⁵ Even illegitimate demands for secession and territorial changes does *not ipso facto* threaten territorial integrity and national security.¹⁶⁶ Nor do political manifesto fuelled by extreme moral values or religious dogma.¹⁶⁷ The line is only crossed when political propaganda is backed by incitements to violence or undermines the democratic process.¹⁶⁸

[56] Unlike recalcitrant leaders hesitant to denounce acts of violent loyalists,¹⁶⁹ Bos was quick to condemn the protestors.¹⁷⁰ Since the tension subsided within 24 hours, there was no pressing social need¹⁷¹ to ban Bos from Natter after 5 June.¹⁷²

[57] Indeed, even in the wake of the infamous Capitol insurrection, Facebook Oversight Board found that ‘*it was not appropriate for Facebook to impose an indefinite*

¹⁶³ Facts [55].

¹⁶⁴ Facts [56].

¹⁶⁵ *Refah Partisi (The Welfare Party) and Others v Turkey* App no 41340/98 (ECtHR, 23 February 2003) (‘*Refah Partisi*’) [100]; *Freedom and Democracy Party (ÖZDEP) v Turkey* App no 23885/94 (ECtHR, 8 December 1999) [45].

¹⁶⁶ *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* App nos 29221/95 and 29225/95 (ECtHR, 2 January 2002) [95]–[98].

¹⁶⁷ *Refah Partisi* (n 165) [100].

¹⁶⁸ *Refah Partisi* (n 165) [98].

¹⁶⁹ *Refah Partisi* (n 165) [130]–[131]; *Zana* (n 92) [57]–[59].

¹⁷⁰ Facts [56].

¹⁷¹ *Perinçek* (n 13) [196]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1996) (‘*Lingens*’) [39]; *Mustafa Erdoğan and Others v Turkey* App nos 346/04 and 39779/04 (ECtHR, 27 May 2014) (‘*Mustafa*’) [34]; *Lyashko* (n 78) [47]; *Muller and others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) (‘*Muller*’) [32]; *Animal Defenders International* (n 78) [100]; *Orlovskaya* (n 74) [106]; *Herrera-Ulloa v Costa Rica* Series C no 107 (IACtHR, 2 July 2004) [122]; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)* Series A no 5 (IACtHR, 13 November 1985) [46].

¹⁷² Facts [62].

suspension’ on former US President Trump and requested Facebook to review its decision after six months.¹⁷³ Indefinite bans without clear criteria of imposition and lifting – such as Natter’s CSP¹⁷⁴ – is arbitrary and ‘*unduly silence speech*’.¹⁷⁵

II. SARGON VIOLATED SANTOS DARL’S RIGHTS UNDER ARTICLE 19 READ WITH ARTICLE 25(B) OF THE ICCPR BY UPHOLDING NATTER’S DECISION TO REMOVE ALL HIS POSTS FROM 31 MAY TO 2 JUNE 2021

[58] In 3 days (31 May to 2 June 2021), Natter’s moderators removed all 55 posts by Darl on Natter.¹⁷⁶ Darl’s appeal against the removal was dismissed by the NOC¹⁷⁷ and Sargon’s Supreme Court.¹⁷⁸ Such decisions to uphold the removal violated the [A] right to freedom of expression under Article 19 of ICCPR; and [B] right to a free and fair elections under Article 25(b) of the ICCPR.

A. SARGON VIOLATED THE RIGHT TO FREEDOM OF EXPRESSION UNDER ARTICLE 19 OF THE ICCPR

[59] As previously canvassed, Sargon’s compliance with Article 19 of the ICCPR is to be examined through the universal three-part test of legality, necessity, and proportionality.¹⁷⁹ Failure to satisfy any one of these cumulative limbs would constitute

¹⁷³ Case Decision 2021-001-FB-FBR (OB, 5 May 2021) [9].

¹⁷⁴ Facts [15].

¹⁷⁵ Case Decision 2021-001-FB-FBR (n 173) [8.3(I)].

¹⁷⁶ Facts [38].

¹⁷⁷ Facts [65]-[66].

¹⁷⁸ Facts [70].

¹⁷⁹ See Memorial [4] above.

a violation of Article 19.¹⁸⁰

i. The removal of Darl's posts was unlawful

[60] The test of legality has two qualitative aspects: [a] sufficient precision; and [b] limited discretion.¹⁸¹

a. Section 4 of CSP lacked sufficient precision

[61] The degree of sufficient precision to enable individuals to regulate their conduct¹⁸² and foresee the '*formalities, conditions, restrictions or penalties*' attached to such conduct¹⁸³ largely depends on the field that the law is designed to cover.¹⁸⁴

[62] For every post removal,¹⁸⁵ Darl received a notification from Natter stating: '*This post was removed due to violation of Section 4 of the Community Standards Policy*'.¹⁸⁶

[63] Since Natter's CSP is a '*basic code of conduct*' which '*sets out what content is permitted and prohibited*' for all users,¹⁸⁷ clarity in language is paramount.¹⁸⁸

¹⁸⁰ GC34 (n 5) [22]; *Velichkin* (n 5) [7.3]; *Sunday Times* (n 13) [45]; *Handyside* (n 13) [49].

¹⁸¹ See Memorial [6]-[7] above.

¹⁸² GC34 (n 5) [25]; HRC, 'CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) [82]; *Olafsson v Iceland* App no 58493/13 (ECtHR, 16 March 2017) [36]; *Chauvy v France* App no 64915/01 (ECtHR, 29 June 2004) ('*Chauvy*') [43]; *Lindon* (n 78) [41]; *Kokkinakis* (n 47) [40]; *Gaweda v Poland* App no 26229/95 (ECtHR, 14 March 2002) [39]; *Usón Ramírez v Venezuela* Series C no 207 (IACtHR, 20 November 2009 [56]-[57]).

¹⁸³ *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) ('*Editorial Board of Pravoye Delo and Shtekel*') [52]; *Kafkaris* (n 17) [140].

¹⁸⁴ *Lupsa v Romania* App no 10337/04 (ECtHR, 8 September 2006) ('*Lupsa*') [37]; *Editorial Board of Pravoye Delo and Shtekel* (n 183) [52]; *Centro Europa 7 S.R.L. and Di Stefano v Italy* [GC] App no 38433 (ECtHR, 7 June 2012) [142]; *Silver and Others v UK* App no 5947/72 (ECtHR, 25 March 1983) [88]; *Chorherr* (n 96) [25].

¹⁸⁵ Facts [38], [65].

¹⁸⁶ Clarifications [50].

¹⁸⁷ Facts [13].

¹⁸⁸ UNGA 2019 Report (n 83) [46]; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue' (16 May 2011) A/HRC/17/27 [48].

[64] Section 4 of the CSP is a bare-bones ‘*hate speech*’ provision.¹⁸⁹ At first blush, subsections (a) and (b) closely mirror the definitions of ‘*protected characteristics*’ and ‘*attack*’ in Facebook’s Community Standards.¹⁹⁰ Nevertheless, Section 4 lacks the nuances evident in Facebook’s system of categorisation with intricate granularity:

Tier	Explanation and Example
1	<ul style="list-style-type: none"> • Violent speech or support • Dehumanising speech (comparisons or generalisations): <ul style="list-style-type: none"> ○ Insects ○ Animals culturally perceived as intellectually or physically inferior ○ Filth, bacteria, disease and faeces ○ Sexual predator ○ Subhumanity ○ Violent and sexual criminals
2	<ul style="list-style-type: none"> • Generalisations that state inferiority <ul style="list-style-type: none"> ○ Physical deficiencies: hygiene (<i>e.g.</i> filthy) and physical appearance (<i>e.g.</i> ugly) ○ Mental deficiencies: intellectual capacity (<i>e.g.</i> stupid), education (<i>e.g.</i> illiterate), mental health (<i>e.g.</i> retarded) ○ Moral deficiencies: negative character traits (<i>e.g.</i> liar), derogatory terms (<i>e.g.</i> whore) • Other statements of inferiority: inadequacy (<i>e.g.</i> worthless), deviation

¹⁸⁹ Facts [14].

¹⁹⁰ Facebook Community Standards: Hate speech’ (Facebook) <<https://transparency.fb.com/en-gb/policies/community-standards/hate-speech/>> accessed on 22 November 2021.

	<p>(e.g. abnormal)</p> <ul style="list-style-type: none"> • Expressions of contempt, dismissal or disgust • Cursing (except in romantic break-up context) <ul style="list-style-type: none"> ○ Reference to genitalia (e.g. d**k) ○ Profanity (e.g. b***h)
3	<ul style="list-style-type: none"> • Segregation (calls for action, aspirational statements, advocacy) • Exclusion (calls for action, aspirational statements, advocacy) <ul style="list-style-type: none"> ○ Explicit (expelling certain groups) ○ Political (denying the right to political participation) ○ Economic (denying access to economic entitlements) ○ Social (denying access to spaces)

[65] Hence, Section 4 of CSP falls far short of industrial standards in social media content moderation¹⁹¹ and suffers from over-breadth.¹⁹² The foreseeability of its enforcement invariably casts a chilling effect on Natter’s users.¹⁹³

b. Section 12 of RMSA vests Natter unfettered discretion as a ‘speech police’ with minimal judicial oversight

[66] The ‘*quality of law*’ criterion requires compatibility the rule of law.¹⁹⁴ Governments

¹⁹¹ Caitlin Ring and Hayley Rousselle, ‘Report and repeat: Investigating Facebook’s hate speech removal process’ (2020) 25(2) First Monday.

¹⁹² HRC, ‘Concluding Observations on the Second Periodic Report of Cambodia’ (27 April 2015) CCPR/C/KHM/CO/2 [21].

¹⁹³ *Cumhuriyet* (n 147) [63]; *Delfi* (n 13) [36]; Special Rapporteur 2015 (n 79) [52].

¹⁹⁴ *Kruslin* (n 18) [30]; *Malone v UK* App no 8691/79 (ECtHR, 2 August 1984) [67]; *Big Brother Watch and Others v UK* App nos 58170/13, 62322/14 and 24960/15 (ECtHR, 13 September 2018) (‘**Big Brother Watch**’) [305]; *Benedik v Slovenia* App no 62357/14 (ECtHR, 24 April 2018) [125].

must afford legal protection against arbitrary interference with freedom of expression,¹⁹⁵ particularly by providing sufficient guidance to competent authorities charged with the execution of laws.¹⁹⁶

[67] There is a recent emergence of national laws granting broad discretionary powers to social media sites on removal of content without judicial orders (*e.g.* Russia,¹⁹⁷ Pakistan,¹⁹⁸ and Kenya¹⁹⁹). As rightly observed by UN Special Rapporteur Irene Khan, the delegation of ‘*speech police*’ functions, traditionally vested with the courts, carries the risk of excessive removal of content by intermediaries erring at the side of caution and fearful of sanctions.²⁰⁰

[68] Section 12 of the RSMA imposes a legal obligation upon social media platforms ‘*to establish ‘transparent and independent’ oversight mechanisms to curb online hate speech, cyber-bullying, and ‘religious extremism’ within six months of enactment*’.²⁰¹ Non-compliance entails a fine of USD10,000 every six months.²⁰²

[69] Whilst the NOC’s decisions are appealable to the Sargon’s courts on constitutional

¹⁹⁵ *Lupsa* (n 184) [34]; *Al-Nashif* (n 48) [119]; *Uitgevers* (n 48) [82]; *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012) (*‘Ahmet Yildirim’*) [59]; *Hasan* (n 48) [84].

¹⁹⁶ *Marina Kockish v Belarus* Communication no 1985/2010 CCPR/C/111/D/1985/2010 (HRC, 24 July 2014) [8.5]; HRC, ‘Concluding Observations on Kyrgyzstan’s Initial Report’ (24 July 2000) CCPR/CO/69/KGZ [21]; Special Rapporteur 2021 (n 30) [40]; *Gooding v Wilson* 405 US 518 (1972) 522.

¹⁹⁷ Federal Law on Information, Information Technologies and Information Protection (no 149 of 27 July 2006) (Russia), art 6.

¹⁹⁸ Citizens Protection (Against Online Harm) Rules 2020 (Pakistan), art 4.

¹⁹⁹ Guidelines for Prevention of Dissemination of Undesirable Bulk Political SMS and Social Media Content via Electronic Communications Networks 2017 (Kenya), art 13.

²⁰⁰ Special Rapporteur 2021 (n 30) [58].

²⁰¹ Facts [21].

²⁰² Clarifications [4].

grounds,²⁰³ such narrow *ex post facto* judicial review fails to provide sufficient safeguards against arbitrariness and abuse.²⁰⁴

ii. The removal of Darl's posts was unnecessary

[70] The test of necessity is enshrined under Article 10(5) of Sargon's Constitution which states that the right to freedom of expression '*may be limited only in terms of law to the extent that the limitation is reasonable and justifiable in an open and democratic society*'.²⁰⁵ Article 25 mandate that Sargon's courts shall ensure the interpretation of such right '*is consistent with Surya's obligations under international law*'.²⁰⁶

[71] However, in upholding the NOC's removal of Darl's posts, the Sargon Supreme Court failed to identify any legitimate aim (*i.e.* respect the rights and reputation of others, or the protection of national security, public order, public health or morals)²⁰⁷ and to demonstrate that the removal corresponded to a pressing social need.²⁰⁸

[72] Instead, the reasons for maintaining Darl's posts are more compelling. As the ultimate guarantor of religious pluralism, Sargon has a duty of neutrality and impartiality to ensure that conflicting religious groups co-exist and tolerate each other peacefully.²⁰⁹

²⁰³ Facts [26].

²⁰⁴ *Ekin Association v France* App no 39288/98 (ECtHR, 17 July 2001) ('*Ekin*') [61]; *Big Brother Watch* (n 194) [413]; *Centrun for rattvisa v Sweden* App no 35252/08 (ECtHR, 25 May 2021) [264].

²⁰⁵ Facts [21].

²⁰⁶ Facts [68].

²⁰⁷ ICCPR (n 63), art 19(3); *Dieudonné M'Bala M'Bala v France* App no 25239/13 (ECtHR, 10 April 2013) [25]; *Njaru v Cameroon* Communication no 1353/2005 CCPR/C/89/D/1353/2005 (HRC, 14 May 2007) [6.4].

²⁰⁸ *Perinçek* (n 13) [196]; *Lingens* (n 171) [39]; *Mustafa* (n 171) [34]; *Muller* (n 171) [32]; *Animal Defenders International* (n 78) [100]; *Orlovskaya* (n 74) [106]; *Lyashko* (n 78) [47].

²⁰⁹ *Leyla Şahin v Turkey* [GC] App no 44774/98 (ECtHR, 10 November 2005) ('*Leyla Şahin*') [107]-[108]; *Sinan Işık v Turkey* App no 21924/05 (ECtHR, 2 February 2010) ('*Sinan*') [45]; *Manoussakis and Others v Greece* App no 18748/91 (ECtHR, 26 September 1996) [47]; *Metropolitan Church of Bessarabia and Others v Moldova* App no 45701/99 (ECtHR, 13 December 2001) [123]; *Kokkinakis* (n 47) [33]; *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) [123]-[128]; *Refah Partisi* (n 165) [94].

This is guaranteed by nurturing mutual tolerance, rather than eliminating the source of tension²¹⁰ or forcing different communities to unite under a single umbrella.²¹¹ Otherwise, democracy erodes and paves the way to a totalitarian regime.²¹²

[73] In short, an open environment for public debate strengthens democracy and combats religious hatred.²¹³ Darl's ideas should be allowed to flow rather than be curtailed.

iii. The removal of Darl's posts was disproportionate

[74] Sargon's decision to uphold the removal of Darl's posts [i] lacked relevant and sufficient legal basis (hate speech);²¹⁴ and [ii] was not the least intrusive measure.²¹⁵

a. Darl Did Not Advocate Hatred against Phi Adherents

[75] The inquiry of whether Darls' posts amounted to hate speech is to be examined through the lens of the universal six-part test laid down in the Rabat Plan of Action.²¹⁶

[76] *First, content* relates to the style and substance of ideas disseminated.²¹⁷ The majority of posts removed by Natter's moderators contained the hashtag #Phinished (43 out of

²¹⁰ *Leyla Şahin* (n 209) [107].

²¹¹ *Sinan* (n 209) [45]; *Serif v Greece* App no 38178/97 (ECtHR, 14 December 1999) [53].

²¹² *Ekin* (n 204) [56]; *Animal Defenders International* (n 78) [100]; *Delfi* (n 13) [131]; *Karácsony and Others v Hungary* App no 42461/13 (ECtHR, 17 May 2016) [132]; Subhradipta Sarkar, 'Right to Free Speech in a Censored Democracy' (2009) 6 *University of Denver Sports and Entertainment Law Journal* 85.

²¹³ UNGA, 'Promotion and protection of the right to freedom of opinion and expression' (7 September 2012) A/67/357 [54] ('**UNGA 2012 Report**').

²¹⁴ *Handyside* (n 13) [50]; *Lingens* (n 171) [40]; *Jersild* (n 85) [31]; *Zana* (n 92) [51]; *Editorial Board of Pravoye Delo and Shtekel* (n 183) [49]; *Barfod v Denmark* App no 11508/85 (ECtHR, 22 February 1989) [28]; *Stoll v Switzerland* [GC] App no 69698/01 (ECtHR, 10 December 2007) [101]; *Uitgevers* (n 48) [81].

²¹⁵ GC34 (n 5) [33]; *Sunday Times* (n 13) [62]; *Perna* (n 78) [38]; *Nikula* (n 78) [47]; *Smith and Grady v UK* App nos 33985/96 and 33986/96 (ECtHR, 27 September 1999) ('*Smith and Grady*') [102]; *Szuluk v UK* App no 36936/05 (ECtHR, 3 June 2009) ('*Szuluk*') [19]; William Schabas, *The European Convention on Human Rights: A Commentary* (2nd edn OUP 2017) 406.

²¹⁶ See Memorial [25]-[26] above.

²¹⁷ *Savva Terentyev* (n 84) [39]; *Jersild* (n 103) [31].

55).²¹⁸ The posts were inspired by the alternative historical narrative that the true natives of Sargon were islanders banished by Phi adherents.²¹⁹ Discourse of historical events – albeit controversial – should not be conflated with hate speech.²²⁰

[77] *Second, context* refers to the surrounding socio-political background.²²¹ Darl’s posts were published within the week leading up to the presidential election.²²² Gen made ‘*spirituality*’ as the core of his manifesto,²²³ whilst Bos denounced Gen for weaponising religion and pledged to reform Sargon’s history curricula.²²⁴ This made the Phi religion fair game for public debate.

[78] *Third, status* refers to Darl’s standing in society.²²⁵ Although Darl is a prominent social media influencer, his Natter following of 400,000²²⁶ only amounts to approximately 2% of Natter’s 25 million users²²⁷ and 10 times less than Gen’s 7 million followers.²²⁸

[79] *Fourth, extent* refers to the size and magnitude of the audience.²²⁹ Whilst Darl’s posts

²¹⁸ Facts [38].

²¹⁹ Facts [2]-[5].

²²⁰ UNGA 2019 Report (n 83) [10]; UNGA 2012 Report (n 213) [49]; *Ergin v Turkey* (no. 6) App no 47533/99 (ECtHR, 4 May 2006) [34]; *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) (*‘Otto-Preminger-Institut’*) [56].

²²¹ Rabat Plan of Action (n 80) [29].

²²² Facts [38]-[42].

²²³ Facts [32]-[33].

²²⁴ Facts [34].

²²⁵ Rabat Plan of Action (n 80) [29]; *Perinçek* (n 13) [234]; *Gündüz* (n 73) [43]; *Refah Partisi* (n 165) [115]; *Zana* (n 92) [50]; *Ojala and Etukeno Oy v Finland* App no 69939/10 (ECtHR, 14 January 2014) [52]; *Almeida Leitão Bento Fernandes v Portugal* App no 25790/11 (ECtHR, 12 June 2015) [51]-[52]; *Petrenco v Moldova* App no 20928/05 (ECtHR, 4 October 2010) [60].

²²⁶ Facts [37].

²²⁷ Facts [7], [37].

²²⁸ Facts [32].

²²⁹ Rabat Plan of Action (n 80) [29(e)].

regularly gained enough popularity to appear on Natter Matter,²³⁰ the exact reach of the 55 posts between 31 May and 2 June 2021 is uncertain.

[80] *Fifth, intent* refers to deliberate incitement of hostility, discrimination, or violence.²³¹

It is evident that Darl's posts were aimed at promoting Bos in the elections (as evinced by all 55 posts containing the hashtag #VoteBos²³²) and the search for historical truth.²³³

[81] *Sixth, imminence* refers to the foreseeable likelihood of violence ensuing.²³⁴ Darl's

posts incited no actual violence (unlike the protestors at the Election Commission²³⁵).

His rhetorical plea for greater criticism against '*religious extremism*' and vigilance

against '*Phaithful interlopers harming women and children*'²³⁶ may be offensive,

shocking, and disturbing.²³⁷ Nevertheless, such provocative words still fall short of

being a '*spark in a powder keg*'²³⁸ or '*fighting words*'.²³⁹

[82] Accordingly, none of the factors indicate any advocacy of hatred against Phi adherents.

²³⁰ Facts [37].

²³¹ Rabat Plan of Action (n 80) [29]; *Perinçek* [232]-[233]; *Nachova and Others v Bulgaria* App nos 43577/98 and 43579/98 (ECtHR 6 July 2005) [160]; *Jersild* (n 85) [35].

²³² Facts [38].

²³³ *Dink v Turkey* App no 2668/07 (ECtHR, 14 September 2010) [135]; *Chauvy* (n 182) [69]; *Lehideux v France* App no 24662/94 (ECtHR, 23 September 1998) [55].

²³⁴ Rabat Plan of Action (n 80) [29(f)]; *McLeod* (n 107) [38]; *Alekhina* (n 86) [103].

²³⁵ Facts [51]-[53].

²³⁶ Facts [38].

²³⁷ *Handyside* (n 13) [49]; *Perinçek* (n 13) [196]; *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992) ('*Castells*') [42]; *Ekin* (n 204) [56]; *Sunday Times* (n 13) [59], [65]; *Lingens* (n 171) [41]; *Barthold* (n 19) [55]; *Muller* (n 171) [33]; *Otto-Preminger-Institut* (n 220) [49]; *Mouvement raëlien suisse v Switzerland* [GC] App no 16354/06 (ECtHR, 13 July 2012) [48].

²³⁸ *S. Rangarajan v P.J. Ram* [1989](2) SCR 204 [226].

²³⁹ *Chaplinsky v New Hampshire* 315 US 568 (1942) 572; *NAACP v Claiborne Hardware Co.* 458 US 886 (1982) 927; *R.A.V. v City of St. Paul* 505 US 377 (1992) 382; *Coleman v Power* [2004] 220 CLR 1 13.

b. The Removal of Darls' Posts was a Mechanical and Excessive Exercise of Discretion

- [83] The principle of proportionality dictates that restrictions to freedom of expression must be proportionate to achieve their protective function²⁴⁰ and employ the least intrusive measure.²⁴¹ Both the manner and effect of Natter's removal of Darl's posts were flawed.
- [84] *First*, States are under a positive obligation to protect freedom of expression, offline and online.²⁴² The role of intermediaries – especially social media platforms – is that of a *mere conduit*.²⁴³ Concomitantly, intermediaries should not be made responsible to proactively monitor user content on their platform.²⁴⁴
- [85] However, recently social media companies have come under intense pressure to moderate their platforms strictly by national laws or by their own initiatives.²⁴⁵ Such

²⁴⁰ UNHRC, 'General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (26 May 2004) CCPR/C/21/Rev.1/Add.3 [6].

²⁴¹ *Smith and Grady* (n 215) [102]; *Szuluk* (n 215) [19]; *Kimel v Argentina* Series C no 177 (IACtHR, 3 May 2008) [74]; *R v Oakes* [1986] 1 SCR 103, [70]; *Bank Mellat v HM Treasury* [2013] UKSC 39 [20]; *William Schabas* (n 215) 406.

²⁴² HRC, 'Promotion and Protection of Human Rights and Fundamental Freedoms, Including the Rights to Peaceful Assembly and Freedom of Association' (adopted 17 December 2018) UNGA A/RES/73/173 [4]; HRC, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' (adopted 26 June 2014) UNGA A/HRC/RES/26/13 [1]; HRC, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' (adopted 5 July 2012) A/HRC/RES/20/8 [5].

²⁴³ Council Directive 2000/31/EC of European Parliament and Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1 ('**EC Directive 2000**') art 12; *Google France and Google v Louis Vuitton* [GC] Joined Cases C-236/08, C-237/08 and C-238/08 (European Court of Justice, 23 March 2010) [113]; UN Special Rapporteur on Freedom of Opinion and Expression and others, 'Joint Declaration on Freedom of Expression and the Internet' (1 June 2011) ('**Joint Declaration 2011**') [2(a)]; 'Manila Principles on Intermediary Liability' (Global Civil Society Initiative) <www.eff.org/files/2015/10/31/manila_principles_1.0.pdf> accessed on 22 November 2021 ('**Manila Principles**') principle I(b).

²⁴⁴ EC Directive 2000 (n 243) art 12; Joint Declaration 2011 (n 243) [2(b)]; Manila Principles (n 243) principle I(d).

²⁴⁵ UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression' (11 May 2016) A/HRC/32/38 [45]; Alexandre de Stree and others, "Online Platforms' Moderation of Illegal Content Online. Law, Practices and Options for Reform" (Policy Department for Economic, Scientific and Quality of Life Policies, June 2020) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652718/IPOL_STU\(2020\)652718_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652718/IPOL_STU(2020)652718_EN.pdf)> accessed on 23 November 2021.

modus operandi, that could lead to an excessive removal of posts, was adopted to protect the companies from state-imposed legal liabilities.²⁴⁶

[86] Natter’s moderators were ‘*required to proactively monitor any content that qualifies to be viewed on Natter Matter*’.²⁴⁷ Since complaints were only made against #Phinished,²⁴⁸ 12 of Darl’s posts with the hashtag #WeWereHereFirst were removed by the moderators’ own accord.²⁴⁹ Essentially, Natter wore the hats of legislator (CSP) and enforcer (reviewers) at once – whilst retaining exclusive power to appoint the adjudicator (NOC).

[87] *Second*, the removal of all 55 posts by Darl within a three-day period²⁵⁰ had the near-identical effect of suspension (whereby all user posts cease to be visible²⁵¹). Suspension has a higher threshold of justification (serious violation or repeated minor violations of CSP) and more procedural safeguards (referral to senior reviewer).²⁵² Further, lodging *multiple* appeals against the removal of individual posts (to be heard by *multiple* senior reviewers)²⁵³ is much more tedious and slower than lodging a *single* appeal against a suspension (to be heard by the NOC).²⁵⁴ Hence, such an abusive ‘*systematic take-down*’ appears to be cynically calculated to distort Darl’s choice of remedies and frustrate Darl

²⁴⁶ Special Rapporteur 2016 (n 245) [47].

²⁴⁷ Facts [38].

²⁴⁸ Clarifications [11].

²⁴⁹ Facts [38]; Clarifications [19].

²⁵⁰ Facts [38].

²⁵¹ Clarifications [41].

²⁵² Facts [20].

²⁵³ Facts [17].

²⁵⁴ Facts [24].

into rage-quitting Natter altogether.²⁵⁵

[88] In short, Darl was a victim of a *disguised* suspension.

B. SARGON VIOLATED THE RIGHT TO FREE AND FAIR ELECTIONS UNDER ARTICLE 25(B) OF THE ICCPR

[89] Freedom of expression plays an essential role in realising the right to vote and be elected at elections in democratic societies under Article 25(b) of the ICCPR.²⁵⁶ Darls' posts on Natter between 31 May to 2 June 2021 was aimed at '*engaging in legitimate political speech during an election*'.²⁵⁷

[90] Accordingly, the removal of Darl's posts contravened Article 25(b) of the ICCPR due to its [i] interference with the free expression of opinion; and [ii] arbitrariness and disproportionality.²⁵⁸

i. The removal of Darl's posts impaired the free expression of opinion of Sargon electors during the June 2021 election

[91] There are compelling reasons why Darl's voice ought to be heard rather than stifled.

[92] *First*, political speech or debate on matters of public interest deserve a higher level of protection from restrictions.²⁵⁹ Public interest ordinarily relates to issues that affect the public to such an extent that it may legitimately take an interest in them, especially if

²⁵⁵ Facts [61].

²⁵⁶ See Memorial [41]-[42].

²⁵⁷ Facts [61].

²⁵⁸ *Ždanoka* (n 131) [115(c)]; *Podkolzina* (n 62) [33].

²⁵⁹ *Sürek* (n 72) [61]; *Lindon* (n 78) [46]; *Lingens* (n 171) [42]; *Castells* (n 237) [43]; *Wingrove v UK* App no 17419/90 (ECtHR, 25 November 1996) [58]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [90]; *Bladet* (n 86); *Perinçek* (n 13) [230]; *Feldek v Slovakia* App no 29032/95 (ECtHR, 12 July 2001) [83]; *Sergey Kuznetsov v Russia* App no 10877/04 (ECtHR, 23 October 2008) [47]; *Bédat* (n 73) [49].

they affect the well-being of citizens or the community's life.²⁶⁰ A fundamental feature of liberal democracies is the separation of religion from the State.²⁶¹ It is rather extraordinary for Gen, the spiritual leader of Phi,²⁶² to enter the political fray.²⁶³

[93] *Second*, it is only natural for discourse on matters of public interest to involve a degree of exaggeration and provocation.²⁶⁴ Indeed, Darl's usage of the provocative coded words such as 'interlopers', '#WeWereHereFirst', and '#Phinished'²⁶⁵ were intended to arouse societal interest to participate in the heated debate on the growing influence of the Phi religion in all aspects of life in Sargon raging between Gen and Bos.²⁶⁶

[94] *Third*, Darl's sentiments merely echo the simmering cultural conflict between Phi adherents and 'returnees' on the historical origins of Sargon's native inhabitants.²⁶⁷ There is nothing untoward with furthering a pre-existing debate in the public arena.²⁶⁸

[95] *Fourth*, it is especially essential for opinions and information of all kinds to be permitted

²⁶⁰ *Satakunnan* (n 17) [171]; *Couderc and Hachette Filipacchi Associes v France* App no 40454/07 (ECtHR, 10 November 2015) [103]; *Erla Hlynsdottir v Iceland* App no 43380/10 (ECtHR, 10 July 2012) [64]; *Sürek* (n 72) [61]; *Kacki v Poland* App no 10947/11 (ECtHR, 4 July 2017) [46].

²⁶¹ Fox J, 'Do Democracies Have Separation of Religion and State?' (2007) 40(1) *Canadian Journal of Political Science* 1; Philip H, 'Separation of Church and State: A Theologically Liberal, Anti-Catholic, and American Principle' (2002) 43 *University of Chicago Law Occasional Paper* 3.

²⁶² Facts [3].

²⁶³ Facts [28].

²⁶⁴ *Mamare v France* App no 12697/03 (ECtHR, 7 November 2006) [25]; *Steel* (n 86) [90]; *Otegi Mondragon v Spain* App no 2034/07 (ECtHR, 15 March 2011) [54].

²⁶⁵ Facts [37]-[38].

²⁶⁶ Facts [30]-[35].

²⁶⁷ Facts [5]-[6].

²⁶⁸ *Satakunnan* (n 17) [187]; *Gündüz* (n 73) [51]; *Weber v Switzerland* App no 3688/04 (ECtHR, 26 July 2007) [48]-[52]; *Observer and Guardian v UK* App no 13585/88 (ECtHR, 26 November 1991) [66]-[71]; *Sunday Times* (n 13) [52]-[56]; *Vereniging Weekblad Bluf! v The Netherlands* App no 16616/90 (ECtHR, 9 February 1995) [37].

to circulate freely in the period preceding an election.²⁶⁹ A lively political debate enriches the public's understanding of the key personalities and issues at hand, and ultimately facilitates the formation of voters' opinions on whether to agree or oppose a particular political candidate.²⁷⁰

[96] Darl's own political leanings is self-evident from the hashtag #VoteBos accompanying all his posts.²⁷¹ Regardless, the people of Sargon would have been better off being informed of Darl's partisan views during elections. For better or for worse, the characteristics of political candidates often mirror those of their core supporters.²⁷²

[97] Hence, removal of Darl's posts impaired the free expression of the will of electors.²⁷³

ii. The removal of Darl's posts was arbitrary and disproportionate

[98] Two possible legitimate aims may be raised by Sargon to justify removing Darl's posts.

[99] *First*, Darl's posts can scarcely be construed as hate speech, for reasons previously elucidated.²⁷⁴ Concomitantly, the rationales of preserving public order²⁷⁵ or preventing discrimination²⁷⁶ lack force. Further, there is a patent inconsistency in Natter's moderation policy – whilst other users' post containing the hashtag #WeWereHereFirst

²⁶⁹ *Bowman* (n 74) [42]; *Matthieu-Mohin* (n 69) [54]; *Lepojic v Serbia* App no 13909/05 (ECtHR, 6 November 2007) [74].

²⁷⁰ *Ricardo Canese v Paraguay* Series C no 111 (IACtHR, 31 August 2004) [90]; *Ahmet Yildirim* (n 195) [54].

²⁷¹ Facts [37]-[38].

²⁷² Bruce W. Hardy, 'Candidate Traits and Political Choices' in Kate Kenski and Kathleen Hall Jamieson (eds), *The Oxford Handbook of Political Communication* (OUP 2014); 'Partisanship and Political Animosity in 2016' (Pew Research Center, June 2016) <<https://www.pewresearch.org/politics/2016/06/22/partisanship-and-political-animosity-in-2016/>> accessed on 23 November 2021.

²⁷³ *Alger v Australia* Communication no 2237/2013 CCPR/C/120/D/2237/2013 (HRC, 13 July 2017) [7.3]; *Matthieu-Mohin* (n 69) [52]; *Matthews* (n 140) [63]; *Podkolzina* (n 62) [33]; *Gitonas* (n 140) [39]; GC25 (n 125) [21].

²⁷⁴ See Memorial [75]-[82] above.

²⁷⁵ ICCPR (n 63) art 19(3)(b).

²⁷⁶ ICCPR (n 63) arts 20(2) and 26.

were merely put on algorithmic pause on Natter Matter,²⁷⁷ only Darl's posts with the same hashtag were removed.²⁷⁸ Removal should only be a measure of last resort, after all less intrusive measures have been exhausted (*e.g.* warnings).²⁷⁹

[100] *Second*, any concern of Darls' posts influencing voters is unfounded. In *Bowman*, the ECtHR found expenditure limits restricting a concerned citizen from distributing leaflets '*with a view to influencing the voters of Halifax in favour of an anti-abortion candidate*' to be disproportionate towards the legitimate aim of '*securing equality between candidates*'.²⁸⁰ Similarly, removing Darl's mild rhetoric is akin to wielding a sledgehammer to crack a nut.²⁸¹

²⁷⁷ Facts [36], [41].

²⁷⁸ Facts [38].

²⁷⁹ Toby Mendel, 'Restricting Freedom of Expression: Standards and Principles' (Centre for Law and Democracy, July 2010) <<http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>> accessed on 22 November 2021 18.

²⁸⁰ *Bowman* (n 74) [45]-[47].

²⁸¹ Toby Mendel (n 279) 18.

PRAYER

For the foregoing reasons, the Applicants respectfully request this Honourable Court to adjudge and declare the following:

- I. Sargon interfered with Emilia Bos's freedom of expression and right to vote under Article 19 read with Article 25(b) of the ICCPR by upholding the Natter Oversight Council's decisions to suspend Emilia Bos and permanently block her from Natter.
- II. Sargon interfered with Santos Darl's freedom of expression and right to vote under Article 19 read with Article 25(b) of the ICCPR by upholding Natter's decision to remove every single post by Santos Darl from 31 May to 2 June 2021.

Respectfully submitted 24 November 2021,

709A,

Counsel for Applicants.