

**THE 2020-2021 PRICE MEDIA LAW**

**MOOT COURT COMPETITION**

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**JO XANA, SOCIAL DEMOCRATIC WORKERS UNION**

**(APPLICANTS)**

**V**

**THE STATE OF IZED**

**(RESPONDENT)**

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**MEMORIAL FOR APPLICANTS**

Words: 4984

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## **LIST OF ABBREVIATIONS**

<b>ACHPR</b>	African Charter on Human and Peoples' Rights
<b>ACHR</b>	American Convention on Human Rights
<b>ACommHPR</b>	African Commission on Human and Peoples' Rights
<b>ACtHPR</b>	African Court on Human and Peoples' Rights
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>COVID-19</b>	Coronavirus Disease 2019
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>H1N1</b>	Influenza A virus subtype H1N1
<b>HRC</b>	United Nations Human Rights Committee
<b>IACtHR</b>	Inter-American Court of Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights

<b>MINDEF</b>	Ized Ministry of Defence
<b>MOH</b>	Ized Ministry of Health
<b>NIDV</b>	Novel Immuno-Deficiency Virus
<b>NSA</b>	Ized National Security Act
<b>OECD</b>	The Organisation for Economic Co-operation and Development
<b>Park</b>	Ized Central Public Park
<b>SARS</b>	Severe Acute Respiratory Syndrome
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>US</b>	United States
<b>WHO</b>	World Health Organization

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## **STATEMENT OF RELEVANT FACTS**

### **SOCIO-POLITICAL BACKDROP**

- [1] Ized is a tropical country home to 20 million people, infested with diurnal and nocturnal mosquitos. Two major political parties vie for power. The conservative National United Alliance [‘**NUA**’] advocates for free market, lower taxes, and tighter security laws. The liberal Democratic Socialist Party [‘**DSP**’] favours the opposite, and espouses for state-funded education and healthcare.
- [2] The media sector is virtually monopolised by the National Network which owns two radio channels and ‘The Net’, Ized’s most popular social media platform (over 4 million users). NUA’s general secretary, Gus Dabyu, sits on its Board of Directors.

### **THE NET AND NET-ASSEMBLIES**

- [3] The Net’s general interface allows users (Netizens) to post opinions (maximum 200 characters), follow other Netizens, and share their posts.
- [4] Additionally, The Net allows Netizens to host a webpage called ‘Net-Assemblies’ with a unique ‘Net-Tag’ beginning with a hash (#) showing all opinions by Netizens joining a Net-Assembly. A Net-Assembly is discoverable by searches on its Net-Tag or member’s post. A Net-Tag can be endorsed by any Netizen.

### **SOCIAL DEMOCRATIC WORKERS UNION**

- [5] The Social Democratic Workers Union [‘**Union**’] is a trade union with legal personality, loosely affiliated with the DSP and led by Jo Xana [‘**Xana**’]. Its membership includes workers in Ized’s state healthcare service.

- [6] The Union regularly promotes campaigns on Net-Assemblies to raise public awareness. The Union publishes the weekly magazine ‘Unite’ which sells 4,000 copies weekly.

### **2020 ELECTIONS AND NIDV**

- [7] In early January 2020, fresh Parliamentary elections were held in Ized. A major electoral concern was the outbreak of a new disease, NIDV. There is no clear scientific consensus whether NIDV transmits via vectors *i.e.* mosquitoes or sexual contact. Official statistics recorded 30,000 cases and 420 deaths in Ized since September 2019.
- [8] Two days prior to elections, the National Network publicised leaked information stating that the actual death toll was close to 2,000 deaths. The next day, the independent Institute of Medical Research [“**IMR**”] reported that the government statistics and reports were inconclusive. Both publications garnered wide media coverage.
- [9] After the elections, NUA secured a clear majority and formed a new government. One major reform proposal was the privatisation of the state healthcare service to ensure high quality and affordable services, and weed out inefficient and unprofessional staff.

### **NATIONAL SECURITY ACT**

- [10] The NUA-led government enacted the National Security Act [“**NSA**”]. Section 22 empowers the Minister of Defence [“**MINDEF**”] to designate a public site to be used for public gatherings upon declaration of an emergency. Section 23 of the NSA empowers the MINDEF to issue guidelines on publications.

[11] On 1 February, the MINDEF declared an emergency for three months, and invoked Section 22 to designate the Central Public Park [**“Park”**] in Ized’s capital Vaai as the sole public site for public gatherings due to its ample space and regular fumigation.

### **THE UNION’S DEMONSTRATION**

[12] On 4 February 2020, the Union announced its organisation of a demonstration against the government’s healthcare privatisation reform. In the following days, the Union’s members publicised the event on The Net. On 13 February, the Union urged its supporters to gather outside the Vaai General Hospital [**“hospital”**]. The MINDEF immediately issued a statement warning that the planned demonstration was unlawful and that demonstrators would be arrested.

[13] On 14 February, the Union’s members numbering 400 persons including Xana gathered outside the hospital. Some waved placards with slogans concerning NIDV and threat of retrenchment following the healthcare reforms. Xana addressed the crowd with a loudspeaker. She claimed that NUA ‘*manufactured*’ the NIDV crisis and were using the NSA and healthcare reform as an authoritarian power grab. She encouraged demonstrators to block the hospital’s entrance to prevent anyone from entering.

[14] Security forces armed with batons arrived to disperse the demonstrators with water cannons, tear gas, and firing of ‘blanks’ into the air. Some demonstrators were arrested (including Xana) and suffered minor injuries. The next day, all demonstrators were released, except Xana who was charged.

[15] On 3 March 2020, Xana was convicted in the High Court under Section 22 of the NSA for conducting a gathering at a non-designated site. She was sentenced to three months

imprisonment, suspended for one year. Her conviction and sentence were upheld on appeal by the Supreme Court.

### **THE UNION'S NET-ASSEMBLY DEMONSTRATION**

- [16] On 10 March, the Union's leadership decided to pivot to '*digital demonstration*' on The Net. Its members launched a series of Net-Assemblies with its slogans as Net Tags. The two Net-Assemblies displayed #FiredForFakeVirus and #Care4Healthcare, attracting endorsements from over 40,000 Netizens. Such Net Tags spurred several Netizens to call for boycotts of healthcare services.
- [17] On 15 March, the Union's magazine 'Unite' published articles encouraging support for its digital demonstrations. One article authored by 'Joxx' claimed that medical experts refrained from publishing their findings that the NIDV could only be sexually-transmitted due to governmental pressure and fear of losing employment.

### **MINISTERIAL GUIDELINES**

- [18] On 16 March, Ized's Ministry of Health ["**MOH**"] reported on the latest NIDV statistics (4,300 new infections and 140 new deaths) and '*credible evidence*' that the virus could be transmitted through mosquitoes. The MINDEF declared that strong action would be taken to arrest persons organising unauthorised gatherings on social media platforms under Section 22 of the NSA.
- [19] Additionally, the MINDEF issued guidelines pursuant to Section 23 prohibiting publications of any medical expert opinion on NIDV without the MOH's authorisation and for all communication concerning NIDV to be '*centralised*' due to the rapid increase of disinformation threatening public health.

[20] The next day, the National Network’s Board of Directors unanimously resolved to indefinitely discontinue the Net-Assembly feature due to the spread of disinformation and its irresponsible use ‘*by political forces*’.

### **LEGAL PROCEEDINGS**

[21] On 20 March, Xana and the Union filed petitions before the Ized Supreme Court claiming violations of their constitutional rights, particularly on freedom of expression and assembly enshrined under Articles 10 and 11 of Ized’s Constitution.

[22] Upon the Supreme Court dismissing their petitions, they presented the same complaints before the Universal Court of Human Rights under Articles 19 and 21 of the ICCPR.

## **STATEMENT OF JURISDICTION**

Xana, the Union and the State of Ized [**'Ized'** or **'Respondent'**] which is a party to the International Covenant on Civil and Political Rights (ICCPR), have submitted their differences to the Universal Court of Human Rights [**'this Court'**], and hereby submit to this Court their dispute concerning Articles 19 and 21 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 Ized's decision to enact Section 22 of the National Security Act, and to designate the Central Public Park as the sole public site to hold public gatherings, violated Xana's and the Social Democratic Workers Union's rights recognised by Articles 19 and 21 of the ICCPR.
  
- II. Whether Ized's decision to convict Xana under Section 22 of the National Security Act violated her rights recognised by Articles 19 and 21 of the ICCPR.
  
- III. Whether Ized's decision to issue the statement of 16 March violated the Social Democratic Workers Union's rights recognised by Articles 19 and 21 of the ICCPR.
  
- IV. Whether Ized's decision to issue guidelines under Section 23 of the National Security Act on 16 March violated the Social Democratic Workers Union's rights recognised by Article 19 of the ICCPR.

## SUMMARY OF ARGUMENTS

### I

Ized's designation of the Park as a '*public site*' for '*public gatherings*' under Section 22 of the NSA violates Article 19 and 21 of the ICCPR. *First*, the proclamation of emergency is not a valid derogation of the ICCPR. Ized did not formally derogate from the ICCPR. Further, the NIDV was not an exigency threatening the life of a nation nor warrants restrictions on public gatherings due to the lack of scientific consensus as to the means of transmission. *Second*, Ized's interference with the freedom of assembly and expression was not permissible under Article 21 of the ICCPR. At all times, Xana's and the Union's demonstration outside the hospital remained peaceful. The sporadic acts of violence and provocative behaviour does not strip away its peaceful nature. Further, Ized's insistence that all protests must be held in a single site (the Park) effectively denied their right to protest within '*sight and sound*' of their target audience (healthcare workers). Lastly, blanket bans on public gatherings are presumptively disproportionate. Ized has afforded no sufficient reasons why other sites could not be fumigated to protect demonstrators from mosquitos and NIDV infections.

### II

Ized's decision to convict Xana resulting to a suspended sentence of three-month imprisonment violates Articles 19 and 21 of the ICCPR. *First*, criminal sanctions imposed upon assembly organisers cuts deeply into the core of their fundamental right to hold opinions. Xana was a victim of persecution of her contrarian political beliefs. *Second*, such sanction failed to fulfil the three-part test of legality, necessity, and proportionality. Precision and foreseeability of criminal statutes must strictly adhere to the maxim '*nullum crimen sine lege*'. Section 22 of the NSA is widely

formulated to catch all types of public gatherings of more than two persons, including for social, religious and recreational purposes. Such overbreadth is antithetical to the principle of legality and rule of law. Further, Xana was charged for merely conducting an unauthorised gathering under Section 22. Such offence lacks any reasonable nexus with the exhaustive permissible restrictions under the Articles 19(3) and 21 of the ICCPR, such as public health and public order. Lastly, the suspended sentence casts a chilling effect on free speech affecting Xana, other members in the Union, and the wider public in Ized.

### III

Ized's declaration to prohibit unauthorised gatherings on social media platforms interfered with the Union's rights under Articles 19 and 21 of the ICCPR. *First*, freedom of expression and assembly protects activities, offline and online. Denial of online spaces for individuals to gather and express their views interferes with both freedoms. Recently in 2020, the HRC recognised that Article 21 protects '*analogous interactions*' to physical gatherings in the online sphere. *Second*, Ized's interference was not provided by law, necessary in a democratic society, nor proportionate to achieve its protective function. On legality, the express words of Section 22 of the NSA can only reasonably refer to physical gatherings. Hence, Ized's prohibition lacks both basis in law, as well as quality of law. On necessity, the hallmarks of a '*democratic society*' are pluralism, tolerance and broadmindedness. Ized's blanket ban on gatherings on social media evinces an attempt to stifle political dissent, rather than to promote dialogue and debate in the spirit of democracy. On proportionality, such ban constituted a prior restraint on free speech. There was no exceptional circumstance (*i.e.*, protection of national security or prevention of crime or disorder) present to justify such restraint.

## IV

Ized's guidelines on prohibiting unauthorised publications on opinions concerning NIDV violates the Unions's freedom of assembly under Article 19 of the ICCPR. *First*, the protective umbrella of Article 19 extends even to false speech. This is because falsehoods are equally instrumental to the discovery of truth in the '*marketplace of ideas*'. Further, free exchange of ideas serves the public interest in receiving information of all kinds, especially to enable individuals to make informed decisions concerning their health. *Second*, Ized's prohibition failed to fulfil the test of legality, necessity and proportionality. Section 23 of the NSA does not explicitly permit the censorship of opinions altogether. The term '*disinformation*' is rather vague and elusive. Further, there is a lack of causal nexus between the need to protect public health and prohibiting all forms of communication on NIDV without prior authorisation. There is no evidence that disinformation caused material harm to the public. In any event, there were other less intrusive measures to suppress disinformation through technical measures (*e.g.*, automatic flagging, labels, links to credible sources, and algorithmic '*circuit breakers*'). Rather than monopolising the media, Ized ought to collaborate with intermediaries and independent fact-checkers to preserve media independence whilst enhancing public confidence in its health policies.

## ARGUMENTS

### **I. IZED’S DECISION TO ENACT SECTION 22 OF THE NSA AND DESIGNATION OF THE PARK AS THE ONLY PUBLIC SITE VIOLATED XANA’S AND THE UNION’S RIGHTS UNDER ARTICLE 19 AND ARTICLE 21 OF THE ICCPR**

[1] Freedom of expression<sup>1</sup> and assembly<sup>2</sup> form the foundation stones of every free and democratic society. Both freedoms are enshrined under the ICCPR,<sup>3</sup> regional conventions (*i.e.*, Europe,<sup>4</sup> Americas,<sup>5</sup> Africa,<sup>6</sup> and Asia<sup>7</sup>), and regimes protecting the rights of

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<sup>1</sup> UNHRC, CCPR General Comment No. 34, Article 19, Freedoms of Opinion and Expression, 12 September 2011, CCPR/C/GC/34 (“General Comment No. 34”) [2]; *Gryb v Belarus* Communication no. 1315/2004, CCPR/C/103/D/1316/2004 (HRC, 26 October 2011) [13.3]; *Zhagiparov v Kazakhstan* Communication no. 2441/2014, CCPR/C/124/D/2441/2014 (HRC, 25 October 2018) (“*Zhagiparov*”) [13.3]; *Strizhak v Belarus* Communication no. 2260/2013, CCPR/C/124/D/2260/2013 (HRC, 1 November 2018) (“*Strizhak*”) [6.3]; *Amelkovich v Belarus* Communication no. 2720/2016, CCPR/C/124/D/2720/2016 (HRC, 29 March 2019) (“*Amelkovich*”) [6.3]; *Insenova v Kazakhstan* Communication nos. 2542/2015 and 2543/2015, CCPR/C/126/D/2542/2015 and CCPR/C/126/2543/2015 (HRC, 26 July 2019) (“*Insenova*”) [9.3].

<sup>2</sup> UNHRC, CCPR General Comment No. 37, Article 21, Right of Peaceful Assembly, 27 July 2020, CCPR/C/GC/37 (“General Comment No. 37”) [1]; *Turchenyak et al. v Belarus* Communication no. 1948/2010, CCPR/C/108/D/1948/2010 (HRC, 24 July 2013) (“*Turchenyak*”) [7.4], [7.7]; *Toregozhina v Kazakhstan* Communication no. 2311/2013, CCPR/C/112/D/2311/2013 (HRC, 25 July 2019) (“*Toregozhina [2019]*”) [8.4]; *Severinets v Belarus* Communication no. 2230/2012, CCPR/C/123/D/2230/2012 (HRC, 19 July 2018) (“*Severinets*”) [8.4] – [8.5]; *Popova v Russian Federation* Communication no. 2217/2012, CCPR/C/122/2217/2012 (HRC, 6 April 2018) (“*Popova*”) [7.3]; *Gimenez v Paraguay* Communication no. 2372/2014, CCPR/C/123/D/2372/2014 (HRC, 25 July 2018) (“*Gimenez*”) [8.3]; *Zhukovsky v Belarus* Communication no. 2724/2016, CCPR/C/127/D/2724/2016 (HRC, 8 November 2019) (“*Zhukovsky*”) [7.4]; *Djavit An v Turkey* App no 20652/92 (ECtHR, 20 February 2003) (“*Djavit An*”) [56]; *Strizhak* (n 1) [6.5]; *Amelkovich* (n 1) [6.5]; *Insenova* (n 1) [9.3], [9.5].

<sup>3</sup> International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, arts. 19, 21.

<sup>4</sup> European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953), arts. 10 – 11; Charter of Fundamental Rights of the European Union (CFR) (adopted 7 December 2000, entered into force 1 December 2009), arts. 11 – 12.

<sup>5</sup> American Declaration of the Rights and Duties of Man (ADRD) (adopted 2 May 1948), arts. 4, 21; American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978), arts. 13, 15.

<sup>6</sup> African Charter on Human and Peoples’ Rights (ACHPR) (adopted 27 June 1981, entered into force 21 October 1986), arts. 9, 11.

<sup>7</sup> Arab Charter on Human Rights (adopted 22 March 2004, entered into force 15 March 2008), arts. 26, 28; ASEAN Declaration on Human Rights (adopted 9 November 2012), arts. 23 – 24.

children,<sup>8</sup> the disabled,<sup>9</sup> and migrant workers.<sup>10</sup> Their close interconnectivity and complementarity is widely acknowledged by the HRC,<sup>11</sup> international courts,<sup>12</sup> and scholars.<sup>13</sup> The freedom of assembly embodies both an expressive purpose,<sup>14</sup> and associational value.<sup>15</sup>

[2] The first issue concerns Ized’s promulgation of Section 22 of the NSA and declaration of emergency designating the Park as the *sole* public site for ‘*public gatherings*’.<sup>16</sup> Whilst

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<sup>8</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered in force 2 September 1990) UNGA Res 44/25 (CRC), arts. 13(1), 15(1).

<sup>9</sup> Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force on 3 May 2008) UNGA Res 61/106 (CPRD), arts. 21, 29.

<sup>10</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered in force 1 July 2003) UNGA Res 45/158 (ICRMW), arts. 13, 26.

<sup>11</sup> General Comment No. 34 (n 1) [4]; General Comment No. 37 (n 2) [9].

<sup>12</sup> *Navalnyy v Russia* App nos 29580/12 and 4 others (ECtHR, 15 November 2018) (“*Navalnyy*”) [101]; *Kudrevičius & Others v Lithuania* App no 37553/05 (ECtHR, 15 October 2015) (“*Kudrevičius*”) [85]; *López Lone et al. v Honduras*, Inter-American Court of Human Rights Series C No. 302 (Preliminary Objections, Merits, Reparations and Costs) (5 October 2015) [160]; *Castañeda Gutman v México*, Inter-American Court of Human Rights Series C No. 184 (Preliminary Objections, Merits, Reparations and Costs) (6 August 2008) [140].

<sup>13</sup> OSCE and Venice Commission, *Guidelines on Freedom of Peaceful Assembly*, (3<sup>rd</sup> edn, OSCE Office for Democratic Institutions and Human Rights 2020) (“OSCE Guidelines”) [5]; Edison Lanza, ‘Protest and Human Rights’ Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (September 2019) OEA/SER.L/V/II/CIDH/RELE/INF.22/19 (“Lanza 2019 Report”) [1] – [2], [17] – [18]; IACHR, ‘Report on the Criminalization of the Work of Human Rights Defenders’ (December 2015) OEA/SER.L/V/II/Doc.49/15 [119]; Rhona K. M Smith, *Textbook on International Human Rights Law* (6th edn, Oxford University Press 2014) 305; Dominika Bychawska-Siniarska, ‘Protecting The Right To Freedom Of Expression Under The European Convention On Human Rights’ (*Council of Europe*, July 2017) <<https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>> accessed 15 November 2020, 10.

<sup>14</sup> *Kivenmaa v Finland* Communication no. 412/1990, CCPR/C/50/D/412/1990 (HRC, 31 March 1994) (“*Kivenmaa*”) [7.6]; *Sekerko v Belarus* Communication no. 1851/2008, CCPR/C/109/D/1851/2008 (HRC, 28 October 2013) [9.3]; *Poplavny and Sudalenko v Belarus* Communication no. 2139/2012, CCPR/C/118/D/2139/2012 (HRC, 3 November 2016) [8.5].

<sup>15</sup> Dragan Golubovic, ‘Freedom of association in the case law of the European Court of Human Rights’ (2013) 17(7-8) *International Journal of Human Rights*; Ashutosh Bhagwat, ‘Associational Speech’ (2011) 120(5) *Yale Law Journal*.

<sup>16</sup> Facts [14], [16]; Clarifications [17].

Article 21 of the ICCPR cannot be entirely separable from Article 19,<sup>17</sup> this issue principally concerns freedom of assembly – the *individual* right to express one’s opinion *collectively*.<sup>18</sup>

[3] Since Article 21 operates as *lex specialis*, this Court need not separately consider Article 19 as *lex generalis*.<sup>19</sup> Any finding of violation under Article 21 of the ICCPR *ipso facto* entails a non-violation of Article 19.

[4] The Applicants’ submission is two-fold: (A) Ized did *not* derogate from the ICCPR; and (B) violated Article 21 of the ICCPR.

#### **A. Ized’s Proclamation Of Emergency Was Not A Valid Derogation From The ICCPR**

[5] Article 4 of the ICCPR allows States to temporarily suspend their obligations during public emergencies.<sup>20</sup> Ized failed to fulfil its (1) procedural; and (2) substantive conditions.

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<sup>17</sup> *Galstyan v Armenia* App no 26986/03 (ECtHR, 15 November 2007) (“*Galstyan*”) [95] – [96]; *Primov and Ors v Russia* App no 17391/06 (ECtHR, 12 June 2014) (“*Primov*”) [91]; *Lashmankin and Ors v Russia* App nos 57818/09 and 14 others (ECtHR, 7 February 2017) (“*Lashmankin*”) [363].

<sup>18</sup> General Comment No. 37 (n 2) [4].

<sup>19</sup> *Kivenmaa v Finland* Communication no. 412/1990, CCPR/C/50/D/412/1990 (Dissenting Opinion of Committee Member Kurt Herndl) (HRC, 31 March 1994) [3.5]; *Hakim Aydin v Turkey* App no 4048/09 (ECtHR, 26 May 2020) [41]; *Razvozhayev v Russia and Ukraine and Udaltsov v Russia* App nos 75734/12, 269515 and 55325/15 (ECtHR, 19 November 2019) [278]; *Liitfiye Zengin and Ors v Turkey* App no 36443/06 (ECtHR, 14 April 2015) [35]; *Schwabe and M.G. v Germany* App nos 8080/08 and 8577/08 (ECtHR, 1 December 2011) (“*Schwabe*”) [99] – [101]; *Association of Citizens Radko & Paunkovski v The Former Yugoslav Republic of Macedonia* App no 74651/01 (ECtHR, 15 January 2009) (“*Radko*”) [80]; *Ashughyan v Armenia* App no 33268/03 (ECtHR, 17 July 2008) (“*Ashughyan*”) [71]; *Ezelin v France* App no 11800/85 (ECtHR, 26 April 1991) (“*Ezelin*”) [35]; *Navalnyy* (n 12) [101].

<sup>20</sup> ICCPR (n 3) art. 4; UNHRC, CCPR General Comment No. 29, Article 4, State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11 (“General Comment No. 29”) [1].

1. Ized did not notify its derogation under Article 4 of the ICCPR

[6] A State derogating from the ICCPR shall immediately notify the UN Secretary-General.<sup>21</sup>

Such notification is essential to enable the HRC and international community to review the sufficiency of its reasons for derogation and compliance with the ICCPR.<sup>22</sup>

[7] During the COVID-19 pandemic, many States deposited notifications of emergency under the ICCPR (including the ECHR<sup>23</sup> and ACHR<sup>24</sup>):

(a) Americas: Ecuador,<sup>25</sup> Colombia,<sup>26</sup> Guatemala,<sup>27</sup> Peru,<sup>28</sup> El Salvador,<sup>29</sup> and Dominican Republic.<sup>30</sup>

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<sup>21</sup> ICCPR (n 3) art. 4(3).

<sup>22</sup> General Comment No. 29 (n 20) [17]; Hafner-Burton EM, Helfer LR and Fariss CJ, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65(4) *International Organization* 673 <<https://doi.org/10.1017/S002081831100021X>> accessed 18 January 2021; Christopher Michaelson, 'International Human Rights on Trial – The United Kingdom's and Australia's Response to 9/11' (2003) 25 *Sydney L Rev* 275, 290.

<sup>23</sup> ECHR (n 4) art. 11.

<sup>24</sup> ACHR (n 5) art. 15; *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6))*, Advisory Opinion OC-8/87 *Inter-American Court of Human Rights Series A No. 8* (30 January 1987) [8].

<sup>25</sup> UN, 'Depositary Notification by the Permanent Mission of Ecuador' (24 March 2020) C.N.119.2020.TREATIES-IV.4 (Depositary Notification); OAS, 'Note Verbal (Ecuador)' (17 March 2020) Note No. 4-2-073/2020.

<sup>26</sup> UN, 'Depositary Notification by the Permanent Mission of Colombia' (25 March 2020) C.N.131.2020.TREATIES-IV.4 (Depositary Notification); OAS, 'Note Verbal (Colombia)' (17 March 2020) Note No.377/2020.

<sup>27</sup> UN, 'Depositary Notification by the Permanent Mission of Guatemala' (23 March 2020) C.N.117.2020.TREATIES-IV.4 (Depositary Notification); OAS, 'Note Verbal (Guatemala)' (23 March 2020) Note No. Ref. NV-OEA-M4-No.182-2020.

<sup>28</sup> UN, 'Depositary Notification by the Permanent Mission of Peru' (30 March 2020) C.N.126.2020.TREATIES-IV.4 (Depositary Notification); OAS, 'Note Verbal (Peru)' (30 March 2020) Note No 7-5-M/045.

<sup>29</sup> UN, 'Depositary Notification by the Permanent Mission of El Salvador' (14 April 2020) C.N.134.2020.TREATIES-IV.4 (Depositary Notification); OAS, 'Note Verbal (El Salvador)' (1 April 2020) Note No. MPOEA- OEA-024/2020.

<sup>30</sup> UN, 'Depositary Notification by the Permanent Mission of the Dominican Republic' (25 June 2020) C.N.279.2020.TREATIES-IV.4 (Depositary Notification); OAS, 'Note Verbal (Dominican Republic)' (20 April 2020) Note No. MPRD- OEA 0400-2020.



(b) Europe: Latvia,<sup>31</sup> Armenia,<sup>32</sup> Estonia,<sup>33</sup> Romania,<sup>34</sup> Georgia,<sup>35</sup> and Moldova.<sup>36</sup>

(c) Africa/Asia: Ethiopia,<sup>37</sup> Namibia,<sup>38</sup> Kyrgyzstan,<sup>39</sup> and Palestine.<sup>40</sup>

[8] However, Ized made no such notification.<sup>41</sup> Hence, its proclamation of emergency did not effectively suspend its obligations under the ICCPR.<sup>42</sup>

## 2. NIDV was not an exigency warranting restrictions on public gatherings

[9] Not every catastrophe qualifies as a public emergency which ‘*threatens the life of the*

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<sup>31</sup> UN, ‘Depository Notification by the Permanent Mission of Latvia’ (16 March 2020) C.N.105.2020.TREATIES-IV.4 (Depository Notification); COE, ‘Note Verbale (Latvia)’ (16 March 2020) JJ9012C.

<sup>32</sup> UN, ‘Depository Notification by the Permanent Mission of Armenia’ (20 March 2020) C.N.114.2020.TREATIES-IV.4 (Depository Notification); COE, ‘Note Verbale (Armenia)’ (19 March 2020) JJ9015C.

<sup>33</sup> UN, ‘Depository Notification by the Permanent Mission of Estonia’ (20 March 2020) C.N.113.2020.TREATIES-IV.4 (Depository Notification); COE, ‘Note Verbale (Estonia)’ (20 March 2020) JJ9017C.

<sup>34</sup> UN, ‘Depository Notification by the Permanent Mission of Romania’ (20 March 2020) C.N.121.2020.TREATIES-IV.4 (Depository Notification); COE, ‘Note Verbale (Romania)’ (21 March 2020) JJ9019C.

<sup>35</sup> UN, ‘Depository Notification by the Permanent Mission of Georgia’ (21 March 2020) C.N.125.2020.TREATIES-IV.4 (Depository Notification); COE, ‘Note Verbale (Georgia)’ (16 March 2020) JJ9018C.

<sup>36</sup> UN, ‘Depository Notification by the Permanent Mission of the Republic of Moldova’ (4 May 2020) C.N.164.2020.TREATIES-IV.4 (Depository Notification); COE, ‘Note Verbale (Moldova)’ (18 March 2020) JJ9016C.

<sup>37</sup> UN, ‘Depository Notification by the Permanent Mission of Ethiopia’ (9 June 2020) C.N.243.2020.TREATIES-IV.4 (Depository Notification).

<sup>38</sup> UN, ‘Depository Notification by the Permanent Mission of the Republic of Namibia’ (6 July 2020) C.N.303.2020.TREATIES-IV.4 (Depository Notification).

<sup>39</sup> UN, ‘Depository Notification by the Permanent Mission of the Kyrgyz Republic’ (31 March 2020) C.N.129.2020.TREATIES-IV.4 (Depository Notification).

<sup>40</sup> UN, ‘Depository Notification by the Permanent Mission of the State of Palestine’ (30 March 2020) C.N.127.2020.TREATIES-IV.4 (Depository Notification).

<sup>41</sup> Clarifications [16].

<sup>42</sup> *Salgar de Montejo v Colombia* Communication no. 64/1979, CCPR/C/14/D/64/1979 (HRC, 29 July 1980) [10.3]; *Tae-Hoon Park v Republic of Korea* Communication no. 628/1995, CCPR/C/64/D/628/1995 (HRC, 3 November 1998) (“*Tae-Hoon Park*”) [10.4].

nation’.<sup>43</sup> Measures derogating from a State’s obligation can only be taken ‘to the extent strictly required by the exigencies’ in relation to its temporal and geographical scope.<sup>44</sup>

[10] *First*, there is no scientific consensus as to NIDV’s root cause,<sup>45</sup> unlike other highly-communicable diseases susceptible to human-to-human transmission (e.g., COVID-19,<sup>46</sup> H1N1,<sup>47</sup> and SARS<sup>48</sup>), The severe drop of cases (30,000 to 4,300) and deaths (420 to 140) within two months<sup>49</sup> evince a low risk of infection. Even credible independent experts at IMR expressed scepticism at the veracity of Ized’s governmental reports.<sup>50</sup> Hence, NIDV was not an exceptional life-threatening crisis.<sup>51</sup>

[11] *Second*, restrictive measures must be grounded on scientific evidence and WHO advice.<sup>52</sup>

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<sup>43</sup> ICCPR (n 3) art. 4(1); General Comment No. 37 (n 2) [3].

<sup>44</sup> ICCPR (n 3) art. 4(1); General Comment No. 37 (n 2) [4].

<sup>45</sup> Facts [10].

<sup>46</sup> WHO, ‘Coronavirus disease (COVID-19): How is it transmitted?’ (2020) <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted>> accessed 12 January 2021; CDC, ‘Frequently Asked Questions’ (2021) <<https://www.cdc.gov/coronavirus/2019-ncov/faq.html>> accessed 12 January 2021.

<sup>47</sup> WHO, ‘What is the pandemic (H1N1) 2009 virus?’ (2010) <[https://www.who.int/csr/disease/swineflu/frequently\\_asked\\_questions/about\\_disease/en/](https://www.who.int/csr/disease/swineflu/frequently_asked_questions/about_disease/en/)> accessed 12 January 2021; CDC, ‘2009 H1N1 Flu (“Swine Flu”) and You’ (2010) <<https://www.cdc.gov/h1n1flu/qa.htm>> accessed 12 January 2021.

<sup>48</sup> WHO, ‘Severe Acute Respiratory Syndrome (SARS)’ (2004) <[https://www.who.int/health-topics/severe-acute-respiratory-syndrome#tab=tab\\_1](https://www.who.int/health-topics/severe-acute-respiratory-syndrome#tab=tab_1)> accessed 12 January 2021; CDC, ‘Frequently Asked Questions About SARS’ (2005) <<https://www.cdc.gov/sars/about/faq.html>> accessed 12 January 2021.

<sup>49</sup> Facts [10], [27].

<sup>50</sup> Facts [12]; Clarifications [24].

<sup>51</sup> UNCHR, ‘Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR’ (1984) UN Doc E/CN.4/1985/4, (“Siracusa Principles”) Principle 39; *Lawless v Ireland (No. 3)* App no 332/57 (ECtHR, 1 July 1961) [28].

<sup>52</sup> Siracusa Principles (n 51) principle 26; WHO, *International Health Regulations (2005) Third Edition*, (7<sup>th</sup> edn, WHO 2016) art. 43(2); Katherine W. Todrys, Erin Howe, Joseph J. Amon, ‘Failing Siracusa: governments’ obligations to find the least restrictive options for tuberculosis control’ (2013) 3(1) Public Health Action

However, Ized failed to adduce any sufficient scientific basis justifying the blanket ban of public assemblies to contain the NIDV outbreak.<sup>53</sup> Hence, its designation of the Park as the sole public site was not strictly required under Article 4 of the ICCPR.

**B. Ized’s Designation Of The Park As The Sole Public Site Violated Article 21 Of The ICCPR**

[12] The compatibility of Ized’s designation of the Park as a public site with Article 21 of the ICCPR involves a two-stage analysis: (1) interference; and (2) restrictions.<sup>54</sup>

1. Ized interfered with the rights to peaceful assembly of Xana and the Union

[13] The Union’s assembly on 14 February was (a) peaceful; and (b) interfered by Ized.

a. *The demonstration outside the hospital was a peaceful assembly*

[14] An ‘assembly’ refers to an intentional and temporary gathering of two or more persons for a common expressive purpose.<sup>55</sup> An assembly encompasses both *moving* processions (e.g.,

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<<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4463097/>> accessed 15 January 2021; Nina Sun, ‘Applying Siracusa A Call for a General Comment on Public Health Emergencies’ (2020) 22(1) Health and Human Rights Journal <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7348455/>> accessed 15 January 2021.

<sup>53</sup> *A. and Others v United Kingdom* App no 3455/05 (ECtHR, 19 February 2009) [184]; *Brannigan and McBride v United Kingdom* App nos 14553/89 and 14554/89 (ECtHR, 26 May 1993) [51]; *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996) [106]; *Sahin Alpay v Turkey* App no 16538/17 (ECtHR, 20 March 2018) [119], [183]; *Mehmet Hasan Altan v Turkey* App no 13237/17 (ECtHR, 20 March 2018) [140]; *Alparslan Altan v Turkey* App no 12778/17 (ECtHR, 16 April 2019) [116]; *Kavala v Turkey* App no 28749/18 (ECtHR, 10 December 2019) [158].

<sup>54</sup> General Comment No. 37 (n 2) [11].

<sup>55</sup> General Comment No. 37 (n 2) [12] – [13]; *Levinov v Belarus* Communication no. 1867/09 CCPR/C/105/D/1867/2009 (HRC, 19 July 2012) [9.7]; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edition, Kehl: N.P Engel, 2005) 373; *Kivenmaa* (n 14) [7.6]; OSCE Guidelines (n 13) [41].

parades<sup>56</sup>) and static meetings (e.g., flash mobs,<sup>57</sup> sit-ins,<sup>58</sup> pickets,<sup>59</sup> and religious gatherings<sup>60</sup>).<sup>61</sup> Assemblies serve as a powerful conduit for political expression<sup>62</sup> (e.g., fabricated election results,<sup>63</sup> territorial secession,<sup>64</sup> abortion,<sup>65</sup> and minority identity<sup>66</sup>).

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<sup>56</sup> *Christians Against Racism and Fascism (CARAF) v United Kingdom* App no. 8440/78, (Commission Decision, 16 July 1980) (“*Christians Against Racism and Fascism*”) [4]; *Hurley v Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 US 557 1995, 568 – 569; David Mead, ‘The Right to Peaceful Protest under the European Convention on Human Rights – A Content Study of Strasbourg Case Law’ (2007) EHRLR 345; *Lashmankin* (n 17) [402].

<sup>57</sup> General Comment No. 37 (n 2) [6]; *Toregozhina v Kazakhstan* Communication no. 2137/2012, CCPR/C/112/D/2137/2012 (HRC, 21 October 2014) (“*Toregozhina [2014]*”) [7.5] – [7.6]; *Obote v Russia* App no 58954/09 (ECtHR, 19 November 2019) [46]; BVerfG, decision of the First Senate, 1 BvQ 25/15 (German Federal Constitutional Court, 18 July 2015) [11]; OSCE Office for Democratic Institutions and Human Rights, *Handbook On Monitoring Freedom Of Peaceful Assembly* (OSCE Office for Democratic Institutions and Human Rights (ODIHR) 2011) <<https://www.osce.org/files/f/documents/5/d/82979.pdf>> accessed 16 January 2021.

<sup>58</sup> *Annenkov and Others v Russia*, App no 31475/10, (ECtHR, 25 July 2017) (“*Annenkov*”) [123]; *G. v Germany* App no 13079/87 (Commission Decision, 6 March 1989), 256; *Tabernacle v Secretary of State for Defence* [2009] EWCA Civ 23 [37] – [38]; UNHRC, ‘Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies’ (4 February 2016) UN Doc A/HRC/31/66 (“*UNHRC 2016 Report*”) [10].

<sup>59</sup> General Comment No. 37 (n 2) [6]; *Chebotareva v Russian Federation* Communication no. 1866/2009, CCPR/C/104/D/1866/2009 (HRC, 26 March 2012) (“*Chebotareva*”) [9.3]; *Kim v Uzbekistan* Communication no. 2175/2012, CCPR/C/122/D/2175/2012 (HRC, 4 April 2018) [13.7]; *Levinov v Belarus* Communication no. 2239/2013, CCPR/C/123/D/2239/2013 (HRC, 19 July 2018) (“*Levinov*”) [6.4]; *Rybchenko v Belarus* Communication no. 2266/2013, CCPR/C/124/D/2266/2013 (HRC, 17 October 2018) [8.5], [8.8]; *Navalny* (n 12) [102].

<sup>60</sup> General Comment No. 37 (n 2) [12], [99]; *Kovalenko v Belarus* Communication no. 1808/2008, CCPR/C/108/D/1808/2008 (HRC, 17 July 2013) [9]; *Barankevich v Russia* App no 10519/03 (ECtHR, 26 July 2007) (“*Barankevich*”) [35]; *Severinets* (n 2) [8.10]; OSCE Guidelines (n 13) [17], [43].

<sup>61</sup> *Adali v Turkey* App no 38187/97 (ECtHR, 31 March 2005) (“*Adali*”) [266]; *Navalny* (n 12) [98]; *Rassemblement jurassien and Unité jurassienne v Switzerland* App no 81981/78 (Commission Decision, 10 October 1979), 119; *Kudrevičius* (n 12) [91]; *Lashmankin* (n 17) [402].

<sup>62</sup> UNHRC, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012) UN Doc A/HRC/20/27 (“*Kiai 2012 Report*”) [12]; UNHRC 2016 Report (n 58) [6].

<sup>63</sup> *Sannikov v Belarus* Communication no. 2212/2012, CCPR/C/122/D/2212/2012 (HRC, 6 April 2018) [6.11] – [6.12]; *Popova* (n 2) [7.4].

<sup>64</sup> *Stankov and the United Macedonian Organisation Ilinden v Bulgaria* App nos 29221/95 and 29225/95 (ECtHR, 2 October 2001) (“*Stankov*”) [96] – [98].

<sup>65</sup> *Women on Waves v Portugal* App no 31276/05 (ECtHR, 3 February 2009) (“*Women on Waves*”) [41] – [42].

<sup>66</sup> *Sidiropoulos and Others v Greece* App no 57/1997/841/1047 (ECtHR, 10 July 1998) [44] – [45]; *Identoba and Others v Georgia* App no 73235/12 (ECtHR, 12 May 2015) (“*Identoba*”) [97].

[15] The terms ‘*peaceful*’ and ‘*non-violent*’ are interchangeable.<sup>67</sup> Violence refers to the use of force likely to result in injury or death, or serious damage to property.<sup>68</sup> Since participants are presumed to harbour peaceful intentions,<sup>69</sup> the burden lies with the authorities to prove their violent intentions.<sup>70</sup> An assembly is *not* deemed violent merely because of the risk of violent extremists attending<sup>71</sup> and sporadic violence unleashed by the demonstrators.<sup>72</sup>

[16] Here, the demonstration organised by the Union and led by Xana outside the hospital attracted approximately 400 participants.<sup>73</sup> The aim was to ‘*protest against the privatisation of healthcare services in Ized*’.<sup>74</sup> Upon Xana’s cajoling, 40 demonstrators blocked the passage into the hospital’s entrance.<sup>75</sup>

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<sup>67</sup> General Comment No. 37 (n 2) [15].

<sup>68</sup> General Comment No. 37 (n 2) [15]; OSCE Guidelines (n 13) [51].

<sup>69</sup> *Saghatelyan v Armenia* App no 23086/08 (ECtHR, 20 September 2018) (“*Saghatelyan*”) [230] – [233]; *Karpyuk and Others v Ukraine* App nos 30582/04 and 32152/04 (ECtHR, 6 October 2015) [198] – [207], [224], [234]; Kiai 2012 Report (n 62) [25]; UNHRC, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (24 April 2013) UN Doc A/HRC/23/39 (“*Kiai 2013 Report*”) [49] – [50]; UNHRC 2016 Report (n 58) [18]; OSCE Guidelines (n 13) [21], [76].

<sup>70</sup> *Christian Democratic People’s Party v Moldova (No. 2)* App no 25196/04 (ECtHR, 2 February 2010) (“*Christian Democratic People’s Party*”) [23]; *Makhmudov v Russia* App no 35082/04 (ECtHR, 26 July 2007) (“*Makhmudov*”) [68]; *Fadeyeva v Russia* App no 55723/00 (ECtHR, 9 June 2005) [79]; *Ahmet Özkan and Others v Turkey* App no 21689/93 (ECtHR, 6 April 2004) [426]; *Aktas v Turkey* App no. 24351/94 (ECtHR, 24 April 2003) [272]; OSCE Guidelines (n 13) [49].

<sup>71</sup> *Christians Against Racism and Fascism* (n 56) [4]; *Ezelin* (n 19) [41]; *Schwabe* (n 19) [103]; UNHRC 2016 Report (n 58) [9]; *Taranenko v Russia* App no 19554/05 (ECtHR, 15 May 2014) (“*Taranenko*”) [66]; Lanza 2019 Report (n 13) [83].

<sup>72</sup> *Ziliberberg v Moldova* App no 61821/00 (ECtHR, 1 February 2005) [2]; *Frumkin v Russia* App no 74568/12 (ECtHR, 5 January 2016) [99]; *Collins v Jordan*, 110 F.3d 1363 1996 (United States) 1371 – 1373; *Ezelin* (n 19) [34]; *Annenkov* (n 58) [124]; OSCE Guidelines (n 13) [50].

<sup>73</sup> Facts [19].

<sup>74</sup> Facts [17].

<sup>75</sup> Facts [19].

[17] Since mere provocative and offensive behaviour falls short of violence,<sup>76</sup> the Union’s protest constitutes a ‘*peaceful assembly*’ protected under Article 21 of the ICCPR.<sup>77</sup>

*b. Ized hindered and halted the Union’s protest*

[18] *First*, Section 22(1) of the NSA granted unfettered discretion to Ized’s MINDEF to designate public sites. This essentially deprived Xana’s and the Union’s right to choose the location of an assembly,<sup>78</sup> particularly within ‘*sight and sound*’ of their target audience.<sup>79</sup>

[19] *Second*, Ized’s security forces arrested protestors and fired tear gas and ‘blanks’ into the air.<sup>80</sup> Since authorities must accord a degree of tolerance even for unauthorised assemblies involving minor disturbances,<sup>81</sup> such prompt dispersal constituted an interference.<sup>82</sup>

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<sup>76</sup> *United Communist Party of Turkey and Others v Turkey* App no 133/1996/752/951 (ECtHR, 30 January 1998) [43]; *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) (“*Handyside*”) [49]; *The Sunday Times v United Kingdom (No.1)* App no 6538/74 (ECtHR, 26 April 1979) (“*The Sunday Times*”) [65]; *Stankov* (n 64) [86]; *Radko* (n 19) [64]; *Christian Democratic People’s Party* (n 70) [27].

<sup>77</sup> *Gün and Others v Turkey* App no 8029/07 (ECtHR, 18 June 2013) [49]; *Alekseyev v Russia* App nos 4916/07 and 14599/09 (ECtHR, 21 October 2010) [80]; *Sergey Kuznetsov v Russia* App no 10877/04 (ECtHR, 23 October 2008) (“*Kuznetsov*”) [45]; *Kudrevičius* (n 12) [91] – [92]; *Lashmankin* (n 17) [402] – [403].

<sup>78</sup> *Lopasov v Belarus* Communication no. 2269/2013, CCPR/C/126/2269/2013 (HRC, 25 July 2019) [8.5]; *Adilkhanov v Kazakhstan* Communication no. 2686/2015, CCPR/C/128/D/2015 (HRC, 12 March 2020) [9.7]; *Telibekov v Kazakhstan* Communication no. 2687/2015, CCPR/C/128/D/2687/2015 (HRC, 13 March 2020) (“*Telibekov*”) [9.6]; *Timoshenko et al. v Belarus* Communication no. 2461/2014, CCPR/C/129/D/2461/2014 (HRC, 23 July 2020) (“*Timoshenko*”) [7.5]; *Sadykov v Kazakhstan* Communication no. 2456/2014, CCPR/C/129/D/2456/2014 (HRC, 23 July 2020) (“*Sadykov*”) [7.5].

<sup>79</sup> General Comment No. 37 (n 2) [22]; *Abildayeva v Kazakhstan* Communication no. 2309/2013, CCPR/C/125/D/2309/2013 (HRC, 29 March 2019) (“*Abildayeva*”) [8.5]; *Suleymenova v Kazakhstan* Communication no. 2416/2014 UN Doc CCPR/C/126/2416/2014 (HRC, 17 July 2019) [9.4]; *Timoshenko* (n 78) [7.5]; *Strizhak* (n 1) [6.5]; *Toregozhina [2019]* (n 2) [8.5]; *Popova* (n 2) [7.3]; *Severinets* (n 2) [8.5].

<sup>80</sup> Facts [20].

<sup>81</sup> *Oya Ataman v Turkey* App no 74552/01 (ECtHR, 5 December 2006) (“*Oya Ataman*”) [39] – [42]; *Elvira Dmitriyeva v Russia* App nos 60921/17 and 7202/18 (ECtHR, 30 April 2019) (“*Dmitriyeva*”) [86]; *Navalnyy* (n 12) [143].

<sup>82</sup> *Akgöl and Göl v Turkey* App nos 28495/06 and 28516/06 (ECtHR, 17 May 2011) [44]; *Berladir and Others v Russia* App no 34202/06 (ECtHR, 10 July 2012) (“*Berladir*”) [48] – [50]; *Kandzhov v Bulgaria* App no 68294/01 (ECtHR, 6 November 2008) [73]; *Bukta and Others v Hungary* App no 25691/04 (ECtHR, 17 July 2007) (“*Bukta*”) [37] – [38].

## 2. Ized's interference was unlawful, unnecessary, and disproportionate

[20] The legitimacy of any restriction under Article 21 of the ICCPR is subject to the three-part test of legality, necessity, and proportionality.<sup>83</sup>

### a. *Ized's interference was not provided by law*

[21] Restrictions must be grounded on laws sufficiently precise to enable the public to regulate their conduct,<sup>84</sup> and not confer unfettered discretion on authorities charged with enforcement.<sup>85</sup> Ized's laws failed to meet such requisite threshold.

[22] *First*, Section 22 of the NSA empowers Ized's MINDEF to designate locations for assemblies during public emergency.<sup>86</sup> Such authority is far more overt than any '*hidden obstacle*' implicit within prior notification<sup>87</sup> or authorisation regimes.<sup>88</sup>

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<sup>83</sup> General Comment No. 37 (n 2) [30] – [40]; *Dzhumanbaev v Kazakhstan* Communication no. 2308/2013, CCPR/C/125/D/2308/2013 (HRC, 29 March 2019) [9.3]; *Ukteshbaev v Kazakhstan* Communication no. 2420/2014, CCPR/C/126/D/2420/2014 (HRC, 17 July 2019) [9.3] – [9.4]; *Chebotareva* (n 59) [9.3]; *Telibekov* (n 78) [9.3].

<sup>84</sup> General Comment No. 34 (n 1) [25]; *Nepomnyashchiy v Russian Federation* Communication no. 2318/2013, CCPR/C/123/D/2318/2013 (HRC, 17 July 2018) ("*Nepomnyashchiy*") [7.7]; *Magyar Kétfarkú Kutya Párt v Hungary* App no 201/17 (ECtHR, 20 January 2020) ("*Magyar Kétfarkú*") [93]; *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) ("*Kafkaris*") [140]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [120]; *Kudrevičius* (n 13) [109]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) ("*Editorial Board*") [52]; *Dubrovina and Others v Russia* App no 31333/07 (ECtHR, 25 February 2020) [43].

<sup>85</sup> *Koktish v Belarus* Communication no. 1985/2010, CCPR/C/111/D/1985/2010 (HRC, 24 July 2014) [8.5]; *Reyes et al. v Chile* Communication no. 2627/2015, CCPR/C/121/D/2627/2015 (HRC, 7 November 2017) [7.5]; *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999) ("*Rekvényi*") [59] – [60]; *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) [52]; *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) ("*Hasan and Chaush*") [84]; *Sindicatul "Păstorul cel Bun" v Romania* App no 2330/09 (ECtHR, 9 July 2013) ("*Sindicatul*") [153]; *Vyerentsov v Ukraine* App no 20372/11 (ECtHR, 11 April 2013) ("*Vyerentsov*") [52].

<sup>86</sup> Facts [14].

<sup>87</sup> *Velichkin v Belarus* Communication no. 1022/2001, CCPR/C/85/D/1022/2001 (HRC, 20 October 2005) [2.1] – [2.4]; *Oya Ataman* (n 81) [38]; *Christian Democratic People's Party* (n 70) [6], [12], [27], [28]; *Balcik and Others v Turkey* App no 25/02 (ECtHR, 29 November 2007) [49].

<sup>88</sup> *Coleman v Australia* Communication no. 1157/2003, CCPR/C/87/D/1157/2003 (HRC, 10 August 2006) ("*Coleman*") [7.3]; *Toregozhina [2019]* (n 2) [8.7]; *Kivenmaa* (n 14) [9.2]; *Popova* (n 2) [7.5]; *Severinets* (n 2) [8.7].

[23] *Second*, the provision prescribes no criterion whatsoever to determine the choice of public sites.<sup>89</sup> The MINDEF’s reasoning that the Park could be ‘*regularly fumigated*’ merely begs the question as to why other locations could not be fumigated upon notification.<sup>90</sup>

*b. Ized’s interference was unnecessary*

[24] Restrictions under Article 21 of the ICCPR must be ‘*necessary in a democratic society*’, rather than merely being reasonable or expedient.<sup>91</sup> Governmental discretion must be exercised ‘*reasonably, carefully, and in good faith*’ and supported by ‘*relevant and sufficient*’ reasons,<sup>92</sup> especially for declarations of public emergency.<sup>93</sup>

[25] As adumbrated above,<sup>94</sup> there is a lack of scientific basis justifying restriction of public assemblies in Ized to combat NIDV. Ultimately, the MINDEF’s immediate condemnation of the Union’s demonstration smacks of expediency, rather than necessity.<sup>95</sup>

*c. Ized’s interference was disproportionate*

[26] Assuming *arguendo* that restrictions on public gatherings were necessary, Ized’s measure

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<sup>89</sup> Facts [14].

<sup>90</sup> Facts [16].

<sup>91</sup> General Comment No. 34 (n 1) [34]; General Comment No. 37 (n 2) [40].

<sup>92</sup> *Hyde Park and Others v Moldavia* App no 33482/06 (ECtHR, 31 March 2009) (“*Hyde Park*”) [29], [78]; *Christian Democratic People’s Party v Moldova (No. 1)* App no 28793/02 (ECtHR, 14 February 2006) [70]; *Ibrahim and Others v Azerbaijan* App nos 69234/11, 69252/11 and 69335/11 (ECtHR, 11 February 2016) [78]; *Makhmudov* (n 70), [64] – [65]; *Kudrevičius* (n 13) [143].

<sup>93</sup> *Siracusa Principles* (n 51) Principles 44 – 45, 62.

<sup>94</sup> See Arguments I [10] – [11].

<sup>95</sup> Facts [18].



was not the least intrusive measure to protect public health.<sup>96</sup>

[27] *First*, blanket bans on peaceful assemblies are presumptively disproportionate since every restriction should be based on a ‘*differentiated or individualized assessment*’ of the conduct of participants and surrounding circumstances.<sup>97</sup> At the peak of COVID-19, Israel<sup>98</sup> and Poland<sup>99</sup> allowed protests adhering to social-distancing precautions to proceed.

[28] *Second*, designation of a *single site* for an *entire country*<sup>100</sup> is akin to the much-maligned Singapore’s ‘*Speakers’ Corner*’<sup>101</sup> and Sri Lanka’s ‘*Agitation Site*’.<sup>102</sup> Such excessive restriction significantly limits public participation,<sup>103</sup> negates the impact of expression due

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<sup>96</sup> General Comment No. 37 (n 2) [37]; *Toregozhina [2014]* (n 2) [7.4]; *Telibekov* (n 78) [9.4]; *Abildayeva* (n 79) [8.4]; *Zhukovsky* (n 2) [7.3]; Kiai 2013 Report (n 69) [23]; UNHRC 2016 Report (n 58) [30]; OSCE Guidelines (n 13) [29].

<sup>97</sup> General Comment No. 37 (n 2) [38]; UNHRC 2016 Report (n 58) [30]; United Nations Special Rapporteur on Freedom of Assembly and Association and others, ‘Joint Declaration On The Right To Freedom Of Peaceful Assembly And Democratic Governance; (*Office of the United Nations High Commissioner for Human Rights*, 2020) <<https://www.ohchr.org/Documents/Issues/FAssociation/joint-declaration-democratic-governance/declaration-en.pdf>> accessed 16 January 2021, principle 1(f).

<sup>98</sup> Joseph Hincks, ‘Israelis Just Showed The World What A Socially Distant Protest Looks Like’ (*Time*, 2020) <<https://time.com/5824133/israel-netanyahu-covid-protest-lapid/>> accessed 16 January 2021.

<sup>99</sup> BBC, ‘Poland Abortion: Protesters Against Ban Defy Coronavirus Lockdown’ (*BBC News*, 2020) <<https://www.bbc.com/news/world-europe-52301875>> accessed 16 January 2021.

<sup>100</sup> Clarifications [17].

<sup>101</sup> Human Rights Watch, ‘*Kill the Chicken to Scare The Monkeys*’ *Suppression Of Free Expression And Assembly In Singapore* (2017) <[https://www.hrw.org/sites/default/files/report\\_pdf/singapore1217\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/singapore1217_web.pdf)> accessed 16 January 2021.

<sup>102</sup> Himel Kotelawala, ‘Making Sense Of The Agitation Site’ (*EconomyNext*, 2021) <<https://economynext.com/making-sense-of-the-agitation-site-47800/>> accessed 12 January 2021; Inform: Human Rights Documentation Centre, *Repression Of Dissent In Sri Lanka Before And During Curfew: February – April 2020* (*Inform: Human Rights Documentation Centre*, 2020) <[https://www.inform.lk/wp-content/uploads/2020/05/ROD\\_Feb-Apr\\_2020.pdf](https://www.inform.lk/wp-content/uploads/2020/05/ROD_Feb-Apr_2020.pdf)> accessed 12 January 2021; Meghal Perera, ‘Out Of Site, Out Of Mind: A Shift In The Protest Landscape Of Colombo’ (*Groundviews*, 2021) <<https://groundviews.org/2020/02/21/out-of-site-out-of-mind-a-shift-in-the-protest-landscape-of-colombo/>> accessed 12 January 2021.

<sup>103</sup> *Lewandowska-Malec v Poland* App no 39660/07 (ECtHR, 18 September 2012) (“*Lewandowska-Malec*”) [70]; *Dombrowski v Pfister* 380 US 479 (1965), 487, 494; IACHR, ‘Annual Report of The Inter-American Commission On Human Rights 2008’ Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (25 February 2009) OEA/Ser.L/V/II.134 [103].

to distance from the target audience,<sup>104</sup> and heightens the risk of surveillance.<sup>105</sup>

[29] *Third*, Ized did *not* critically evaluate the alternative resources necessary to neutralise the NIDV threat.<sup>106</sup> Mosquito-borne diseases (*e.g.*, Zika, malaria, and dengue) can be adequately suppressed by simpler but effective methods, such as nets<sup>107</sup> and insecticides.<sup>108</sup>

[30] Hence, restricting the holding of assemblies to only the Park was disproportionate.

## **II. IZED’S CONVICTION OF XANA UNDER SECTION 22 OF THE NSA VIOLATED HER RIGHTS UNDER ARTICLES 19 AND 21 OF THE ICCPR**

[31] The right to hold opinions<sup>109</sup> is secured by freedom of expression<sup>110</sup> and assembly.<sup>111</sup> Freedom of expression includes the ‘*right to seek, receive and impart information and ideas of all kinds*’<sup>112</sup> including ‘*those that offend, shock and disturb*’.<sup>113</sup> Such freedom

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<sup>104</sup> General Comment No. 37 (n 2) [22], [26]; *Strizhak* (n 1) [6.5]; OSCE Guidelines (n 13) [133].

<sup>105</sup> Facts [23]; OSCE Guidelines (n 13) [163].

<sup>106</sup> *Barankevich* (n 60) [33].

<sup>107</sup> WHO, ‘Guidelines for the treatment of malaria – Third Edition’ (2015) <<https://www.who.int/publications/i/item/9789241549127>> accessed 22 January 2021, 102 – 103; WHO, ‘Achieving and maintaining universal coverage with long-lasting insecticidal nets for malaria control’ (2017) <[https://www.who.int/malaria/publications/atoz/who\\_recommendation\\_coverage\\_llin/en/](https://www.who.int/malaria/publications/atoz/who_recommendation_coverage_llin/en/)> accessed 16 January 2021, 1 – 4.

<sup>108</sup> WHO, ‘The critical role of vector control in the fight against Malaria’ (2021) <<https://www.who.int/malaria/media/vector-control/en/>> accessed 16 January 2021.

<sup>109</sup> ICCPR (n 3) art. 19(1); General Comment No. 34 (n 1) [9] – [10].

<sup>110</sup> ICCPR (n 3) art. 19(2); General Comment No. 34 (n 1) [10].

<sup>111</sup> *Schwabe* (n 19) [19]; *Ashughyan* (n 19) [19]; *Rekvényi* (n 85) [58].

<sup>112</sup> ICCPR (n 3) art. 19(2); General Comment No. 34 (n 1) [11].

<sup>113</sup> *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007) (“*Stoll*”) [101]; *Morice v France* App no 29369/10 (ECtHR, 23 April 2015) (“*Morice*”) [124]; *Bédard v Switzerland* App no 56925/08 (ECtHR, 29 March 2016) (“*Bédard*”) [48]; *Handyside* (n 76) [49].

allows democracy to thrive and resolve ‘*irksome*’ societal problems through dialogue.<sup>114</sup>

[32] The second complaint concerns Ized’s conviction of Xana for ‘*conducting a gathering at a public site that was not designated*’ under Section 22 of the NSA<sup>115</sup> resulting to a three-month imprisonment sentence (suspended for a year conditional upon no further unlawful behaviour).<sup>116</sup> Such conviction (A) primarily interferes with Xana’s freedom of expression; and (B) was not a permissible restriction under Article 19 of the ICCPR.

**A. Ized’s Conviction Of Xana Primarily Interfered With Xana’s Freedom Of Expression Under Article 19 Of The ICCPR**

[33] As the Union’s leader, Xana organised and attended the demonstration outside hospital.<sup>117</sup> After being arrested by Ized’s security forces before completing her speech, she was charged and convicted under Section 22 of the NSA.<sup>118</sup>

[34] Criminal sanctions imposed upon assembly organisers are best examined through the lens of Article 19 (*lex specialis*) interpreted in light of Article 21 (*lex generalis*).<sup>119</sup> Since any finding of violation under Article 19 of the ICCPR *ipso facto* entails a violation of Article 21, there is no need for this Court to separately consider the latter provision.<sup>120</sup>

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<sup>114</sup> *Radko* (n 19) [76]; *Stankov* (n 64) [88].

<sup>115</sup> Facts [23].

<sup>116</sup> Clarifications [22].

<sup>117</sup> Facts [18] – [19].

<sup>118</sup> Facts [19], [21] – [22].

<sup>119</sup> *Yilmaz v Turkey* App no 68514/01 (ECtHR, 17 July 2008) (“*Yilmaz*”) [33], [56] – [59]; *Dmitriyeva* (n 81) [66].

<sup>120</sup> *Rekvényi* (n 85) [61] – [62].

[35] This Court’s review *cannot* be constrained by Ized’s classification of Xana’s actions under domestic law.<sup>121</sup> Otherwise, Ized would be granted *carte blanche* to formulate statutory prohibitions on assemblies to undermine freedom of expression.<sup>122</sup> Ized’s enforcement measures not only interfered with Xana’s freedom of expression,<sup>123</sup> but also bordered dangerously close to political persecution for her deeply held opinions.<sup>124</sup>

## **B. Ized’s Conviction Of Xana Violated Article 19 Of The ICCPR**

[36] The critical question is whether Ized’s interference passed the test of legality, necessity, and proportionality (as adopted by the HRC,<sup>125</sup> ECtHR,<sup>126</sup> IACtHR,<sup>127</sup> and

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<sup>121</sup> *Tatár and Fáber v Hungary* App no 26005/08 (ECtHR, 12 June 2012) (“*Tatár*”) [29]; *Yilmaz* (n 119) [56] – [59].

<sup>122</sup> *Kablis v Russia* App no 48310/16 and 59663/17 (ECtHR, 30 April 2019) (“*Kablis*”) [103]; *Tatár* (n 121) [40].

<sup>123</sup> *Dmitriyeva* (n 81) [77]; *Tatár* (n 121) [29] – [30].

<sup>124</sup> *Faurisson v France* Communication no. 550/1993, CCPR/C/58/D/550/1993 (HRC, 2 January 1993) [9.6]; *Andre Mpaka-Nsusu v Zaire* Communication no. 157/1986, CCPR/C/27/D/157/1983 (HRC, 26 March 1986) [10]; *Essono Mika Miha v Equatorial Guinea* Communication no. 414/1990, CCPR/C/51/D/414/1990 (HRC, 8 July 1994) [6.5].

<sup>125</sup> *Androsenko v Belarus* Communication no. 2092/2011, CCPR/C/116/D/2092/2011 (HRC, 30 March 2016) [7.3]; *Zdrestov v Belarus* Communication no. 2391/2014, CCPR/C/128/D/2391/2014 (HRC, 13 March 2020) [8.2] – [8.3]; *Olechkevitch v Belarus* Communication no. 1785/2008, CCPR/C/107/D/1785/2008 (HRC, 18 March 2013) [8.3]; *Pivonos v Belarus* Communication no. 1830/2008, CCPR/C/106/D/1830/2008 (HRC, 29 October 2012) [9.2]; *Zhagiparov* (n 1) [13.3], [13.6]; *Strizhak* (n 1) [6.3], [6.5]; *Gimenez* (n 2) [8.3]; *Insenova* (n 1) [9.3], [9.5]; *Zhukovsky* (n 2) [7.3] – [7.4]; *Amelkovich* (n 1) [6.3], [6.5]; *Levinov* (n 59) [8.3].

<sup>126</sup> *Karácsony and Others v Hungary* App no 42461/13 and 44357/13 (ECtHR, 17 May 2016) [121] – [125]; *Handyside* (n 76) [44] – [45], [49]; *Eğitim Ve Bilim Emekçileri Sendikası v Turkey* App no 20641/05 (ECtHR, 25 September 2012) [44], [50]; *Kilinç v Turkey* App no 40884/07 (ECtHR, 12 January 2021) [33] – [34]; *Balaskas v Greece* App no 73087/1 (ECtHR, 5 November 2020) [33]; *Guz v Poland* App no 965/12 (ECtHR, 15 October 2020) [73] – [78]; *Stoll* (n 113) [101]; *The Sunday Times* (n 76) [45], [49], [62]; *Kudrevičius* (n 12) [108], [143]; *Magyar Kétfarkú* (n 84) [93] – [94].

<sup>127</sup> *Rios v Venezuela*, Inter-American Court of Human Rights Series C No. 194 (Preliminary Objections, Merits, Reparations and Costs) (28 January 2009) [72]; *Palamara-Iribarne v Chile*, Inter-American Court of Human Rights Series C No. 135 (Merits, Reparations and Costs) (22 November 2005) [79], [85]; *Canese v Paraguay*, Inter-American Court of Human Rights Series C No. 111 (Merits, Reparations and Costs) (31 August 2004) [123]; *Herrera-Ulloa v Costa Rica*, Inter-American Court of Human Rights Series C No. 107 (Preliminary Objections, Merits, Reparations and Costs) (22 July 2004) [121] – [123].

ACtHPR/ACommHPR).<sup>128</sup> None of the conjunctive three limbs have been satisfied.

1. Ized’s conviction of Xana was not provided by law

[37] Laws restricting freedom of expression must be formulated with sufficient precision to enable individuals to regulate their conduct accordingly,<sup>129</sup> and reasonably foresee the consequences which their actions may entail.<sup>130</sup>

[38] Precision and foreseeability are even more vital for criminal statutes,<sup>131</sup> in accordance with the fundamental maxim ‘*nullum crimen sine lege*’.<sup>132</sup> Elements of criminality must be expressed exhaustively and clearly, with no room of ambiguity.<sup>133</sup>

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<sup>128</sup> *Konaté v Burkina Faso* App no 004/2013 (ACtHPR, 5 December 2014) [125]; *Umuhoza v Rwanda* App no 003/2014 (ACtHPR, 24 November 2017) [132] – [133]; *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda And Constitutional Rights Project v Nigeria* App nos 105/93, 128/94, 130/94 and 152/96 (ACommHPR, 1998) [66], [68] – [69]; *Interights v Mauritania* App no 242/2001 (ACommHPR, 2004) [78] – [79].

<sup>129</sup> General Comment No. 34 (n 1) [25]; *de Groot v The Netherlands* (14 July 1995) Communication no. 578/1994, CCPR/C/54/D/578/1994 (“*de Groot*”) [4.1]; *Nepomnyashchiy* (n 84) [7.7].

<sup>130</sup> *Kafkaris* (n 84) [140]; *The Sunday Times* (n 76) [49]; *Editorial Board* (n 84) [52].

<sup>131</sup> *Kimel v Argentina*, Inter-American Court of Human Rights Series C No. 177 (Merits, Reparations and Costs) (2 May 2008) (“*Kimel*”) [63]; *Uson Ramirez v Venezuela*, Inter-American Court of Human Rights Series C No. 207 (Preliminary Objections, Merits, Reparations, and Costs) (20 November 2009) (“*Uson Ramirez*”) [55].

<sup>132</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) (“*Rome Statute*”), art. 22(1); *Larissis and Others v Greece* App no 23372/94 and 26378/94 (ECtHR, 24 February 1998) (“*Larissis*”) [40] – [41]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) (“*Kokkinakis*”) [52].

<sup>133</sup> *Keun-Tae Kim v Republic of Korea* Communication no. 574/1994, CCPR/C/64/D/574/1994 (HRC, 4 January 1999) [12.3]; *The Word “Laws” in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, Inter-American Court of Human Rights Series A No. 6 (9 May 1986) [29]; *Castillo Petruzzi v Peru*, Inter-American Court of Human Rights Series C No. 52 (Merits, Reparations and Costs) (30 May 1999) [121]; *Cantoral Benavides v Peru*, Inter-American Court of Human Rights Series C No. 69 (Merits) (18 August 2000) [157]; *Ricardo Canese v Paraguay*, Inter-American Court of Human Rights Series C No. 111 (Merits, Reparations and Costs) (31 August 2004) [174]; *De La Cruz Flores v Peru*, Inter-American Court of Human Rights Series C No.115 (Merits, Reparations and Costs) (18 November 2004) [79]; *García Asto and Ramírez Rojas v Peru*, Inter-American Court of Human Rights Series C No. 137 (Preliminary Objection, Merits, Reparations and Costs) (25 November 2005) [188]; *Lori Berenson Mejía v Peru*, Inter-American Court of Human Rights Series C No. 119 (Merits, Reparations and Costs) (25 November 2004) [117], [119]; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, Inter-American

[39] Section 22 of the NSA criminalises the conducting ‘*any gathering at a public site*’ not designated by Ized’s MINDEF.<sup>134</sup> Section 22(2) defines ‘*public site*’ as ‘*any location or space that is used by members of the public and is visible to members of the public*’.<sup>135</sup> Such broad ambit even encompasses communal outdoor activities.<sup>136</sup> No exception is allowed for gatherings lasting a short duration, or locations far from mosquito breeding grounds.

[40] Such an expansive catch-all provision renders all kinds of public gatherings as illegal – ranging from idyllic picnics at the park, religious ceremonies,<sup>137</sup> to spontaneous assemblies.<sup>138</sup> The MINDEF’s statement on 16 March to extend the operation of Section 22 to ‘*unauthorised gatherings on social media platforms*’<sup>139</sup> reinforces the sheer overbreadth of discretion and heightens the risk of arbitrariness and abuse.<sup>140</sup>

[41] Hence, Section 22 of the NSA lacked sufficient precision to meet the test of legality.

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Court of Human Rights Series A No. 5 (13 November 1985) (“Advisory Opinion OC-5/85”) [39] – [40]; *Kimel* (n 131) [63]; *Usón Ramírez* (n 131) [55].

<sup>134</sup> Facts [14].

<sup>135</sup> Facts [14].

<sup>136</sup> Clarifications [1].

<sup>137</sup> *Niemotko v State of Maryland* 340 US 268 (1951), 272 – 273; *Barankevich* (n 60) [29] – [35].

<sup>138</sup> *Eva Molnár v Hungary* App no 10346/05 (ECtHR, 7 October 2008) (“*Eva Molnár*”) [38]; *Bukta* (n 82) [36].

<sup>139</sup> Facts [27].

<sup>140</sup> General Comment No. 34 (n 1) [34]; *de Groot* (n 129) [4.3]; *Navalnyy* (n 12) [115]; *Hasan and Chaush* (n 85) [84].

2. Ized's conviction of Xana was unnecessary

[42] Freedom of expression may be restricted on several grounds: (a) protection of national security or of public order, or of public health or morals; or (b) respect the rights of others or reputation of others.<sup>141</sup> Such exceptions must be narrowly construed.<sup>142</sup>

[43] To invoke such grounds, Ized must demonstrate a direct and immediate connection between the expression and threat.<sup>143</sup> Furthermore, the necessity of the measure taken to address the threat must be established by convincing and compelling evidence.<sup>144</sup>

[44] *First*, public health considerations may arise during an outbreak, or whenever a gathering threatens the health of the participants or public<sup>145</sup> (e.g., deteriorating sanitary conditions of protestors on hunger-strike).<sup>146</sup> However, Ized produced scant evidence that large outdoor gatherings are the proximate cause of NIDV infections.

[45] *Second*, it is difficult to reconcile Ized's intervention with public safety or public order. The police arrested and fired at the 400 Union demonstrators indiscriminately (rather than targeting the 40 odd minority blocking the hospital's entrance).<sup>147</sup> Xana was convicted

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<sup>141</sup> ICCPR (n 3) art. 19(3)(a) – (b).

<sup>142</sup> *Nemtsov v Russia* App no 1774/11 (ECtHR, 31 July 2014) (“*Nemtsov*”) [72].

<sup>143</sup> General Comment No. 34 (n 1) [35]; *Shin v Republic of Korea* Communication no. 926/2000, CCPR/C/80/D/926/2000 (HRC, 16 March 2004) [7.2]; *Jong-Kyu Sohn v Republic of Korea* Communication no. 518/1992, CCPR/C/54/D/518/1992 (HRC, 19 July 1995) [6.2]; *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].

<sup>144</sup> *Ouranio Toxo v Greece* App no 74989/01 (ECtHR, 20 October 2005) [36]; *Adali* (n 61) [267]; *Nemtsov* (n 142) [72]; *Makhmudov* (n 70) [64], [70].

<sup>145</sup> General Comment No. 37 (n 2) [45].

<sup>146</sup> *Cisse v France* App no 51346/99 (ECtHR, 9 April 2002) [48].

<sup>147</sup> Facts [20].

under Section 22 of the NSA for conducting an unauthorised gathering (rather than causing public disorder or inciting violence).<sup>148</sup>

[46] Hence, both the dispersal of the demonstration and conviction of Xana lacked causal nexus to the permissible restrictions under the Article 19(3) of the ICCPR. Ized's rigid and mechanical enforcement of rules governing assemblies had '*become an end in itself*' instead of ensuring their smooth conduct in a democratic society.<sup>149</sup>

3. Ized's suspended sentence of Xana to three-month imprisonment was disproportionate

[47] The principle of proportionality dictates that restrictions to freedom of expression must be the least intrusive measure to achieve its desired aim.<sup>150</sup> Concomitantly, criminal sanction is reserved as the measure of last resort in exceptional situations.<sup>151</sup> Several factors militate against sentencing Xana to imprisonment.

a. *Xana delivered a political speech*

[48] Political speech on matters of public interest commands a high level of protection from

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<sup>148</sup> Facts [21] – [22].

<sup>149</sup> *Lashmankin* (n 17) [449]; *Primov* (n 17) [118]; *Kablis* (n 122) [88].

<sup>150</sup> General Comment No. 34 (n 1) [34]; General Comment No. 37 (n 2) [37]; *Marques v Angola* Communication no. 1128/2002, CCPR/C/83/D/1128/2002 (HRC, 29 March 2005) [3.9]; *Coleman* (n 88) [4.3]; *Toregozhina [2014]* (n 57) [7.4].

<sup>151</sup> General Comment No. 34 (n 1) [47]; *Malcolm Ross v Canada* Communication no. 736/1997, CCPR/C/70/D/736/1997 (HRC, 18 October 2000) [11.6]; Siracusa Principles (n 51) Principle 11.



ensorship.<sup>152</sup> Such protection is *not* obviated by the use of hostile tone,<sup>153</sup> and seriousness of allegations.<sup>154</sup> Criticism against public officials (*e.g.*, judiciary)<sup>155</sup> and promotion of morally repugnant views (*e.g.*, totalitarian symbol)<sup>156</sup> are equally entitled to protection.

[49] Outside the hospital, Xana repeated the Union’s contrarian views on the origins and effects of NIDV to the extent that NUA ‘*manufactured*’ the health crisis.<sup>157</sup> Nonetheless, such provocative rhetoric contains a deeper message of genuine concern – the privatisation of healthcare resulting to loss of employment among healthcare workers and increase of healthcare costs to the public.<sup>158</sup> Hence, Xana’s political speech warrants special protection.

*b. Xana’s speech caused minimal disruption*

[50] It is natural for assemblies to cause a certain level of disruption,<sup>159</sup> and encounter

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<sup>152</sup> *Sürek v Turkey (no. 1)* App no 26682/95 (ECtHR, 8 July 1999) [61]; *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 and 36448/02 (ECtHR, 22 October 2007) [46]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [90]; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) [230]; *Feldek v Slovakia* App no 29032/95 (ECtHR, 12 July 2001) [83]; *Kuznetsov (n 77)* [47]; *Bédat (n 113)* [49].

<sup>153</sup> *E.K. v Turkey* App no 28496/95 (ECtHR, 7 February 2002) [79] – [80]; *Morice (n 113)* [125].

<sup>154</sup> *Thoma v Luxembourg* App no 38432/97 (ECtHR, 29 March 2001) [57]; *Morice (n 113)* [125].

<sup>155</sup> *Roland Dumas v France* App no 34875/07 (ECtHR, 15 July 2010) [43]; *Gouveia Gomes Fernandes and Freitas E Costa v Portugal* App no 1529/08 (ECtHR, 29 March 2011) [47].

<sup>156</sup> *Vajnai v Hungary* App no 33629/06 (ECtHR, 8 July 2008) (“*Vajnai*”) [57].

<sup>157</sup> Facts [19].

<sup>158</sup> Facts [19].

<sup>159</sup> *Ashughyan (n 19)* [90]; *Oya Ataman (n 81)* [38].

hostility.<sup>160</sup> Intervention is only warranted when the assembly escalates into violence.<sup>161</sup>

[51] Although Xana exhorted demonstrators to block the hospital's entrance,<sup>162</sup> an emergency exit remained accessible.<sup>163</sup> Mere blocking of public access is *not* a danger to public order *per se*.<sup>164</sup> Instead of dispersing the assembly and arresting Xana, the appropriate response is to escort the demonstrators away and form a cordon to forge safe passage for patients.<sup>165</sup>

*c. Xana did not act reprehensibly*

[52] No participant of an assembly should be criminally sanctioned – even at the lower end of the scale of penalties – unless guilty of committing reprehensible acts.<sup>166</sup>

[53] Xana did not block the hospital's entrance, nor resist arrest.<sup>167</sup> No other demonstrators – including those blocking the entrance – were charged.<sup>168</sup> Hence, Ized's conviction of Xana appears aimed at suppressing political dissent rather than criminal behaviour.

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<sup>160</sup> *Samiüt Karabulut v Turkey* App no 16999/04 (ECtHR, 27 January 2009) (“*Karabulut*”) [35]; *Balçık And Others v Turkey* App no 25/02 (ECtHR, 29 November 2007) (“*Balçık*”) [49]; *Oya Ataman* (n 81) [38].

<sup>161</sup> *Karabulut* (n 160) [37].

<sup>162</sup> Facts [19].

<sup>163</sup> Clarifications [20].

<sup>164</sup> *Balçık* (n 160) [51]; *Oya Ataman* (n 81) [41].

<sup>165</sup> *Lashmankin* (n 17) [465] – [469].

<sup>166</sup> *Gasparyan v Armenia (No. 1)* App no 35944/03 (ECtHR, 13 January 2009) [43]; *Galstyan* (n 17) [117]; *Ezelin* (n 19) [53]; *Ashughyan* (n 19) [90], [93].

<sup>167</sup> Clarifications [20].

<sup>168</sup> Facts [21].

*d. Xana's conviction casts a chilling effect on free speech*

[54] Imposition of criminal sanctions, however mild, invariably casts a chilling effect on free speech.<sup>169</sup> Targeting public figures amplifies the effect due to wider media coverage.<sup>170</sup>

[55] Xana's suspended sentence effectively silences her for an entire year.<sup>171</sup> Other Union members will also likely fear speaking out.<sup>172</sup> Indeed, their physical demonstrations immediately halted.<sup>173</sup> Ultimately, the chilling effect will spread throughout Ized to the 'detriment of society as a whole'.<sup>174</sup>

**III. IZED'S PROHIBITION OF UNAUTHORISED GATHERINGS ON SOCIAL MEDIA VIOLATED THE UNION'S RIGHTS UNDER ARTICLES 19 AND 21 OF THE ICCPR**

[56] On 10 March, after Xana's conviction, the Union pivoted to 'digital demonstrations' via Net-Assemblies.<sup>175</sup> On 16 March, Ized's MINDEF extended Section 22 of the NSA over 'unauthorised gatherings on social media platforms'.<sup>176</sup> Such prohibition (A) interfered with the Union's rights; and (B) was beyond the scope of Articles 19 and 21 of the ICCPR.

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<sup>169</sup> *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002) ("*Nikula*") [54] – [55]; *Cumpăna and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004) ("*Cumpăna*") [114]; Kiai 2013 Report (n 69) [77] – [78]; *Tatár* (n 121) [41].

<sup>170</sup> *Nemtsov* (n 142) [78].

<sup>171</sup> *Lewandowska-Malec* (n 103) [70].

<sup>172</sup> *İsmail Sezer v Turkey* App no 36807/07 (ECtHR, 24 March 2015) ("*Sezer*") [55]; *Özbent and Others v Turkey* App nos 56395/08 and 58241/08 (ECtHR, 9 June 2015) ("*Özbent*") [48] – [49].

<sup>173</sup> Facts [23].

<sup>174</sup> *Lombardo and Others v Malta* App no 7333/06 (ECtHR, 24 April 2007) [61]; *Willie v Liechtenstein* App no 28396/95 (ECtHR, 28 October 1999) [50]; *Nikula* (n 169) [54].

<sup>175</sup> Facts [23] – [24].

<sup>176</sup> Facts [27].

## A. Ized's Prohibition Interfered With The Union's Freedom Of Expression And Assembly

[57] The magnitude of Ized's interference comprises of three facets: (1) online environment; (2) Ized's duty of facilitation; (3) the Union's right to protest.

### 1. Ized interfered with the Union's freedom of expression and assembly online

[58] Today, the Internet has transformed into a '*public forum*'.<sup>177</sup> Since universal access to the Internet is a basic human right,<sup>178</sup> States must strive to bridge the '*digital divide*'.<sup>179</sup> States must fully protect freedom of expression<sup>180</sup> and assembly<sup>181</sup> of individuals, offline and online. Such freedoms cannot be interpreted restrictively.<sup>182</sup>

[59] A day after Ized's declaration, National Network discontinued the Net-Assembly feature indefinitely.<sup>183</sup> Such denial of the Union's '*remote participation*' in online assemblies

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<sup>177</sup> *Packingham v North Carolina* 137 US 1730 (2017) (United States) [1735]; *International Society of Krishna Consciousness v Lee* 505 US 672 (1992) (United States) [679]; *Knight First Amendment Institute at Columbia University v Donald J. Trump* 17 Civ. 5205 (2018) (United States) [61] – [62]; *Ms. K v Germany*, Judgement of the First Senate 1 BvR 699/06 (German Federal Constitutional Court, 22 February 2011) [70].

<sup>178</sup> 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) UN Doc A/HRC/17/27 [66]; Kiai 2013 Report (n 69) [72].

<sup>179</sup> *Kalda v Estonia* App no 17429/10 (ECtHR, 19 January 2016) [52]; *Jankovskis v Lithuania* App no 21575/08 (ECtHR, 17 January 2017) [62].

<sup>180</sup> UNHRC, '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]; UNHRC, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' (Adopted 26 June 2014) UNGA A/HRC/RES/26/13 [1]; UNHRC, 'The Promotion, Protection and Enjoyment of Human Rights on the Internet' (Adopted 5 July 2012) A/HRC/RES/20/8 [5].

<sup>181</sup> UNHRC, 'The Promotion and Protection of Human Rights in the Context of Peaceful Protest' (Adopted 6 July 2018) UNGA A/HRC/RES/38/11 [2]; UNHRC, 'The Rights to Freedom of Peaceful Assembly and of Association' (Adopted 11 October 2012) UNGA A/HRC/RES/21/16; UNHRC, 'The Rights to Freedom of Peaceful Assembly and of Association' (Adopted 26 September 2013) UNGA A/HRC/RES/25/5; UNHRC 2016 Report (n 58) [10].

<sup>182</sup> *Chumak v Ukraine* App no 44529/09 (ECtHR, 6 March 2018) [36]; *Taranenko* (n 71) [65]; *Djavit An* (n 2) [56].

<sup>183</sup> Facts [27] – [28].

interfered with their rights under Articles 19 and 21 of the ICCPR.<sup>184</sup>

2. Ized breached its duty to facilitate the Union’s freedom of assembly

[60] Aside from the negative obligation of non-interference,<sup>185</sup> Ized owes a positive obligation to facilitate the Union’s right to peaceful assembly.<sup>186</sup> This includes creation of an ‘*enabling environment*’ via legislation<sup>187</sup> and protection from third-party interference.<sup>188</sup>

[61] Concomitantly, even if Ized exerted no effective<sup>189</sup> or overall<sup>190</sup> control over National Network, Ized ought to enact a robust regulation on online gatherings to avoid ‘*collateral censorship*’ by private intermediaries.<sup>191</sup> Such glaring omission entails a breach of its facilitative duty.

3. Ized interfered with the Union’s freedom of association

[62] Freedom of assembly bears a symbiotic link with freedom of association.<sup>192</sup> Both freedoms

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<sup>184</sup> General Comment No. 37 (n 2) [13].

<sup>185</sup> UNHRC, ‘Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Clément Voule’ (17 May 2019) UN Doc A/HRC/41/41 (“Voule 2019 Report”) [13].

<sup>186</sup> General Comment No. 37 (n 2) [23] – [24]; *Turchenyak* (n 2) [7.4]; *Toregozhina [2019]* (n 2) [8.4]; *Severinets* (n 2) [8.4]; *Popova* [7.3]; Voule 2019 Report (n 185) [8]; Kiai 2012 Report (n 62) [27]; Kiai 2013 Report (n 69) [49].

<sup>187</sup> UNHRC, CCPR, ‘Concluding Observations on the Second Periodic Report of Benin’ (23 November 2015) CCPR/C/BEN/CO/2 [33]; General Comment No. 37 (n 2) [24].

<sup>188</sup> *Alekseev v Russian Federation* No. 1873/2009, CCPR/C/109/D/18 (HRC, 25 October 2013) (“*Alekseev*”) [9.6]; General Comment No. 37 (n 2) [24]; Voule 2019 Report (n 185) [14].

<sup>189</sup> *Military and Paramilitary in and Against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14 [115]; Application of the Convention on the Prevention and Punishment of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) [2007] ICJ Rep 43 [400].

<sup>190</sup> *Loizidou v Turkey* App no 15318/89 (ECtHR, 18 December 1996) [56]; *Prosecutor v Dusko Tadić* (Appeal Judgement) ICTY-94-1-A 16 (15 July 1999) [131]; *Ilaşcu v Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) [314] – [316].

<sup>191</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) (Joint Dissenting Opinion of Judges Sajó and Tsotsoria) [2]; Jack Balkin, ‘Old-School/New-School Speech Regulation’ (2014) 127 Harvard Law Review 2296, 2309.

<sup>192</sup> ICCPR (n 3) art. 22; OSCE Guidelines (n 13) [5].

empower people to act collectively to achieve a common purpose.<sup>193</sup> Associations conduct assemblies to mobilise members and convey their aspirations.<sup>194</sup> Together, they form the *right to protest*<sup>195</sup> – a potent tool capable of influencing public policy<sup>196</sup> by ‘*amplifying the voices*’ of marginalised people with alternative political and economic interests.<sup>197</sup>

[63] Collective action is especially critical for trade unions.<sup>198</sup> Curtailment of rights of any member – especially their leaders – has a ripple effect on their activities and interests.<sup>199</sup> Hence, the shutdown of Net-Assemblies – coupled with prohibiting physical gatherings<sup>200</sup> and convicting Xana<sup>201</sup> – landed a third crippling blow onto the collective interests of healthcare workers in Ized.<sup>202</sup>

## **B. Ized’s Prohibition Was Unlawful, Unnecessary And Disproportionate**

[64] Next, Ized’s prohibition of unauthorised online gatherings did not fulfil the test of legality,

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<sup>193</sup> *Escher et al. v Brazil*, Inter-American Court of Human Rights Series C No. 200 (Preliminary Objections, Merits, Reparations, and Costs) (July 6 2009) [169] – [170]; *Baena Ricardo et al. v Panama*, Inter-American Court of Human Rights Series C No. 72 (Merits, Reparations and Costs) (28 November 2003) [156]; *Cantoral Huamaní and García Santa Cruz v Peru*, Inter-American Court of Human Rights Series C No. 167 (Preliminary Objection, Merits, Reparations and Costs) (July 10 2007) [144]; *Kawas-Fernández v Honduras*, Inter-American Court of Human Rights Series C No. 196 (Merits, Reparations and Costs) (April 3 2009) [143].

<sup>194</sup> Kiai 2012 Report (n 62) [51].

<sup>195</sup> Lanza 2019 Report (n 13) [20]; OSCE Guidelines (n 13) [9] – [10]; *Women on Waves* (n 65) [39].

<sup>196</sup> Kiai 2012 Report (n 62) [51].

<sup>197</sup> UNHRC 2016 Report (n 58) [6].

<sup>198</sup> Lanza 2019 Report (n 13) [20].

<sup>199</sup> *Hyde Park and Others v Moldova (nos. 5 and 6)* App nos 6991/08 and 15084/08 (ECtHR, 14 September 2010) [32]; *Sezer* (n 172) [55]; *Özbent* (n 172) [48] – [50].

<sup>200</sup> See Arguments I.

<sup>201</sup> See Arguments II.

<sup>202</sup> Clarifications [8].

necessity, and proportionality.<sup>203</sup>

1. Ized's prohibition was not provided by law

[65] As adumbrated above, any penal restriction must be sufficiently precise, foreseeable, and clearly define the elements of crime.<sup>204</sup> Moreover, criminal statutes cannot be construed to an accused's detriment, by way of analogy.<sup>205</sup> For instance, a statute prohibiting associations from distributing '*leaflets, written statements, or similar publications*' cannot be reasonably foreseen nor analogised to cover oral press statements made to the public.<sup>206</sup>

[66] Section 22(2) of the NSA's definition of '*public site*' as '*any location or space that is used by members of the public and is visible to members of the public*' includes these examples: '*public parks, public squares, public thoroughfares, and means of public transportation*'.<sup>207</sup>

[67] *First*, any right-thinking person would construe Section 22 as referring *only* to physical sites (offline). Both a strict statutory construction<sup>208</sup> and the liberal rule of *ejusdem generis*<sup>209</sup> would similarly exclude cyberspace (online). Stretching the meaning of '*public*

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<sup>203</sup> See Arguments II(B) at [36].

<sup>204</sup> See Arguments II(B)(1) at [37] – [38].

<sup>205</sup> Rome Statute (n 132) art. 22(1); *Başkaya and Okçuoğlu v Turkey* App nos 23536/94 and 24408/94 (ECtHR, 8 July 1999) [36]; *Kokkinakis* (n 132) [52]; *Larissis* (n 132) [32] – [34], [40] – [41].

<sup>206</sup> *Karademirci and Others v Turkey* App nos 37096/97 and 37101/97 (ECtHR, 25 January 2005) [40] – [42].

<sup>207</sup> Facts [14].

<sup>208</sup> ICCPR (n 3) art. 15; Rome Statute (n 132) art. 22(2); *The Prosecutor v Omar Hassan Ahmad Al Bashir* (Judgment) ICC-02/05-01/09 (4 March 2009) [133].

<sup>209</sup> R. N. Graham, 'In Defence of Maxims' (2001) 22 (1) Statute Law Rev 45, 2; 'The Rule of "Ejusdem Generis"' Virginia Law Review (1916) Vol. 4, No. 1 57 <<https://doi.org/10.2307/1063125>> accessed January 20 2021.

site’ to ‘*unauthorised gatherings on social media platforms*’<sup>210</sup> is an executive overreach *ultra vires* the legislative text antithetical to the rule of law.<sup>211</sup>

[68] *Second*, importation of the MINDEF’s declaration into Section 22 results in ambiguity, if not absurdity. Do ‘*social media platforms*’ refer only to social-networking sites (*e.g.*, Twitter), or also Internet forums (*e.g.*, Reddit)? Do ‘*gatherings*’ only include group chats (*i.e.*, Net-Assemblies), or also conversation trail of responses to public posts (*i.e.*, The Net’s general interface<sup>212</sup>)? Does ‘*facilitate the conducting*’ require online intermediaries to expeditiously remove ‘*unauthorised gatherings*’ from their platforms,<sup>213</sup> or only entail individual criminal liability (due to the MINDEF’s emphasis on ‘*arrest persons who organise*’<sup>214</sup>)?

[69] Hence, whether Section 22 is construed in isolation or tandem with the MINDEF’s declaration, Ized’s prohibition of online assemblies is devoid of ‘*basis in law*’ and ‘*quality of law*’.<sup>215</sup>

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<sup>210</sup> Facts [27].

<sup>211</sup> ICCPR (n 3) art. 4; General Comment No. 29 (n 20) [2]; *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) [30]; *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [67]; *Silver and Others v The United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 (ECtHR, 25 March 1983) [90]; *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978) [55].

<sup>212</sup> Facts [5] – [6]; Clarifications [3].

<sup>213</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178/1, art. 14; Act to Improve the Enforcement of Rights on Social Networks (Network Enforcement Act) (1 October 2017) (Germany), art. 1 s 2(2).

<sup>214</sup> Facts [27].

<sup>215</sup> *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) [30]; *VgT Verein Gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001) [52]; *Gorzelik and Others v Poland* App no 44158/98 (ECtHR, 17 February 2004) [64] – [65]; *Gawęda v Poland* App no 26229/95 (ECtHR, 14 March 2002) [39]; *Rotaru* (n 85); *Sindicatul* (n 85) [153]; *Vyerentsov* (n 85) [52].



2. Ized's prohibition was unnecessary in a democratic society

[70] According to Article 21 of the ICCPR, no restrictions can be placed on freedom of assembly except those '*necessary in a democratic society*'. As adumbrated above, the element of '*necessity*' requires a direct causal nexus.<sup>216</sup>

[71] *First*, the official rationale is '*the spread of disinformation that posed grave risks to public health and public order*'.<sup>217</sup> The Union's digital demonstrations protested against Ized's '*healthcare reforms*' and '*use of the NSA*' to suppress dissent.<sup>218</sup> Their Net Tags (#FiredForFakeVirus and #Care4Healthcare) attracted widespread endorsements.<sup>219</sup> Netizens supportive of their campaign called for the boycott of hospitals.<sup>220</sup>

[72] However, even assuming such content caused public confusion or panic, there is little utility in targeting '*gatherings on social media platforms*'<sup>221</sup> (*i.e.*, Net-Assemblies) whilst leaving their core features of content dissemination fully functional (*i.e.*, Net Tags,<sup>222</sup> post,<sup>223</sup> share,<sup>224</sup> endorse,<sup>225</sup> and reply).<sup>226</sup>

[73] *Second*, the hallmark of a '*democratic society*' is '*pluralism, tolerance and*

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<sup>216</sup> See Arguments II(B)(2) at [40] – [44].

<sup>217</sup> Facts [27].

<sup>218</sup> Facts [24].

<sup>219</sup> Facts [24].

<sup>220</sup> Facts [25].

<sup>221</sup> Facts [27].

<sup>222</sup> Facts [6]; Clarifications [4].

<sup>223</sup> Facts [27].

<sup>224</sup> Facts [27].

<sup>225</sup> Facts [27]; Clarifications [5].

<sup>226</sup> Facts [27]; Clarifications [3].

*broadmindedness*'.<sup>227</sup> Democracy does not entail the tyranny of majority – a balance must be struck between majority and minority views to avoid the abuse of dominance.<sup>228</sup> A principal trait of democracy is resolution of problems through dialogue and debate.<sup>229</sup>

[74] Hence, the prohibition of online gatherings cannot be justified simply on the basis of Ized's own view of the merits of the Union's protest.<sup>230</sup> Sweeping preventive measures to censor expression is a '*disservice to democracy and often even endanger it*'.<sup>231</sup>

### 3. Ized's prohibition was disproportionate

[75] As adumbrated above, blanket bans on peaceful assemblies are presumptively disproportionate.<sup>232</sup> Ized's prohibition of online gatherings was not a measure of last resort<sup>233</sup> due to it being: (a) a prior restraint; and (b) not content neutral.

#### *a. Prior restraint is presumptively unlawful*

[76] Prior restraint on freedom of assembly and expression is a draconian measure only justifiable in exceptional circumstances.<sup>234</sup> Online prior restraints include blocking of

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<sup>227</sup> *Pentikäinen v Finland* App no 11882/10 (ECtHR, 20 October 2015) [87]; *Stoll* (n 113) [101]; *Morice* (n 113) [124]; *Hyde Park* (n 92) [27] – [28]; *Stankov* (n 64) [86]; *Dmitriyeva* (n 81) [74]; *Kiai* 2013 Report (n 69) [32], [41].

<sup>228</sup> *Chassagnou and Others v France* App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999) [112]; *Bączkowski and Others v Poland* App no 1543/06 (ECtHR, 3 May 2007) [63]; *Hyde Park* (n 92) [28]; *Christian Democratic People's Party* (n 70) [63] – [64]; *Identoba* (n 66) [93].

<sup>229</sup> *Radko* (n 19) [76].

<sup>230</sup> *Hyde Park* (n 92) [26].

<sup>231</sup> *Stankov* (n 64) [90], [97].

<sup>232</sup> See Arguments I(C)(2)(c) at [27].

<sup>233</sup> General Comment No. 37 (n 2) [37]; OSCE Guidelines (n 13) [132].

<sup>234</sup> *Association Ekin v France* App no 39288/98 (ECtHR, 17 July 2001) [56]; *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland (no. 2)* App no 32772/02 (ECtHR, 30 June 2009) [93].

access to the Internet<sup>235</sup> or social media platforms.<sup>236</sup> A prior notification or authorisation regime must serve to facilitate the safe conduct of assemblies,<sup>237</sup> protect national security,<sup>238</sup> or prevent disorder or crime.<sup>239</sup> Mere suspicion of threat to public order – based on previous offences or affiliation to specific associations – is insufficient proof.<sup>240</sup>

[77] Due to the absence of any ‘*real risk*’ of imminent danger,<sup>241</sup> Ized’s ban on online gatherings was unwarranted. The blocking of Net-Assemblies disproportionately deprived Netizens of precious perishable commodities (*i.e.*, news and debates of topical issues).<sup>242</sup>

*b. The prohibition was not content neutral*

[78] Next, restrictions must be content neutral.<sup>243</sup> States cannot ban meetings of associations – no matter how obnoxious their ideology may be<sup>244</sup> – unless they serve as a platform to propagate violence or reject democracy.<sup>245</sup>

[79] Hence, it is wholly disproportionate to ban all online gatherings (*i.e.*, Net-Assemblies) merely to silence the voice of a single association (*i.e.*, the Union).

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<sup>235</sup> *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012) (“*Yildirim*”) [51], [64].

<sup>236</sup> *Kablis* (n 122) [94].

<sup>237</sup> General Comment No. 37 (n 2) [37]; *Kuznetsov* (n 77) [42]; OSCE Guidelines (n 13) [132].

<sup>238</sup> *Nurettin Aldemir and Others v Turkey* App nos 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02 (ECtHR, 18 December 2007) [42].

<sup>239</sup> *Eva Molnár* (n 138) [37].

<sup>240</sup> General Comment No. 37 (n 2) [37]; *Kablis* (n 122) [102]; *Vajnai* (n 156) [55]; OSCE Guidelines (n 13) [134].

<sup>241</sup> *Kablis* (n 122) [105].

<sup>242</sup> *Kablis* (n 122) [91]; *Yildirim* (n 235) [47].

<sup>243</sup> General Comment No. 37 (n 2) [22]; *Alekseev* (n 188) [9.6]; *Amelkovich* (n 1) [6.6]; OSCE Guidelines (n 13) [115].

<sup>244</sup> *Vajnai* (n 156) [56].

<sup>245</sup> *Stankov* (n 64) [103].

**IV. IZED’S PROHIBITION OF UNAUTHORISED PUBLICATIONS ON NIDV UNDER SECTION 23 OF THE NSA VIOLATED THE UNION’S RIGHTS UNDER ARTICLE 19 OF THE ICCPR**

[80] As COVID-19 peaked in 2020, the WHO Director-General Dr Tedros declared: ‘*But we’re not just fighting an epidemic, we’re fighting an infodemic*’.<sup>246</sup> Such clarion call was echoed by numerous international organisations (*e.g.*, UNICEF,<sup>247</sup> UNESCO,<sup>248</sup> EU,<sup>249</sup> and OECD<sup>250</sup>) to stem the rapid spread of rumours, gossip and unreliable information.<sup>251</sup>

[81] Nevertheless, Ized opportunistically used the NIDV health crisis as a ‘*pathogen of repression*’ to consolidate authoritarian power.<sup>252</sup> Ized’s prohibition of unauthorised publication of opinions concerning NIDV<sup>253</sup> (A) interfered with the Union’s freedom of expression; and (B) such interference was not permissible under Article 19 of the ICCPR.

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<sup>246</sup> Dr Tedros Adhanom Ghebreyesus, ‘Keynote Address’ (*Munich Security Conference*, Munich, 15 February 2020) <<https://www.who.int/director-general/speeches/detail/munich-security-conference>> accessed 23 January 2021.

<sup>247</sup> WHO, UN, UNICEF, UNDP, UNESCO, UNAIDS, ITU, UN Global Pulse, IFRC, ‘Managing the COVID-19 infodemic: Promoting healthy behaviours and mitigating the harm from misinformation and disinformation’ (23 September 2020) <<https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation>> accessed 23 January 2021 (“WHO Managing The COVID-19 Infodemic”).

<sup>248</sup> Julie Posetti and Kalina Bontcheva, ‘DISINFOEMIC: Deciphering COVID-19 Disinformation’ (*UNESCO*, 2020) <[https://en.unesco.org/sites/default/files/disinfodemic\\_deciphering\\_covid19\\_disinformation.pdf](https://en.unesco.org/sites/default/files/disinfodemic_deciphering_covid19_disinformation.pdf)> accessed 23 January 2021, 2.

<sup>249</sup> ‘Speech of Vice President Věra Jourová on countering disinformation amid COVID-19 “From pandemic to infodemic”’ (*European Commission*, 4 June 2020) <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_20\\_1000](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1000)> accessed 23 January 2021.

<sup>250</sup> OECD, ‘Combatting COVID-19 disinformation on online platforms, OECD Policy Responses to Coronavirus (COVID-19)’ (3 July 2020) (“OECD Policy Response”), 2.

<sup>251</sup> WHO, ‘Managing epidemics: Key facts about major deadly diseases’ (2018) (“WHO Managing Epidemics”), 34.

<sup>252</sup> UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, David Kaye’ (23 April 2020) UN Doc A/HRC/44/49 (“Kaye 2020 Report”) [4].

<sup>253</sup> Facts [27].

**A. Ized’s Prohibition Interfered With The Union’s Freedom Of Opinion And Expression Under Article 19 Of The ICCPR**

[82] Traditionally, courts take the conservative view that free speech does *not* protect ‘false speech’ (*i.e.*, US,<sup>254</sup> UK<sup>255</sup> and Singapore<sup>256</sup>). Nevertheless, the prevalent view is that opinions of unverifiable truth is equally deserving of protection.

[83] *First*, free speech facilitates the discovery of truth.<sup>257</sup> It is only through the free exchange of opinions that ‘*misconceptions and errors are exposed*’ and what ‘*withstands testing emerges as truth*’.<sup>258</sup> The remedy to false speech is true speech.<sup>259</sup> This is known as the ‘*marketplace of ideas*’.<sup>260</sup>

[84] *Second*, free speech promotes public participation in governance – the bedrock of any a democratic society.<sup>261</sup> Article 19 of the ICCPR embodies the public’s corresponding right to *receive* information,<sup>262</sup> especially on political questions and matters of public interest.<sup>263</sup>

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<sup>254</sup> *Time, Inc. v Hill* 385 US 374 (1967), 389; *Garrison v Louisiana* 379 US 64 (1964), 75.

<sup>255</sup> *Reynolds v Times Newspapers* [2001] 2 AC 127 (United Kingdom) (“*Reynolds*”), 238 – 239 (Lord Hobhouse).

<sup>256</sup> *Review Publishing Co Ltd and Another v Lee Hsien Loong* [2009] SGCA 46 (Singapore) [282] – [283].

<sup>257</sup> *Grant v Torstar Corp.* 2009 SCC 61 (Canada) [47].

<sup>258</sup> *ibid* [49].

<sup>259</sup> *Whitney v California* 274 U.S. 357 (1927), 377 (Brandeis J concurring opinion); *United States v Alvarez* 567 U.S. 709 (2012), 15 – 17.

<sup>260</sup> *Abrams v United States* 250 U.S. 616 (1919), 630 (Oliver Wendell Holmes Jr. J dissenting opinion); *New York Times v Sullivan* 376 U.S. 254 (1964), 279; John Stuart Mill, *On Liberty* (Batoche Books, 1859), 50.

<sup>261</sup> *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992) [43]; *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992) (“*Thorgeirson*”) [63]; *The Observer and Guardian v The United Kingdom* App no 13585/88 (ECtHR, 26 November 1991) [59(a)]; Advisory Opinion OC-5/85 (n 133) [70].

<sup>262</sup> ICCPR (n 3) art. 19(2); General Comment No. 34 (n 2) [13]; *Mavlonov and Sa’di v Uzbekistan* Communication no. 1334/2004, CCPR/C/95/D/1334/2004 (HRC, 29 March 2009) [8.4].

<sup>263</sup> *Monnat v Switzerland* App no 73604/01 (ECtHR, 21 September 2006) (“*Monnat*”) [58]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) (“*Lingens*”) [42]; *Thorgeirson* (n 261) [55] – [56].

[85] *Third*, access to information is especially critical during health emergencies to enable individuals to make informed decisions<sup>264</sup> in accordance with the principles of self-determination and autonomy.<sup>265</sup> Concomitantly, States must refrain from censoring health-related information, and preventing public participation in health-related affairs.<sup>266</sup>

[86] In fact, Ized’s prohibition of ‘*publication of any **opinion** of any medical expert or other person*’<sup>267</sup> is even more far-reaching than banning false statements of facts. Since the ‘*truth of value judgments is not susceptible of proof*’,<sup>268</sup> such prohibition essentially infringes the inviolable freedom of opinion under Article 19(1) of the ICCPR.

### **B. Ized’s Prohibition Was Unlawful, Unnecessary And Disproportionate**

[87] Any interference must strictly conform to the permissible restrictions under Article 19 of the ICCPR in accordance with the test of legality, necessity, and proportionality.<sup>269</sup>

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<sup>264</sup> CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) (“CESCR General Comment No. 14”) [34].

<sup>265</sup> ICCPR (n 3) art. 17; *Pretty v The United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) [65] – [66]; *Jehovah’s Witnesses of Moscow and Others v Russia* App no 302/02 (ECtHR, 10 June 2010) [135] – [136].

<sup>266</sup> Kaye 2020 Report (n 252) [19] – [20], [59]; CESCR General Comment No. 14 (n 264) [37]; UNHRC, ‘COVID-19: Governments must promote and protect access to and free flow of information during pandemic – International experts’ (19 March 2020); UNESCO, ‘COVID-19: the role of judicial operators in the protection and promotion of the right to freedom of expression: guidelines’ in ‘Protecting Freedom of Expression during the COVID-19 crisis: UNESCO issues Guidelines for Judicial Operators’ 15 September 2020 <<https://en.unesco.org/news/protecting-freedom-expression-during-covid-19-crisis-unesco-issues-guidelines-judicial>> accessed 24 January 2021 (“UNESCO Guidelines for Judicial Operators”), 6 – 7.

<sup>267</sup> Facts [27].

<sup>268</sup> *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004) [76]; *Oberschlick v Austria* (no. 1) App no 11662/85 (ECtHR, 23 May 1991) [63]; *Lingens* (n 263) [46].

<sup>269</sup> *Abdelhamid Benhadj v Algeria* Communication no. 1173/2003 CCPR/C/90/D/1173/2003 (HRC, 20 July 2007) [8.10]; *Mouvement Ralien Suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) [48]; *Animal Defenders International v The United Kingdom* App No. 48876/08 (ECtHR, 22 April 2013) [100]; *Hachette Filipacchi Associes v France* App no 71111/01 (ECtHR, 14 June 2007) [40]; *Steel and Morris v The United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) [87]; *Tae-Hoon Park* (n 42) [10.3]; *Monnat* (n 263) [55].

1. Ized's guidelines were provided by law

- [88] As adumbrated above, the principle of legality requires precision and foreseeability.<sup>270</sup> Imposition of an authorisation regime is yet another form of prior restraint<sup>271</sup> which must be tightly controlled by a well-defined legal framework reinforced by judicial review.<sup>272</sup>
- [89] *First*, the authority to ‘issue **guidelines** on the publication of any news, opinion, or other form of expression’ in Section 23<sup>273</sup> cannot be extrapolated to *prohibit* publications altogether (as opposed to filtering its content). Since the term ‘guidelines’ is synonymous to ‘advice’<sup>274</sup> and ‘recommendations’,<sup>275</sup> any strict prohibition on the mere voicing out of opinions in any form (offline and online) was not reasonably foreseeable.
- [90] *Second*, the guidelines’ rationale of addressing ‘the rapid increase of disinformation’<sup>276</sup> is vague and ambiguous.<sup>277</sup> The term ‘disinformation’ is ‘extraordinarily elusive’,<sup>278</sup> and easily confused with ‘misinformation’ (regardless of intent to deceive)<sup>279</sup> and

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<sup>270</sup> See Arguments II(B)(1) at [37] – [38].

<sup>271</sup> See Arguments III(B)(3)(a) at [76].

<sup>272</sup> *Kablis* (n 122) [92]; *Yıldırım* (n 235) [64].

<sup>273</sup> Facts [15].

<sup>274</sup> ‘guideline, n’ (*Cambridge Dictionary*) <<https://dictionary.cambridge.org/dictionary/english/guideline>> accessed 23 January 2021.

<sup>275</sup> WHO, ‘WHO guidelines’ (2021) <<https://www.who.int/publications/who-guidelines>> accessed 23 January 2021.

<sup>276</sup> Facts [27].

<sup>277</sup> Kaye 2020 Report (n 252) [49]; OECD Policy Responses (n 250), 6; Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (*Office of the United Nations High Commissioner for Human Rights* 2017) <<https://www.osce.org/files/f/documents/6/8/302796.pdf>> accessed 23 January 2021 (“Joint Declaration 2017”), principle 2(a).

<sup>278</sup> Kaye 2020 Report (n 252) [42].

<sup>279</sup> OECD Policy Responses (n 250), 2.

'propaganda' (recklessness).<sup>280</sup> Similar penal laws prohibiting 'fake news' on COVID-19 (e.g., Russia,<sup>281</sup> Hungary,<sup>282</sup> Azerbaijan,<sup>283</sup> Romania,<sup>284</sup> Bosnia and Herzegovina,<sup>285</sup> and Armenia<sup>286</sup>) have attracted strong condemnation.<sup>287</sup>

[91] *Third*, the sole power to authorise publications on NIDV is vested with Ized's MOH without any independent oversight.<sup>288</sup> The absence of any criteria and time frame for approval<sup>289</sup> exacerbates the risk of arbitrariness.<sup>290</sup> Further, the threat of criminal sanction for non-compliance<sup>291</sup> is unduly punitive and susceptible to abuse.<sup>292</sup>

## 2. Ized's guidelines were unnecessary to protect public health

[92] Ized purports to centralise all communications on NIDV 'due to the rapid increase of

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<sup>280</sup> Joint Declaration 2017 (n 277), principle 2(c); UNESCO Guidelines for Judicial Operators (n 266), 10.

<sup>281</sup> Federal Law of 01.04.2020 No. 100-FZ "On Amendments to the Criminal Code of the Russian Federation and Articles 31 and 151 of the Criminal Procedure Code of the Russian Federation" (Russia), art. 1.

<sup>282</sup> Criminal Code of the Republic of Hungary (Act Nr. 100 of 2012), s 337(2).

<sup>283</sup> 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.

<sup>284</sup> Decree signed by the President of Romania, Mr. Klaus Iohannis, regarding the establishment of the state of emergency on the Romanian territory (16 March 2020) (Romania), art. 2.

<sup>285</sup> Decree on Spreading of Panic and False News in a State of Emergency (19 March 2020) (Bosnia and Herzegovina); Decision on Prohibiting Spreading of Panic and Disorder (7 April 2020) (Bosnia and Herzegovina).

<sup>286</sup> Decree on the State of Emergency (24 March 2020) (Armenia).

<sup>287</sup> 'Press freedom must not be undermined by measures to counter disinformation about COVID-19' (*Council of Europe Portal*, 3 April 2020) <<https://www.coe.int/en/web/commissioner/-/press-freedom-must-not-be-undermined-by-measures-to-counter-disinformation-about-covid-19>> accessed 22 January 2021 ("Europe Press Freedom").

<sup>288</sup> Facts [27].

<sup>289</sup> Clarifications [9].

<sup>290</sup> General Comment No. 34 (n 2) [25]; *Centro Europa 7 S.R.L. and Di Stefano v Italy* App no 38433/09 (ECtHR, 7 June 2012) [141], [155]; *Tourancheau and July v France* App no 53886/00 (ECtHR, 24 November 2005) [54]; *Kablis* (n 122) [55] – [56]; *Editorial Board* (n 84) [52]; *Kafkaris* (n 84) [140].

<sup>291</sup> Facts [15].

<sup>292</sup> Joint Declaration 2017 (n 277) principle 2(b); Kaye 2020 Report (n 252) [40], [42].



*disinformation, which posed a serious threat to public health*'.<sup>293</sup> However, there is an absence of causal link as required by the test of necessity.<sup>294</sup>

[93] An infodemic – if left unchecked – can mislead the public with wrong health advice,<sup>295</sup> cause social unrest,<sup>296</sup> and ultimately, cost lives.<sup>297</sup> Nevertheless, such potential risks are sufficiently addressed by pre-existing penal laws, particularly on prevention of public disorder (*i.e.*, breach of health guidelines),<sup>298</sup> and consumer protection<sup>299</sup> (*i.e.*, bogus cures).

[94] Ized's healthcare system was under no actual threat of boycotts or vandalism.<sup>300</sup> In fact, NIDV infections and deaths were already drastically dropping prior to the guidelines being issued on 16 May.<sup>301</sup> Hence, Ized failed to adduce relevant and convincing evidence<sup>302</sup> that

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<sup>293</sup> Facts [27].

<sup>294</sup> See Arguments II(B)(2) at [42] – [43].

<sup>295</sup> WHO Managing Epidemics (n 251), 42; Niharika Sharma, 'Can garlic, hot water, or masks prevent the spread of Covid-19? Here's what doctors say' (*Quartz India*, 9 March 2020) <<https://qz.com/india/1813845/coronavirus-fake-news-rife-on-indian-facebook-whatsapp-twitter/>> accessed 22 January 2021; 'False claim: Gargling with warm water and salt or vinegar will kill the coronavirus', (*Reuters*, 17 March 2020) <<https://www.reuters.com/article/uk-factcheck-coronavirus-salt-vinegar/false-claim-gargling-with-warm-water-and-salt-or-vinegar-will-kill-the-coronavirus-idUSKBN2142MW>> accessed 22 January 2021.

<sup>296</sup> Europe Press Freedom (n 287).

<sup>297</sup> WHO Managing The COVID-19 Infodemic (n 247).

<sup>298</sup> COVID-19 Public Health Response Act 2020 (New Zealand), ss 9 — 11; Public Health (Control of Disease) Act 1984, 1984 c.22 (United Kingdom), s 13.

<sup>299</sup> Kaye Report 2020 (n 252) [46]; 'Warning Letter Colloidal Vitality LLC/Vital Silver MARCS-CMS 604885' (*Food and Drug Administration*, 6 March 2020) <<https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/colloidal-vitality-llc-vital-silver-604885-03062020>> accessed 23 January 2021.

<sup>300</sup> OECD Policy Responses (n 250), 3.

<sup>301</sup> Facts [27].

<sup>302</sup> *Ruokanen v Finland* App no 45130/06 (ECtHR, 6 April 2010) [35]; *Chauvy v France* App no 64915/01 (ECtHR, 29 June 2004) [63], [65]; *Tønshørgs Blad AS and Haukom v Norway* App no 510/04 (ECtHR, 1 March 2007) [54]; *Handyside* (n 76) [50]; *Cumpănă* (n 169) [90].

a new law banning publication on opinions was necessary to protect public health.

3. Ized's guidelines were proportionate

[95] Even assuming *arguendo* that suppressing disinformation was paramount, there were other less intrusive alternative measures available.<sup>303</sup> An effective anti-disinformation regime consists of three core aspects: (a) media; (b) technical means; and (c) cooperation.

a. *Ized should decentralise communications to ensure plurality*

[96] At all times, States must avoid monopoly over the media, and ensure plurality of voices.<sup>304</sup> According to the WHO, emergency response to outbreaks must involve a dynamic '*two-way communication*' including facts (head) and responses to public concerns (heart).<sup>305</sup> Cutting off channels of communication would invariably breed public confusion and mistrust.<sup>306</sup> In short, governments must both talk and *listen*.<sup>307</sup>

[97] The government-affiliated National Network already dominates the media sector.<sup>308</sup> The guidelines further enabled Ized to tighten control over information that the public receives and imparts.<sup>309</sup> Indeed, Ized has become the '*Ministry of Truth*' in true Orwellian

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<sup>303</sup> General Comment No. 34 (n 1) [34].

<sup>304</sup> General Comment No. 34 (n 1) [40]; UNHRC, CCPR, 'Concluding observations of the Human Rights Committee on Guyana' (23 November 2015) CCPR/C/79/Add.121 [19]; UNHRC, CCPR, 'Concluding Observations of the Human Rights Council on the Russian Federation' (1 December 2003) CCPR/CO/79/RUS [19]; UNHRC, CCPR, 'Concluding Observations of the Human Rights Committee on Viet Nam' (5 August 2002) CCPR/CO/75/VNM [18]; UNHRC, CCPR, 'Comments of the Human Rights Committee on Italy' (3 August 1994) CCPR/C/79/Add. 37 [XVII].

<sup>305</sup> WHO Managing Epidemics (n 251), 34 – 35.

<sup>306</sup> Kaye 2020 Report (n 252) [22] – [23].

<sup>307</sup> WHO Managing Epidemics (n 251), 34.

<sup>308</sup> Facts [3] – [4].

<sup>309</sup> General Comment No. 34 (n 1) [11]; IACHR, 'Report of the Special Rapporteur for Freedom of Expression: Chapter III Inter-American Legal Framework Of The Right To Freedom Of Expression' (30 December 2009) OEA/Ser L/V/II Doc 51 [93].

fashion.<sup>310</sup>

*b. Ized should facilitate adoption of technical measures*

[98] There is a myriad of technical methods to effectively detect and filter online content that Ized could direct intermediaries to adopt.

[99] *First, by **passive automated monitoring***. Social media platforms (*i.e.*, Facebook) are capable of promptly detecting suspicious content through algorithmic signals, or human reviewers acting upon user reports.<sup>311</sup>

[100] *Second, by **labelling content***. Instead of removing suspicious content altogether, intermediaries can instead ‘hide’ such posts behind notices indicating different levels of risks (*e.g.*, Twitter – misleading information, disputed claims, and unverified claims).<sup>312</sup>

[101] *Third, by **providing context***. In addition to labelling, intermediaries can attach links pointing towards more credible sources elsewhere – a measure effectively employed by Facebook<sup>313</sup> and Twitter<sup>314</sup> against COVID-19 disinformation.

[102] *Fourth, by **pausing virality***. Intermediaries can trigger a ‘*circuit-breaker*’ (analogous to

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<sup>310</sup> George Packer, ‘George Orwell’s Unheeded Warning’ (2019) 324(1) *The Atlantic*, 40.

<sup>311</sup> Adam Mosseri, ‘Working to Stop Misinformation and False News’ (*Facebook*, 6 April 2017) <<https://www.facebook.com/formedia/blog/working-to-stop-misinformation-and-false-news>> accessed 15 December 2020.

<sup>312</sup> 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](https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html)> accessed 15 December 2020.

<sup>313</sup> ‘How is Facebook addressing false information through independent fact-checkers?’ (*Facebook Help Centre*) <<https://www.facebook.com/help/1952307158131536>> accessed 15 December 2020.

<sup>314</sup> ‘Notices on Twitter and what they mean’ (*Twitter Help Centre*) <<https://help.twitter.com/en/rules-and-policies/notices-on-twitter>> accessed 15 December 2020.

COVID-19 lockdowns<sup>315</sup>) which pauses the ‘*algorithmic amplification*’ of content with sudden spikes of virality to buy time for human reviewers to fact-check its veracity.<sup>316</sup>

*c. Ized should collaborate with intermediaries and fact-checkers*

[103] Instead of usurping control, Ized should lean towards strengthening collaboration. To combat COVID-19 disinformation, established intermediaries (*i.e.*, Facebook, Twitter, Instagram, TikTok, and YouTube) created special spaces and pages to highlight alerts from authoritative sources (*i.e.*, WHO and national health authorities).<sup>317</sup> Another tried-and-tested method is to fund or employ independent fact-checkers to verify content.<sup>318</sup>

[104] Such alternatives preserve the independence of the media, as well as enhance transparency and accountability in Ized’s own health guidelines.<sup>319</sup> In contrast, criminalisation of disinformation is counterproductive to fighting the NIDV infodemic. This serves to only fuel distrust in institutional advice, delay public access to reliable information, and cast a chilling effect on independent health experts to share new discoveries.<sup>320</sup>

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<sup>315</sup> ‘Circuit Breaker to Minimise Further Spread of COVID-19’ (*Singapore Ministry of Health*, 3 April 2020) <<https://www.moh.gov.sg/news-highlights/details/circuit-breaker-to-minimise-further-spread-of-covid-19>> accessed 15 December 2020.

<sup>316</sup> ‘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](https://informationdemocracy.org/wp-content/uploads/2020/11/ForumID_Report-on-infodemics_101120.pdf)> accessed 15 December 2020, 79 – 80 ; Jeff Roberts, ‘Facebook’s new tool to stop fake news is a game changer – if the company would only use it’ (*Fortune*, 19 October 2020) <<https://fortune.com/2020/10/18/facebook-tool-stop-fake-news-viral-content-review-system-fb-business-model/>> accessed 15 December 2020.

<sup>317</sup> OECD Policy Responses (n 250), 4.

<sup>318</sup> *ibid.*, 4, 6.

<sup>319</sup> Kaye 2020 Report (n 252) [22].

<sup>320</sup> David Kaye, Harlem Désir and Edison Lanza, ‘COVID-19: Governments must promote and protect access to and free flow of information during pandemic – International experts’ (*United Nations Human Rights Office of the High Commissioner*, Geneva, Washington & Vienna, 19 March 2020) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729&LangID=E>> accessed 23 January 2021.

[105] For as much as ‘*the truth matters*’ during health crises, even the truth will fail without public confidence.<sup>321</sup> In short, Ized should strive to become the *Ministry of Trust*, rather than the *Ministry of Truth*.

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<sup>321</sup> ‘WHO Director-General’s introductory remarks at the UNGA side event on infodemic management’ (*WHO*, 23 September 2020) <<https://www.who.int/director-general/speeches/detail/who-director-general-s-introductory-remarks-at-the-unga-side-event-on-infodemic-management>> accessed 23 January 2021.

## PRAYER

Based on the foregoing, the Applicants respectfully request this Honourable Court to adjudge and declare:

- I. Ized's designation of the Park as the sole site for public gatherings under Section 22 of the NSA violated Articles 19 and 21 of the ICCPR.
- II. Ized's conviction of Xana resulting to a one-year suspended sentence of three-months imprisonment under Section 22 of the NSA violated Articles 19 and 21 of the ICCPR.
- III. Ized's prohibition of unauthorised gatherings on social media platforms under Section 22 of the NSA violated Articles 19 and 21 of the ICCPR.
- IV. Ized's prohibition of unauthorised publication of news, opinions and expressions concerning NIDV under Section 23 of the NSA violated Article 19 of the ICCPR.

Respectfully submitted,

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Counsel for the Applicants.