

**TEAM CODE: 115A**

**THE 2023-2024 PRICE MEDIA LAW MOOT COURT COMPETITION**

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**UNA AND ONEAI**

***(APPLICANTS)***

**V**

**THE STATE OF CERO**

***(RESPONDENT)***

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**WRITTEN SUBMISSIONS FOR THE APPLICANTS**

**WORD COUNT: 4990 WORDS**

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### LIST OF ABBREVIATIONS

<b>ABBREVIATION</b>	<b>FULL FORM</b>
<b>ACHPR</b>	African Convention on Human and People's Rights
<b>ACtHPR</b>	African Court on Human and Peoples' Rights
<b>CCID</b>	Cerovian Criminal Investigation Department
<b>DRC</b>	Digital Regulatory Commission
<b>DSA</b>	Digital Safety Act
<b>ECHR</b>	European Convention on Human Rights
<b>ELA</b>	Enos Liberation Army
<b>EU</b>	European Union
<b>HRC</b>	United Nations Human Rights Committee
<b>IACHR</b>	Inter-American Commission of Human Rights
<b>IACtHR</b>	Inter-American Court of Human Rights
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ISIL</b>	Islamic State of Iraq and the Levant
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>RMSM</b>	Run-My-Social-Media
<b>u/s</b>	Under Section
<b>UK</b>	United Kingdom
<b>UNHRC</b>	United Nations Human Rights Council
<b>USA</b>	United States of America
<b>USD</b>	United States Dollar

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## STATEMENT OF RELEVANT FACTS

### **PARTIES INVOLVED**

1. Cero is a country with a population of approximately 50 million people. It recognizes the right to free speech and information and its obligations are consistent with international law. It is primarily engaged in manufacturing arms and has a regional defence pact with its neighbour Enos.
2. Una is a Cerovian model and social media influencer with eight million followers in Cero. She produces short videos on matters of fashion and tourism, thereby promoting Cerovian culture. Una has been a vocal critic of the arms trade between Cero and Enos. She utilises the RMSM service offered by OneAI.
3. OneAI is a technology company that has developed several sophisticated AI programmes at the global stage. It recently launched RMSM, a programme that generates social media content for its subscribers. These programmes are compliant with the laws of Cero and the community standards of the relevant social media platform it posts content on.

### **DIGITAL SERVICES ACT**

4. Cero enacted the DSA to regulate social media. Section 28 criminalizes the indirect encouragement of terrorism, which includes the glorification of terrorist entities. Section 77 empowers the DRC to receive and investigate complaints alleging violations of the DSA. Section 100 defines ‘glorification’ and ‘terrorism’. A violation of DSA results in either civil or criminal punishment.

### **RUN-MY-SOCIAL MEDIA (RMSM)**

5. RMSM is an AI machine-learning tool developed by OneAI with 800,000 users. Through continuous learning, it automatically generates content on its users’ behalf, imitating their styles, habits, preferences, and views.

6. RMSM’s beta version ran as a plug-in on several technology platforms for two years, with 99.3% of its content compliant with community standards. OneAI guaranteed that 100% of the content would be compliant in the market version, evinced by its terms of service.
7. RMSM’s market version gives users the choice to post content suggested by it and determine its frequency and theme. The user could auto-generate content and decide whether to label their posts as ‘suggested’ or ‘autogenerated’.

**CRISIS IN ENOS**

8. The conflict between the Enosian government and the ELA, a rebel group that seeks to crackdown on corruption and conduct free and fair elections, has reached its peak. The ELA has not been designated a terrorist entity in Cero.
9. The Enosian military used heavy artillery fire upon the ELA, forcing them to surrender. There was a siege on the coastal town of Naut, resulting in a rising number of casualties. This ‘genocide’ cost roughly nine thousand lives. There is also an HRC investigation into the potential commission of war crimes by the Enosian military.
10. The bleak picture of the dead in this *humanitarian crisis* generated a huge outcry on social media. There were calls for a ceasefire and the termination of all hostilities. Citizens including Una criticized the Cero-Enos arms trade on social media.

**UNA’S POSTS**

11. Una posted multiple posts concerning the situation in Naut.

<b>Date</b>	<b>Platform</b>	<b>Auto-Generated</b>	<b>Content of the Statement</b>
14 March	Instagram	No	A video calling for a ceasefire with the

2023		(Reviewed)	caption ‘# Naut’ and ‘#StopArmingEnos
16 March 2023	Facebook and Instagram	No (Reviewed)	The genocide must stop! #♥Naut #StopArmingEnos # 🙏 Ela’
17 March 2023 at 9.00 AM	Instagram	Yes (Reviewed)	Stop the genocide! # ♥Naut #StopArmingEnos # 🙏 Ela
17 March 2023 at 11.00 AM	Facebook	Yes (Not Reviewed)	The genocide must stop! I stand in solidarity with ELA. #♥Naut #StopArmingEnos # 🙏 Ela

12. At 2.00 AM on 18 March, there were reports of a bomb blast at a Cerovian arms manufacturing facility. It caused minor damages but no casualties. The ELA denied its involvement in the bomb blast. Information relating to the attack was classified on grounds of national security.

#### **LEGAL PROCEEDINGS**

13. The DRC received multiple complaints concerning the impugned statement because it glorified terrorism. Further, A few complaints claimed that the impugned statement was linked to the ‘terrorist’ attack on the Cerovian facility. The DRC submitted its report to the CCID, which initiated proceedings against Una and OneAI.

14. Una and OneAI were jointly found guilty by the High Court for recklessly publishing content that indirectly encouraged terrorism by glorifying a terrorist entity. Their prosecution and sentence were upheld by the Court of Appeals and Constitutional Court.

15. In the aftermath of the verdict, Una lost 90% of her endorsements and eight million social media followers, reducing her monthly income to USD 10,000. RMSM's user base decreased to 200,000.
16. Una and OneAI then applied to the Universal Court of Human Rights on the grounds that Cero had violated their rights under Article 19 of the ICCPR.



## **STATEMENT OF JURISDICTION**

Una and OneAI (Applicants) have approached the Universal Court of Human Rights on issues relating to the right of freedom of expression under Article 19 of the International Covenant on Civil and Political Rights.

All appeals or other remedies within the Cerovian legal system have been exhausted. No law, domestic or international, restricts the Applicants' standing to bring the present challenges.

On the basis of the foregoing, the Honourable Court is hereby requested to adjudge the dispute according to the rules and principles of international law, including any applicable declarations and treaties.

## **QUESTIONS PRESENTED**

### **I.**

DID UNA'S CONVICTION AND SENTENCE UNDER THE DIGITAL SAFETY ACT VIOLATE HER  
RIGHT TO FREEDOM OF EXPRESSION UNDER ARTICLE 19 OF THE ICCPR.

### **II.**

DID ONEAI'S CONVICTION AND SENTENCE UNDER THE DIGITAL SAFETY ACT VIOLATE ITS  
RIGHT TO FREEDOM OF EXPRESSION, INCLUDING THE FREEDOM TO IMPART INFORMATION,  
UNDER ARTICLE 19 OF THE ICCPR.

## SUMMARY OF ARGUMENTS

### QUESTION I

Una's prosecution and the criminal imprisonment of one year, fine of \$1,500, and ban from the use of social media violate Article 19 of the ICCPR.

*Firstly*, the restriction on Una's speech was not prescribed by law as the DSA was vague and overbroad due to the use of terms including indirect encouragement and glorification. Further, the use of recklessness as a *mens rea* standard and reliance on the reasonable man test renders the provision overbroad. The DSA lacks adequate safeguards because of the use of summary trials and the absence of a maximum ban period, rendering it susceptible to arbitrary usage.

*Secondly*, Una's prosecution did not correspond to a pressing social need. Una's prosecution did not possess a pressing social need because her post was not reckless and was unlikely to incite imminent violence. It was merely an outcry against human right violations and a call for cessation of all hostilities. Considering the availability of counter-narratives on social media, it is unlikely to incite imminent violence. Further, Una's special duties do not create a pressing social need.

*Thirdly*, Una's punishment was disproportionate to the legitimate aim. This is because of the importance of public debate and the chilling effect that ensues out of criminally prosecuting statements that contribute to the same. Further, criminal imprisonment is a measure of last resort and is used in cases involving the direct and intentional incitement of violence.

*Therefore*, Una's prosecution and the range of penalties imposed on her violate Article 19 of the ICCPR.

## QUESTION II

OneAI's conviction and subsequent fine and ban of one-month on the use of RMSM violates Article 19 of the ICCPR.

*Firstly*, OneAI's conviction is not prescribed by law. It was unforeseeable since RMSM cannot publish or disseminate information. Further, OneAI could have not been deemed reckless for RMSM's autogenerated content. Further, the DSA is vague, overbroad, and lacks adequate safeguards.

*Secondly*, OneAI's conviction does not correspond a pressing social need. The restriction did not serve a pressing social need because RMSM should be granted immunity against culpability as an intermediary. This is because RMSM does not exercise any editorial control over the information it generates, is responsible and duly diligent, and substantially contributes to democratic governance. In any case, even if RMSM is not an intermediary, there is no pressing social need because the impugned statement is unlikely to incite violence.

*Thirdly*, OneAI's conviction was not proportionate to the legitimate aims pursued. One, the one-month ban was disproportionate because it is a very extreme measure, and because alternatives are available. Two, the \$50,000 fine is disproportionate because lesser fines are generally given by Courts and because the fine corresponds to the highest punishment under the DSA. Three, the conviction imposes a chilling effect.

*Therefore*, OneAI prosecution and the range of penalties imposed on her violate Article 19 of the ICCPR.

## ARGUMENTS

### II] CERO VIOLATED UNA'S RIGHTS UNDER ARTICLE 19 OF THE ICCPR BY CONVICTING HER UNDER THE DSA

1. The High Court of Cero found Una guilty under section 28 of the DSA and imprisoned her for a year, fined her an amount of \$1,500, and prohibited her from using social media for one month.<sup>1</sup> These penalties were affirmed by the Court of Appeal<sup>2</sup> and Constitutional Court.<sup>3</sup> All domestic remedies have been exhausted.<sup>4</sup>
  
2. The freedom to speech and expression is a core tenet of a functioning democratic society<sup>5</sup> that finds place in various regional human rights instruments.<sup>6</sup> While the right is

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<sup>1</sup> Fact on Record [36].

<sup>2</sup> *ibid* [37].

<sup>3</sup> *ibid* [38].

<sup>4</sup> *ibid* [42].

<sup>5</sup> HRC, 'General Comment No 34: Article 19: Freedom of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/G34 ('**GC 34**') [13], [22]-[25]; ACommHPR, 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa' (2002) ACHPR/Res 62(XXXII) 02; *R v Keegstra* [1990] 3 SCR 697 [89]; *Vladimir Velichkin v Belarus* Communication no 1022/2001 CCPR/C/85/D/1022/2001 (HRC, 23 November 2005) [7.3] *Pavel Levinov v Belarus* Communication No 1812/2008 UN Doc CCPR/C/123/D/2239/2013 (HRC, 26 July 2011); *Ingabire Victoire Umuhoza v Republic of Rwanda* App no 003/2014 (ACtHPR, 24 November 2017) [119]; *Liubou Pranevich v Belarus* Communication No 2251/2013 UN Doc CCPR/C/124/D/2251/2013 (HRC, 15 October 2018); *Berik Zhagiparov v Kazakhstan* Communication No 2441/2014 UN Doc CCPR/C/124/D/2441/2014 (HRC, 25 October 2018); *Hasanov and Majidli v Azerbaijan* App nos 926/14 and 9717/14 (ECtHR, 7 October 2021) ('**Hasanov**') [53]; *Khural and Zeynalov v Azerbaijan* (no. 2) App no 383/12 (ECtHR, 19 January 2023) ('**Khural**') [41]; *Chkhartishvili v Georgia* App no 31349/20 (ECtHR, 11 May 2023) [52]; *Sanchez v France* App no 45581/15 (ECtHR, 15 May 2023) ('**Sanchez**') [145]; *Udovychenko v Ukraine* App no 46396/14 (ECtHR, 23 June 2023) ('**Udovychenko**') [37]; *Bild GmbH & Co. KG v Germany* App no 9602/18 (ECtHR, 31 October 2023) ('**Bild**') [28].

<sup>6</sup> American Declaration of the Rights and Duties of Man (adopted 2 May 1948) art 4; European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 1950, entered into force 3 September 1953), art 10; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) art 13; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) art 9; Arab Charter on Human Rights (adopted 22 March 2004, entered into force 15 March 2008), art 26; ASEAN Human Rights Declaration (adopted 18 November 2012), art 23.

complemented by various special duties and responsibilities,<sup>7</sup> restrictions must satisfy the conjunctive three-prong test of prescription, legitimacy, and necessity.<sup>8</sup>

3. Una's conviction constitutes a restriction on her right to freedom of expression under Article 19 of the ICCPR. It is submitted that it violates Article 19 of the ICCPR because it is neither prescribed by law [A] nor necessary in a democratic society [B].

#### [A] UNA'S CONVICTION AND SENTENCING IS NOT PRESCRIBED BY LAW

4. A restriction is prescribed by law if it is accessible and of a certain quality.<sup>9</sup> It must not be vague and overbroad.<sup>10</sup> It should be formulated with sufficient precision<sup>11</sup> to ensure that

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<sup>7</sup> GC 34 (n 5) [21]; *I.V.T v Romania* App no 35582/15 (ECtHR, 1 June 2022); *Drozd v Poland* App no 15158/19 (ECtHR, 6 April 2023) [60]; *Ikotity v Hungary* App no 50012/17 (ECtHR, 5 October 2023) [39]; *Eigirdas and VJ "Demokratijos plėtros fondas" v Lithuania* App nos 84048/17 and 84051/17 (ECtHR, 12 September 2023) [73]; *Pricope v Romania* App no 60183/17 (ECtHR, 30 May 2023) [38]; *Hurbain v Belgium* App no 57292/16 (ECtHR, 4 July 2023) [177 *Bild* (n 5)].

<sup>8</sup> GC 34 (n 5) [25]-[26]; *The Sunday Times v United Kingdom* App no 6538/74 VIII (ECtHR, 26 April 1979) ('*Sunday Times*') [49]; *Robert Faurisson v France* Communication No 550/1993 UN Doc CCPR/C/58/D/550/1993 (HRC, 8 November 1986); *Tae Hoon Park v Korea* Communication No 628/1995 UN Doc CCPR/C/64/D/628/1995 (HRC, 3 November 1998) [10.3]; *Afuson Njaru v Cameroon* Communication No 1353/2005 UN Doc CCPR/C/89/D/1353/2005 (HRC, 19 March 2007); *Ríos v Venezuela* Series C No 194 (IACtHR, 28 January 2009) [346]; *Khairullo Saidov v Tajikistan* Communication No 2680/2015 UN Doc CCPR/C/122/D/2680/2015 (HRC, 4 April 2018) [6.3]; *Interights v Mauritania* App no 242/2001 (ACommHPR, 4 June 2004) [78]-[79]; *NIT S.R.L. v Republic of Moldova* [GC] App no 28470/12 (ECtHR, 5 April 2022) [177]; *Svetova v Russia* App no 54714/17 (ECtHR, 24 January 2023) [37]; *Gaspari v Armenia* App no 67783/13 (ECtHR, 11 July 2023) [21], [24-26]; *Rogalski v Poland* App no 5420/16 (ECtHR, 23 March 2023) [44]; *Narbutas v Lithuania* App no 14139/21 (ECtHR, 19 December 2023) [291]-[293]. See also Ezekiel Rediker, 'The Incitement of Terrorism on the Internet: Legal Standards, Enforcement, and the Role of the European Union' (2015) 36(2) *Michigan Journal of International Law* 321, 329-331.

<sup>9</sup> GC 34 (n 5) [25]; UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue' (20 April 2010) A/HRC/14/23 ('**Frank La Rue Report**') [79(d)]; *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) [140]; *Dmitriyevskiy v Russia* App no 42168/06 (ECtHR, 3 October 2017) [82].

<sup>10</sup> GC 34 (n 5); Article 19, 'The Impact of UK Anti-Terror Laws on Freedom of Expression' (April 2006) <<https://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>> accessed 1 December 2023; Victoria L. Killion, 'Terrorism, Violent Extremism, and the Internet: Free Speech Considerations' (*Congressional Research Service*, 6 May 2019) <<https://sgp.fas.org/crs/terror/R45713.pdf>> accessed 13 November 2023; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan and ors, Letter OL LKA 9/2023 to the Democratic Socialist Republic of Sri Lanka (20 November 2023) <<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28608>> accessed 22 December 2023 ('**Letter OL LKA 9/2023**').

<sup>11</sup> UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye' (6 April 2018) UN Doc A/HRC/38/35 ('**David Kaye April**') [7]; UN Economic and Social Council and UN Sub-Commission on Prevention of Discrimination and Protection of

actions proscribed are foreseeable and individuals can regulate their conduct accordingly.<sup>12</sup> The restriction must be specific and well-defined.<sup>13</sup> Additionally, laws allowing discretion must expound upon its scope<sup>14</sup> and contain adequate safeguards to prevent arbitrary application.<sup>15</sup>

5. It is submitted that Una's conviction is not prescribed by law because the DSA is vague and overbroad [1] and lacks adequate safeguards against arbitrariness [2].

#### [1] THE DSA IS VAGUE AND OVERBROAD

6. It is submitted that section 28 [a] and section 100 [b] of the DSA are vague and overbroad.

#### [a] Section 28 is vague and overbroad

7. Section 28 is vague and overbroad for three reasons.
8. *First*, sub-section (1) penalises statements that *indirectly encourage* terrorism.<sup>16</sup> Sub-section (3) explains that indirect encouragement *includes* glorification.<sup>17</sup> Its non-

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Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN.4/1984/4 ('**Siracusa Principles**'); *Sanchez* (n 5) [125].

<sup>12</sup> *Magyar Kétfarkú Kutya Párt v Hungary* App no 201/17 (ECtHR, 20 January 2020) ('**MTE**') [94]; *Selahattin Demirtas v Turkey* (no 2) [GC] App no 14305/17 (ECtHR, 22 December 2020) [250].

<sup>13</sup> Marc J. Bossuyt, *Guide To The "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers 1987).

<sup>14</sup> *Sunday Times* (n 9) [49]; *Hasan and Chaush v Bulgaria* App no 30985/96 (ECtHR, 26 October 2000) [84]; *Sanoma Uitgevers B.V v The Netherlands* App no 38224/03 (ECtHR, 14 September 2010) [82]; *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2002) [83]; *Liu v Russia* App no 42086/05 (ECtHR, 6 December 2007) [56]; *Al-Nashif v Bulgaria* App no 50963/99 (ECtHR, 20 June 2002) [119].

<sup>15</sup> *Chauvy v France* App no 64915/01 (ECtHR, 29 June 2004) ('**Chauvy**') [43]-[45]; *Altuğ Taner Akçam v Turkey* App no 27520/07 (ECtHR, 25 October 2011) [93]-[94]; *Beghal v UK* App no 4755/16 (ECtHR, 22 August 2016); *R (Miranda) v Secretary of State* [2016] 1 WLR 1505 [110]-[119]; *Savva Terentyev v Russia*, App no 10692/09 (ECtHR, 28 August 2018) ('**Savva Terentyev**') [85].

<sup>16</sup> Facts on record [5].

<sup>17</sup> *ibid.*

exhaustive nature leaves the term unclear and ambiguous.<sup>18</sup> Its scope extends to nearly every expression of support of violence, failing to differentiate between violent terrorist acts and foreign resistance movements.<sup>19</sup> It may potentially extend to praising those fighting the apartheid regime using violence.<sup>20</sup> The use of this standard in the UK<sup>21</sup> and Egypt<sup>22</sup> has been criticised for its vagueness.<sup>23</sup>

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<sup>18</sup> Daragh Murray, 'Freedom of Expression, Counter-Terrorism and the Internet in Light of the UK Terrorist Act 2006 and the Jurisprudence of the European Court of Human Rights' (2017) 27(3) *Netherlands Quarterly of Human Rights* 331, 343; Tufyal Choudhury, 'The Terrorism Act 2006' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (OUP 2010) 481-486; S Chehani Ekaratne, 'Redundant Restriction: The U.K.'s Offense of Glorifying Terrorism' (2010) 23 *Harvard Human Rights Journal* 205, 207-208.

<sup>19</sup> *R v Gul* [2013] UKSC 64 ('*Gul*') [61]; UNGA Res 40/61 (14 January 1986) 40th Session of the General Assembly 301-302; HC Deb 26 October 2005, vol 438, cols 325, 338, 364 (UK); Ellen Parker, 'Implementation of the UK Terrorism Act 2006 - The Relationship between Counterterrorism Law, Free Speech, and the Muslim Community in the United Kingdom versus the United States' (2007) 21(2) *Emory International Law Review* 711, 749-755; See also Randeep Ramesh, 'MIA accused of supporting terrorism by speaking out for Tamil Tigers' *The Guardian* (11 February 2009) <<https://www.theguardian.com/music/2009/feb/11/mia-sri-lanka-tamil-tigers>> accessed 7 December 2023; Tufyal Choudhury (n 21); Daniel Boffey, 'Plan to tighten law on glorifying terrorism 'could criminalise crowd at Murrayfield'' *The Guardian* (13 November 2023) <<https://www.theguardian.com/politics/2023/nov/13/plan-to-tighten-law-on-glorifying-terrorism-could-criminalise-crowd-at-murrayfield#:~:text=%E2%80%9CBecause%20terrorism%20is%20defined%20without,the%20anthem%5D%20Flower%20of%20Scotland.>>> accessed 21 November 2023.

<sup>20</sup> Michael C. Shaughnessy, 'Praising the Enemy: Could the United States Criminalise the Glorification of Terror Under an Act Similar to the United Kingdom's Terrorism Act 2006' (2009) 113(3) *Pennsylvania State Law Review* 923, 936-939.

<sup>21</sup> Terrorism Act 2006 (UK), s 1(2)(b); Article 19, 'Statement on the 'Encouragement' of Terrorism: Clause 1 of the UK Terrorism Bill' (2005) <<https://www.article19.org/data/files/pdfs/analysis/encouragement-of-terrorism.pdf>> accessed 17 November 2023, 5.

<sup>22</sup> Anti-Terror Law 2015 (Egypt), art 28; 'Egypt's updated terrorism law opens the door to more rights abuses, says UN expert' (*OHCHR*, 9 April 2020) <<https://www.ohchr.org/en/press-releases/2020/04/egypts-updated-terrorism-law-opens-door-more-rights-abuses-says-un-expert>> accessed 13 November 2023.

<sup>23</sup> GC 34 (n 5) [46]; UNGA, 'Promotion and Protection of the Right to Freedom of Opinion and Expression: Note by the Secretary General' (10 August 2011) UN Doc A/66/290 ('**Note by the Secretary General**') [34]; Joint Committee on Human Rights, *The Council of Europe Convention on the Prevention of Terrorism* (2006-07, HL 26/HC 247) ('**Joint Committee, Convention on the Prevention of Terrorism**') [29], [34], [50]; Kent Roach, 'Must we trade rights for security? The choice between smart, harsh, or proportionate security strategies in Canada and Britain' (2006) 27(5) *Cardozo Law Review* 2151, 2181-2182; Article 19 (n 21).



9. *Second*, section 28(2)(b) makes recklessness culpable.<sup>24</sup> Recklessness under the DSA is determined according to the *reasonable man* test.<sup>25</sup> This test dilutes the high threshold otherwise required to penalise political speech<sup>26</sup> because the convictions are not dependent on the individual defendant's state of mind.<sup>27</sup> Rather, it depends on a reasonable internet user's perspective. This has been criticised in the UK<sup>28</sup> because an individual would be unable to assess the consequences of his statement, considering the diverse opinions prevalent among internet users.<sup>29</sup> *Therefore*, the standard of recklessness u/s 28(2)(b) is vague and overbroad.

10. *Third*, the scope of the act does not limit the scope of the act to designated entities. A lack of such a requirement makes it difficult to foresee that the ELA was a terrorist entity. In order to avoid such ambiguity, legislations in Zimbabwe<sup>30</sup> and Zambia<sup>31</sup> limit the applicability of offences to entities designated as *terrorists*. The ELA was not designated

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<sup>24</sup> Facts on Record [5].

<sup>25</sup> *ibid* [5].

<sup>26</sup> Article 19, 'Submission to Inquiry on the Definition of Terrorism' (March 2006) 8 <<http://www.article19.org/pdfs/analysis/united-kingdom-review-oferror-definition.pdf>> accessed 24 December 2023; Eric Metcalfe, 'Draft Terrorism Bill: Preliminary Briefing' (*Justice*, September 2005) [10]-[12], [17] <[https://files.justice.org.uk/wp-content/uploads/2015/04/06172129/Terrorism\\_Bill\\_JUSTICE\\_preliminary\\_briefing\\_sep05.pdf](https://files.justice.org.uk/wp-content/uploads/2015/04/06172129/Terrorism_Bill_JUSTICE_preliminary_briefing_sep05.pdf)> accessed 15 November 2023.

<sup>27</sup> *R v G* [2003] UKHL 50, 1050.

<sup>28</sup> Murray (n 18) 343-344; Sterling A Marchand, 'An Ambiguous Response to a Real Threat: Criminalizing the Glorification of Terrorism in Britain' (2010) 42(1) *George Washington International Law Review* 123, 143-157.

<sup>29</sup> Frank La Rue Report (n 9) [109]; Jack M Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1, 5-9.

<sup>30</sup> Suppression of Foreign and International Terrorism Act 2007 (Zimbabwe) Ch 11:21, s 10.

<sup>31</sup> Anti-Terrorism Act no 21 of 2007 (Zambia), s 18.

a terrorist entity by Cero.<sup>32</sup> *Therefore*, the non-restriction to designated entities renders the law vague and overbroad

*Therefore*, section 28 is vague and overbroad.

### **[b] Section 100 is vague and overbroad**

11. The definitions of glorification and terrorism under the DSA are vague and overbroad.

12. *First*, glorification includes any form of *praise or celebration* without any other details provided, thereby widening the umbrella of free speech being criminalised.<sup>33</sup> The misuse and widespread criticism<sup>34</sup> of glorification remedies in the UK,<sup>35</sup> Spain,<sup>36</sup> France,<sup>37</sup>

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<sup>32</sup> Facts on Record [20].

<sup>33</sup> *R v Abdul Rahman* [2008] EWCA Crim 1465 [5]; Martin Scheinen, 'Limits to freedom of expression: lessons from counter-terrorism' in Tarlach McGonagle and Yvonne Donders (eds), *The United Nations and Freedom of Expression and Information* (CUP 2015) 440-442; Tjeerd Ryaards, 'Misuse of Anti-Terror Legislation Threatens Freedom of Expression' (*Council of Europe*, 4 December 2018) <<https://www.coe.int/fi/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression>> accessed 11 November 2023.

<sup>34</sup> UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye' (11 May 2016) A/HRC/32/38 ('**David Kaye May**') [37]; Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* (2005-06, HL 75-I/HC 561-I) [27]-[41]. See also Jonathan Hall QC, 'Glorification of Terrorism' (*6KBW College Hill*, 23 October 2017) <<https://blog.6kbw.com/posts/glorification-of-terrorism>> accessed 23 November 2023; Anna Pastor, 'Terrorism Laws are Threatening Freedom of Expression in Spain' (*Freedom House*, 18 April 2018) <<https://freedomhouse.org/article/terrorism-laws-are-threatening-freedom-expression-spain>> accessed 26 November 2023.

<sup>35</sup> David Brown and Tom Saunders, 'Police seek women over Hamas paraglider at Pro-Palestinian protest' *BBC* (15 October 2023) <<https://www.thetimes.co.uk/article/police-seek-women-who-wore-images-hamas-paragliders-pro-palestinian-protest-5sgq2rlb3>> accessed 28 November 2023.

<sup>36</sup> 'Four arrested in Spain for alleged terror offences' *Arab News* (21 October 2023) <<https://www.arabnews.com/node/2395281/world>> accessed 2 November 2023; Article 19, 'Spain: Speech related offences of the Penal Code' (March 2020) <<https://www.article19.org/wp-content/uploads/2020/03/Spain-Penal-Code-analysis-March-2020-Final.pdf>> accessed 17 November 2023.

<sup>37</sup> AFP, 'French left-wing party probed for glorifying 'terror' by supporting Hamas' *Times of Israel* (10 October 2023) <<https://www.timesofisrael.com/french-left-wing-party-probed-for-glorifying-terror-by-supporting-hamas/>> accessed 7 November 2023; Anthony Faiola and Griff Whitte, 'In France, a growing debate over why some speech is protected and some isn't' *Washington Post* (14 January 2015) <[https://www.washingtonpost.com/world/parisians-line-for-blocks-for-new-charlie-hebdo-authorities-detain-comedian/2015/01/14/5a25ad74-9bc8-11e4-bcfb-059ec7a93ddc\\_story.html](https://www.washingtonpost.com/world/parisians-line-for-blocks-for-new-charlie-hebdo-authorities-detain-comedian/2015/01/14/5a25ad74-9bc8-11e4-bcfb-059ec7a93ddc_story.html)> accessed 30 November 2023.

Turkey,<sup>38</sup> and Israel<sup>39</sup> highlight its overbroad nature. *Therefore*, the definition of glorification u/s 100 is vague and overbroad.

13. *Second*, section 100 defines terrorism as acts that *influence* the government or *intimidate the public* through force.<sup>40</sup> Terms such as *influence* or *intimidate* must prescribe a threshold for the damage arising from the act that must be met to amount to terrorism.<sup>41</sup> The DSA does not provide such a threshold. *Therefore*, the definition of terrorism is vague and overbroad.

*Therefore*, section 100 is vague and overbroad.

## [2] THE DSA LACKS ADEQUATE SAFEGUARDS

14. It is submitted that the DSA lacks adequate safeguards because it grants arbitrary discretion to the DRC [a] and lacks guidance on sentencing [b].

### **[a] The DRC has been conferred with unfettered discretion**

15. Anybody exercising media regulation by receiving complaints must effectively function in law and practice to prevent arbitrariness.<sup>42</sup> The DRC reports to the CCID on the basis of *credible* complaints,<sup>43</sup> making it the primary initiator of convictions. However, there exists no guiding mechanism to assess such credibility. The inconsistent and improper

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<sup>38</sup> ‘Turkey detains more than 2,100 in 1 week: Interior Ministry’ *Rudaw* (19 February 2018) <<https://www.rudaw.net/english/middleeast/turkey/19022018>> accessed 4 November 2023.

<sup>39</sup> Murray (n 25) 339-340.

<sup>40</sup> Fact on record [5].

<sup>41</sup> *Gul* (n 19) [62]. See also Anti-Terrorism Act No.14/2002 (Uganda), section 7 read and S.B Bossa, Titus Mulindwa ‘The anti-Terrorism Act, 2002 (Uganda) - Human Rights Concerns and Implications’ (*International Court of Justice*, 15 September 2004) 5-10 <[https://www.icj.org/wp-content/uploads/2012/04/icj\\_anti-terrorism\\_act\\_position\\_paper\\_2002.pdf](https://www.icj.org/wp-content/uploads/2012/04/icj_anti-terrorism_act_position_paper_2002.pdf)> accessed 17 November 2023.

<sup>42</sup> OL LKA (n 10) 9.

<sup>43</sup> Fact on Record [6].

exercise of powers on its end can lead to arbitrary investigations and infringement of rights.

*Therefore*, the discretion granted to DRC is arbitrary and there are no adequate safeguards.

### **[b] The DRC lacks adequate safeguards on sentencing**

16. The law lacks adequate safeguards on sentencing because it convicts individuals based on summary trials and does not prescribe a period for ban.

17. *First*, section 28(4) provides for the disposal of cases through summary trials.<sup>44</sup> Summary trials are only permissible in exceptional situations.<sup>45</sup> They do not allow proper evaluation of facts, which can lead to arbitrariness in adjudication.<sup>46</sup> For these reasons, the OHCHR has recommended against summary trials for free speech restrictions.<sup>47</sup> *Therefore*, conviction through summary trials results in arbitrariness.

18. *Second*, section 28(4) does not possess a maximum timeline for which a *restriction order*, including on the use or provision of social media and other digital services, can be imposed.<sup>48</sup> This provides unbridled discretion to the judiciary,<sup>49</sup> which can be used to restrict the use of social media in perpetuity. *Therefore*, the absence of such a timeline results in arbitrariness.

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<sup>44</sup> Fact on record [5].

<sup>45</sup> *Kyprianou v Cyprus* App no 73797/01 (ECtHR, 15 December 2005) [47].

<sup>46</sup> *ibid* [67]-[68].

<sup>47</sup> UN Special Rapporteur on Freedom of Opinion and Expression and ors, 'Joint Declaration on Freedom of Expression and responses to conflict situations' (OHCHR, 4 May 2015) <<https://www.ohchr.org/en/statements/2015/05/joint-declaration-freedom-expression-and-responses-conflict-situations>> accessed 3 December 2023.

<sup>48</sup> Facts on record [5].

<sup>49</sup> *Tolstoy Miloslavsky v UK* App no 18139/91 (ECtHR, 13 July 1995) [50]-[51]; *Independent News and Media and Independent Newspapers Ireland Ltd v Ireland* App no 55120/00 (ECtHR, 18 June 2005) [115]; *Krone Verlag v Austria* App no 27306/07 (ECtHR, 19 June 2012) [61].

Therefore, the DSA lacks adequate safeguards.

## **[B] UNA’S CONVICTION IS NOT NECESSARY IN A DEMOCRATIC SOCIETY**

19. A restriction is necessary in a democratic society if it corresponds to a pressing social need<sup>50</sup> and is proportionate to the legitimate aims pursued.<sup>51</sup> It is submitted that the restriction on Una neither possessed a pressing social need [1] nor was proportionate to the legitimate aims pursued [2].

### [1] UNA’S CONVICTION CORRESPONDED TO A PRESSING SOCIAL NEED

20. A restriction corresponds to a pressing social need if the reasons adduced for it are *relevant and sufficient*.<sup>52</sup> Free speech can be curbed only under one of the grounds enumerated under Article 19(3).<sup>53</sup> There must be a direct and immediate connection between the expression and the relevant public interest.<sup>54</sup> The danger sought to be mitigated must be real and not hypothetical.<sup>55</sup> These restrictions must be strictly construed<sup>56</sup> and protected against misuse.<sup>57</sup>

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<sup>50</sup> *Sunday Times* (n 10) [59]; *Gorzelik v Poland* App no 44158/98 (ECtHR, 17 February 2004) [95]; *Otegi Mondragon v Spain* App no 2034/07 (ECtHR, 15 September 2011) [49].

<sup>51</sup> *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007) [101]; *Morice v France* App no 29369/10 (ECtHR, 23 April 2015) [124]; *Pentikäinen v Finland* App no 11882/10 (ECtHR, 20 October 2015) [87]; *Jorge López v Spain* App no 54140/21 (ECtHR, 20 September 2022) (*‘Jorge Spain’*) [22]; *Fragoso Dacosta v Spain* App no 27926/21 (ECtHR, 8 June 2023) [23]; *Tuleya v Poland* App nos 21181/19 and 51751/20 (ECtHR, 6 July 2023) [532].

<sup>52</sup> *Chauvy* (n 15) [70].

<sup>53</sup> GC 34 (n 5) [22]; *Handyside* (n 10) [49].

<sup>54</sup> *Superintendent, Central Prison v Dr Ram Manohar Lohia* AIR 1960 SC 633 [13]; *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009) (*‘Féret’*) [73].

<sup>55</sup> *Mr. Jeong-Eun Lee v Republic of Korea* Communication No 1119/2002 UN Doc CCPR/C/84/D/1119/2002 (HRC, 20 July 2005) [7.3].

<sup>56</sup> GC 34 (n 5) [22]; *Romesh Thappar v State of Madras* AIR 1950 SC 124 [10]; *Görmüş v Turkey* App no 49085/07 (ECtHR, 19 January 2016) [37]; *Stoll v Switzerland* [GC] App no 69698/01 (ECtHR, 10 December 2007) [54]; *Saure v Germany No. 2* App no 6091/16 (ECtHR, 28 March 2023) [52]-[53].

<sup>57</sup> Frank La Rue Report (n 9) [120].

21. It is submitted that there was no pressing social need to convict and sentence Una since she did not act recklessly [a] and her statement was unlikely to incite violence [b]. Further, Una's special duties do not create a pressing social need [c].

**[a] Una's statement was not made recklessly**

22. The ground of recklessness used to convict Una is neither *relevant* nor *sufficient*. The relevant test for recklessness is whether members of the public would be indirectly encouraged to commit acts of terrorism. In determining the same, the context of the statement must be considered.<sup>58</sup> There is no *real* danger that DSA mitigates in prosecuting the impugned statement. AI users such as Una must exercise a minimum level of due diligence and take preventive and mitigative measures to prevent societal harms that AI technologies may cause.<sup>59</sup>

23. *First*, Una has been a vocal critic of Cero's arms trade with Enos. The impugned statement attempted to bring to light the bleak picture of three thousand dead, trapped, and injured civilians in the city of Naut.<sup>60</sup> As pointed out by several individuals in Cero and the UNHRC's investigation,<sup>61</sup> Enos was suffering from potential *war crimes* and a *humanitarian crisis*.<sup>62</sup> Such statements expressing solidarity without any call for violence have been previously made by the UNHRC<sup>63</sup> and actors.<sup>64</sup> A US Congresswoman

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<sup>58</sup> *Gözel and Özer v Turkey* App no 43453/04 and 31098/05 (ECtHR, 6 July 2010) ('*Gözel*') [52]; *Erdoğan and İnce v Turkey* [GC] App no 25067/94 and 25068/94 (ECtHR, 11 December 1997) [47]; *Savva Terentyev* (n 5) [66].

<sup>59</sup> *Sanchez* (n 5) 190.

<sup>60</sup> Fact on record [22], [25], [30].

<sup>61</sup> *ibid* [30].

<sup>62</sup> *ibid* [22]-[23].

<sup>63</sup> 'UNHRC downplays Israel's loss, observes silence 'for loss of lives in occupied Palestine and elsewhere' *First Post* (10 October 2023) <<https://www.firstpost.com/world/un-human-rights-council-downplays-israels-loss-observes-silence-for-loss-of-lives-in-occupied-palestine-and-elsewhere-13226442.html>> accessed 15 November 2023.

expressly made a statement indicating solidarity with Hamas in the House of Representatives.<sup>65</sup> *Members of the public* are unlikely to construe this as indirectly encouraging the commission of terrorism.

24. *Second*, Una subscribed to RMSM’s market version.<sup>66</sup> It was reasonable on Una’s part to rely on the *terms of service* which guaranteed compliance with community standards.<sup>67</sup> Her reliance on OneAI’s terms as a user and prompt actions to remove the post and prevent any harm demonstrate due diligence on her part.

*Therefore*, Una was not reckless.

### **[b] Una’s statement did not incite imminent violence**

25. There is no direct and immediate connection between the expression and public interest if there exists no proximity between the impugned statement and the likelihood of imminent violence.<sup>68</sup> Violence is imminent when it causes a danger that one or more such offences

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<sup>64</sup> ‘Hollywood starts who broke silence on Israel-Palestine conflict, here is the list’ *Economic Times* (31 October 2023) <<https://economictimes.indiatimes.com/news/international/us/hollywood-stars-who-broke-silence-on-israel-palestine-conflict-here-is-the-list/articleshow/104834313.cms>> accessed 29 November 2023.

<sup>65</sup> ‘Rep Cori Bush: I Stand in Solidarity with Hamas Resistance’ (14 May 2021) <<https://www.youtube.com/watch?v=8WbUI0xcD0I>> accessed 19 December 2023.

<sup>66</sup> Fact on record [16].

<sup>67</sup> Council of Europe, ‘Recommendation CM/Rec (2018) 2 to member States on the roles and responsibilities of internet intermediaries’ (7 March 2018) (**‘Recommendation CM/Rec (2018)’**) [2.1.5]. See also Eva Nave and Lottie Lane, ‘Countering online hate speech: How does human rights due diligence impact terms of service?’ (2023) 51 *Computer Law and Security Review* <<https://www.sciencedirect.com/science/article/pii/S0267364923000948>> accessed 1 December 2023.

<sup>68</sup> *Siracusa Principles* (n 16) cl I(C)(54); *Brandenburg v Ohio* 95 US 444, 447 (1969); Michael Curtis, *Free Speech, The People’s Darling Privilege* (Duke University Press 2000) 394–397; James Weinstein, ‘Extreme Speech, Public Order, and Democracy: Lessons from The Masses’ in James Weinstein and Ivan Hare (eds), *Extreme Speech and Democracy* (OUP 2010) 41; Lucas Powe, ‘Brandenburg: Then and Now’ (2011) 44 *Texas Tech Law Review* 69, 75–77; Susan Gilles, ‘Brandenburg v State of Ohio: An “Accidental”, “Too Easy”, and “Incomplete” Landmark Case’ (2010) 38 *Capital University Law Review* 517, 522–525. See also Article 19, ‘The Johannesburg Principles on National Security, Freedom of Expression and Access to Information’ 9 (1996) <<https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>> accessed 3 November 2023.

may be committed.<sup>69</sup> Convictions without danger of violence should only be done exceptionally.<sup>70</sup>

26. Una's prosecution lacks proximity between the statement and the incitement of imminent violence. When speech can be rebutted through counter-narratives, it is unlikely to incite violence.<sup>71</sup> Social media contains a multitude of controversial ideas, thereby creating counter-narratives.<sup>72</sup> The criticism and support<sup>73</sup> of the impugned statement highlights these counter-narratives. Despite the wide engagement with the impugned post,<sup>74</sup> it was not flagged as violative of Facebook's community standards.<sup>75</sup>

*Therefore, Una's statement was unlikely to incite violence.*

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<sup>69</sup> HRC, 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' (5 October 2012) UN Doc A/HRC/22/17/Add.4 [29]; *Board of Trade v Owen* [1957] 1 All ER 411 [416]; *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) [14]; *Prosecutor v Nahimana et al* Case No ICTR-99-52-A (28 November 2007) [720].

<sup>70</sup> David Kaye May (n 34) [52]; UN Security Council, 'Letter dated 23 November 2021 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council' (24 November 2021) UN Doc S/2021/973; *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) [48], [51]; *Soulas v France* App no 15948/03 (ECtHR, 10 July 2008) [39]-[41], [43]; *Hizb ut-Tahrir v Germany* App no 31098/08 (ECtHR, 12 June 2012) [73]; *Kasymakhunov and Saybatalov v Russia* App no 26261/05 and 26377/06 (ECtHR, 14 March 2013) [107]-[112]; *Belek and Velioglu v Turkey* App no 44227/04 (ECtHR, 6 October 2015); *Kingdom of Spain Supreme Court Judgment 354/2017* (17 May 2017); *Kingdom of Belgium Constitutional Court Decision No 31/2018* (15 March 2018); *Lilliendahl v Iceland* App no 29297/18 (ECtHR, 11 June 2020) [36]-[39]; *Handzhiyski v Bulgaria* App no 10783/14 (ECtHR, 6 April 2021) [54]-[56]. See also Craig Forcece and Kent Roach, 'Criminalizing Terrorist Babble: Canada's Dubious New Terrorist Speech Crime' (2015) 53(1) *Alberta Law Review* 35, 40.

<sup>71</sup> *Tristant Domoso v Panama* Series C No 193 (IACtHR, 27 January 2009) [121]; *Paul Chambers v Director of Public Prosecutions* [2012] EWHC 2157 [31]-[32]. See also Terri L Towner, 'Campaigns and Election in a Web 2.0 World: Uses, Effects, and Implications for Democracy' in Christopher G Reddick and Stephen K Aikins (eds), *Web 2.0 Technologies and Democratic Governance* (Springer 2012) 201.

<sup>72</sup> UNHRC, 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' (6 May 2014) UN Doc A/HRC/26/49 [55]-[63]; UNGA, 'Global Counter-Terrorism Strategy' (20 September 2006) UN Doc A/RES/60/288.

<sup>73</sup> Fact on Record [28].

<sup>74</sup> *ibid* [31], [40].

<sup>75</sup> *ibid* [34].



**[c] Una's special duties and responsibilities do not create a pressing social need**

27. Freedom of expression carries with itself *special duties and responsibilities*, contingent on the status of the individual.<sup>76</sup> Despite Una's popularity, her duties and responsibilities do not create a pressing social need.

28. Una has been declared the most influential figure in Cero through a poll but only in a sample size of only *several thousand internet users*.<sup>77</sup> It cannot be deemed indicative of Una's popularity. Moreover, influence depends on the reasons for popularity.<sup>78</sup> Una could have not exercised influence through the impugned statement since she was primarily famous for travel vlogging and fashion.<sup>79</sup>

*Therefore*, Una's special duties and responsibilities do not justify a pressing social need.

**[2] UNA'S CONVICTION WAS DISPROPORTIONATE**

29. A restriction must be the least restrictive measure to achieve the goal in question to be proportionate to the legitimate aim.<sup>80</sup> Further, the benefits of imposing the restriction must be balanced with the harms caused.<sup>81</sup> In this assessment, the form and means of the

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<sup>76</sup> Note by the Secretary General (n 23); *Féret* (n 54) [76]; *Mahi v Belgium* App no 57462/19 (ECtHR, 7 July 2020) [31]-[32].

<sup>77</sup> *ibid* [15].

<sup>78</sup> *Paul Chambers* (n 71) [31].

<sup>79</sup> Fact on Record [15].

<sup>80</sup> *Glor v Switzerland* App no 13444/04 (ECtHR, 30 April 2009) [94]; *Tagiyev and Huseynov v Azerbaijan* App no 13274/08 (ECtHR, 5 December 2019) [49]; *Mouvement Ralien Suisse v Switzerland* [GC] App no 16354/06 (ECtHR, 13 July 2012) [75]; See also *Anuradha Bhasin v Union of India* (2020) 3 SCC 637; Evelyn Mary Aswad, 'To Protect Freedom of Expression, Why Not Steal Victory from the Jaws of Defeat?' (2020) 77(2) Washington and Lee Law Review 609, 622-624.

<sup>81</sup> *İbrahim Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996) [60]; *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997) [55]; *Bladet Tromsø and Stansaa v Norway* App no 21980/93 (ECtHR, 20 May 1999) [65]; *Karatas v Turkey* App no 23168/94 (ECtHR, 8 July 1999) [51]; *Eerikäinen v Finland* App no 3514/02 (ECtHR, 26 September 2006) [60]; *Von Hannover v Germany* (no 2) [GC] App no 40660/08 and 60641/08 (ECtHR, 7 February 2012) [104]-[107]; *Yalçın Küçük v Turkey* App no 28493/95 (ECtHR, 5 December 2002) [39]; *R v Malik* 2008 EWCA (Crim) 1450 [26]-[28], [43]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) [63]; *Węgrzynowski and Smolczewski v*

statement, and the nature and severity of the interference are relevant parameters.<sup>82</sup> The reasoning of the national courts is also considered while assessing this requirement.<sup>83</sup>

30. Cero does not enjoy any margin of appreciation in determining restrictions under Article 19 of the ICCPR.<sup>84</sup> If any is to be given, it must be narrow because the impugned statement was made on matters of public interest and constituted political expression critical of government policy.<sup>85</sup> Granting a wide margin mitigates the universality of human rights<sup>86</sup> and brings about divergence in thresholds for free speech restrictions.<sup>87</sup>

31. It is submitted that Una's prosecution was not proportionate to the legitimate aims pursued because the one-year imprisonment [a], the \$1,500 fine [b], and the one-month

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*Poland* App no 33846/07 (ECtHR, 16 July 2013) [98]; *Case of Index.hu Zrt v Hungary* App no 77940/17 (ECtHR, 7 September 2023) [23]. See also Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012) ch 12; S Chehani Ekaratne (n 18) 216-217.

<sup>82</sup> GC 34 (n 5); *Arslan v Turkey* App No 23462/94 (ECtHR, 8 July 1999); *Skalka v Poland* App no 43425/98 (ECtHR, 27 May 2003) [41]-[42]; *Öztürk v Turkey* App no 22479/93 (ECtHR, 28 September 1999); 588; *Bédat v Switzerland* [GC] App no 56925/08 (ECtHR, 29 March 2016) [79]; *Cumpănă and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004) ('*Cumpănă*') [111].

<sup>83</sup> *Gözel* (n 58).

<sup>84</sup> GC 34 (n 5) [36]; Note by the Secretary-General (n 23); Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights Cases Materials and Commentary* (3rd edn, OUP 2013) 625.

<sup>85</sup> GC 34 (n 5) [36]; Directive (EU) 2017/541 Of The European Parliament And Of The Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2017] OJ L88/6; *Ilmari Lämsman v Finland* Communication No 511/1992 UN Doc CCPR/C/52/D/511/1992 (HRC, 14 October 1993) [9.4]; *Theophanous v Herald & Weekly Time* (1994) 182 CLR 104 [124]; *Sürek v Turkey* (No 1) App no 26682/95 (ECtHR, 8 July 1999) [61]; *Ricardo Canese v Paraguay* Serie C No 111 (IACtHR, 31 August 2004); *Dammann v Switzerland* App no 77551/01 (ECtHR, 25 April 2006) [51]; *Eon v France* App no 26118/10 (ECtHR, 14 March 2013) [59]; *Feldek v Slovakia* App no 29032/95 (ECtHR, 12 July 2001) [74]; *July and SARL Libération v France* App no 20893/03 (ECtHR, 14 February 2008) [67].

<sup>86</sup> Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (OUP 2012) 1; Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31(4) *New York University Journal of International Law and Politics* 843, 844; Cora Feingold, 'The Doctrine of Margin of Appreciation and the European Convention on Human Rights' (1977) 53(1) *Notre Dame Law Review* 90, 95.

<sup>87</sup> Gehan Gunatilleke, 'Justifying Limitations on the Freedom of Expression' (2021) 22 *Human Rights Review* (2021) 22 *Human Rights Review* 91, 100.

suspension [c] were disproportionate. Further, Una was convicted on insufficient grounds [d].

**[a] Una's imprisonment was disproportionate**

32. Free speech restrictions should not include imprisonment<sup>88</sup> unless *serious* and *exceptional* circumstances exist.<sup>89</sup> Such circumstances must be determined based on an individual's conduct, actual malice, damage caused, and other information demonstrating necessity.<sup>90</sup> Imprisonment should not be imposed when free speech contributes to political debate.<sup>91</sup>
33. Criminal imprisonment should not be permitted for the offence of glorification as it dilutes the difference between advocacy of ideas and incitement of violence.<sup>92</sup> It has been awarded for the glorification of terrorism where there was a direct provocation to incite violence.<sup>93</sup> While suspended imprisonment has been used to penalise glorification, the quantum of suspended imprisonment has been as little as two months.<sup>94</sup>

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<sup>88</sup> GC 34 (n 5) [47]; *Article 19 v Eritrea* App no 275/03 (ACtHPR, 30 May 2007).

<sup>89</sup> *Lohé Issa Konaté v Burkina Faso* App no 004/2013 (ACtHPR, 5 December 2014) [165]; *Alexander Adonis v The Philippines* Communication No 1815/2008 UN Doc CCPR/C/103/D/1815/2008/Rev.1 (HRC, 26 April 2012) [7.9]; *Rouillan v France* App no 28000/19 (ECtHR, 23 June 2022).

<sup>90</sup> *Gavrilovici v Moldavia* App no 25464/05 (ECtHR, 20 April 2009) [60]; *Kimel v Argentina* Series C no 177 (IACtHR, 3 May 2008) [7].

<sup>91</sup> *Stomakhin v Russia* App no 52273/07 (ECtHR, 9 May 2018); *Lopes Gomes Da Silva v Portugal* App no 37698/67 (ECtHR, 28 September 2000) [33]; *Vajnai v Hungary* App no 33629/06 (ECtHR, 8 July 2008) [47]; *Grebneva and Alisimchik v Russia* App no 8918/05 (ECtHR, 22 November 2016) [51], [58]; *Z.B. v France* App no 46883/15 (ECtHR, 2 September 2021) [67]; *Mukhin v Russia* App no 3642/10 (ECtHR, 14 December 2021) [121]-[147]; *Radio Broadcasting Company B92 AD v Serbia* App no 67369/16 (ECtHR, 5 September 2023) [73].

<sup>92</sup> *Fatullayev v Azerbaijan* App no 40984/07 (ECtHR, 22 April 2010) [116]; *Gözel* [58]; *Nedim Şener v Turkey* App no 38270/11 (ECtHR, 8 July 2014) [116]; *Dilipak v Turkey* App no 29680/05 (ECtHR, 15 September 2015) [62]; *Shreya Singhal v Union of India* (2015) 5 SCC 1 (Nariman J) [12].

<sup>93</sup> *Jorge Spain* (n 51) [25].

<sup>94</sup> Lauren McCauley, 'Amid Speech Crackdown, French Comedian Found Guilty for Facebook Post' (*Common Dreams*, 18 March 2015) < <https://www.commondreams.org/news/2015/03/18/amid-speech-crackdown-french-comedian-found-guilty-facebook-post> > accessed 22 November 2023.

34. The impugned statement was neither intentional nor mala fide. It was in furtherance of her constitutional duty towards society and the international community by disseminating information concerning human right violations.<sup>95</sup> The UNHRC has also warned against the use of criminal sanctions for those taking pro-Palestinian stances and expressing solidarity<sup>96</sup> with victims. Una's statement similarly extended support to the victims of Enosian violence.

*Therefore, Una's suspended imprisonment is disproportionate.*

**[b] Una's \$1,500 fine was disproportionate**

35. The quantum of fine in cases where terrorism has been glorified is much lesser. A Russian businessman was fined \$37 for allegedly distributing extremist content.<sup>97</sup> The former Speaker of the Tunisian House was fined a mere sum of \$326 for the glorification of terrorism.<sup>98</sup> In another case involving the glorification of ISIL propaganda, the defendant was made to pay a fine of €600.<sup>99</sup>

*Therefore, a fine of \$1,500 is disproportionate.*

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<sup>95</sup> Facts on record [3].

<sup>96</sup> 'Speaking out on Gaza / Israel must be allowed: UN Experts' (*OHCHR*, 23 November 2023) <<https://www.ohchr.org/en/press-releases/2023/11/speaking-out-gaza-israel-must-be-allowed-un-experts>> accessed 30 November 2023.

<sup>97</sup> Elizaveta Vereykia, 'Russian Businessman Fined for Distributing 'Extremist' Mickey Mouse Jesus Leaflets' *The Moscow Times* (19 June 2015) < <https://themoscowtimes.com/archive/russian-businessman-fined-for-distributing-extremist-mickey-mouse-jesus-leaflets>> accessed 7 December 2023.

<sup>98</sup> Raul Redondo, 'Islamist leader Rachid Ghannouchi sentenced in Tunisia for glorifying terrorism' *Atalayar* (16 May 2023) <<https://www.atalayar.com/en/articulo/politics/islamist-leader-rachid-ghannouchi-sentenced-in-tunisia-for-glorifying-terrorism/20230516120729184783.html>> accessed 18 November 2023.

<sup>99</sup> Eurojust, 'Terrorism Convictions Monitor: Issue 32' (2018) 6 <[https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2018-12\\_TCM-32\\_EN.pdf](https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2018-12_TCM-32_EN.pdf)> accessed 12 December 2023.

### **[c] Una's one-month ban was disproportionate**

36. The internet and social media provide a platform to its users to freely disseminate information.<sup>100</sup> Further, social media companies have been criticised for suspending the accounts of those individuals contributing to public discourse.<sup>101</sup>
37. Despite having taken down the impugned statement within seventy-five minutes<sup>102</sup> of posting it, the ban was imposed. The impact of such restrictions can be investigated to assess proportionality.<sup>103</sup> Consequent to her conviction, she lost 90% of her endorsements and a significant amount of her monthly income.<sup>104</sup>
38. The consequences Una ensued evince the *chilling effect*.<sup>105</sup> Such a ban creates deterrents for individuals from voicing their opinions and furthering their rights.<sup>106</sup> Bans for statements that criticise the government's economic and geopolitical policies are a state-sanctioned crackdown against legitimate criticism.<sup>107</sup> A ban of such a nature curbs dissent, the

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<sup>100</sup> *Times Newspapers Ltd v the United Kingdom* App nos 23676/03 and 3002/03 (ECtHR, 13 November 2018) ('*Times Newspaper*') [27]; See also UNHRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan' (20 April 2022) UN Doc A/HRC/50/29 [3], [5]-[7].

<sup>101</sup> Amarnath Amarsingam and Thusiyan Nandakumar, 'Social Media Platforms are Silencing Social Movements' (*Tech Policy Press*, 14 May 2021) <<https://www.techpolicy.press/social-media-platforms-are-silencing-social-movements/>> accessed 12 December 2023.

<sup>102</sup> Fact on Record [28].

<sup>103</sup> *Cumpănă* (n 82) [118].

<sup>104</sup> Fact on Record [39].

<sup>105</sup> *New York Times v Sullivan* 376 US 254, 300-301 (1964); *Reno v ACLU* 521 US 844, 845 (1997); *Schweizerische Radio-und Fernsehgesellschaft v Switzerland* App no 43524/98 (ECtHR, 12 April 2001) [72]; Frederick Schauer, 'Fear, Risk and the First Amendment: Unravelling the Chilling Effect' (1978) 58 *Boston University Law Review* 685, 690; Leslie Kendrick, 'Speech, Intent, and the Chilling Effect' (2013) 54(5) *William & Mary Law Review* 1633, 1649; Andrew Cornford and Anneke Petzsche, 'Terrorism Offences' in Kai Ambos and ors (eds), *Core Concepts in Criminal Law and Criminal Justice* (CUP 2019) 206.

<sup>106</sup> Frederick Schauer (n 105) 687.

<sup>107</sup> *Whitney v California* 274 US 357, 377 (1927) (Brandeis J concurring opinion); See also Ed Thoman, 'Glorify Hamas and you break law, says UK terror watchdog' (*BBC*, 14 October 2023) <<https://www.bbc.com/news/uk-67100274>> accessed 16 November 2023; Kritika Sharma, 'Kashmiri journalist Fahad Shah arrested for

hallmark of a functioning democracy.<sup>108</sup> Penalising dissent harms deliberation on matters of public interest,<sup>109</sup> deterring individuals<sup>110</sup> from expressing themselves.

Therefore, the one-month ban was disproportionate.

#### **[d] Una was convicted on insufficient grounds**

39. In *Gözel v Turkey*,<sup>111</sup> the ECtHR deemed the restriction disproportionate because the grounds given by the Turkish courts for the conviction of the applicants were not sufficient to justify the interference.<sup>112</sup> The Serbian Supreme Court upheld Una's conviction because it was 'permissible under law' and because she had duties under Article 19(2) of Constitution.<sup>113</sup>

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'glorifying terror' in social media posts' *The Print* (5 February 2022) <<https://theprint.in/india/kashmiri-journalist-fahad-shah-arrested-for-glorifying-terror-in-social-media-posts/822446/>> accessed 5 November 2023.

<sup>108</sup> *Editorial Board of Grivna Newspaper v Ukraine* App nos 41214/08 and 49440/08 (ECtHR, 16 April 2019) [84]; UNGA, 'Report of the Human Rights Council on its forty-fourth session' (8 June 2021) UN Doc A/HRC/44/2; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (17 April 2013) UN Doc A/HRC/23/40; UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Joint Declaration on Media Freedom and Democracy (2 May 2023).

<sup>109</sup> *Erkizia Almandoz v Spain* App no 5869/17 (ECtHR, 22 September 2021) [15]; *Glukhin v Russia* App no 11519/20 (ECtHR, 4 July 2023) [51]; Lawrence Liang, 'Free Speech and Expression' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016). See also Nadim Houry, 'France's Creeping Terrorism Laws Restricting Free Speech' (*Human Rights Watch*, 30 May 2018) < <https://www.hrw.org/news/2018/05/30/frances-creeping-terrorism-laws-restricting-free-speech> > accessed 13 November 2023.

<sup>110</sup> *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985) [58]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [37]; Judith Townend, 'Freedom of Expression and the Chilling Effect' in Howard Tumber Silvio Waisbord (eds), *The Routledge Companion to Media and Human Rights* (Routledge 2017); *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 697, [43]. UNGA, 'Resolution adopted by the Human Rights Council on 24 March 2017' (11 April 2017) UN Doc A/HRC/RES/34/18.

<sup>111</sup> *Gözel* (n 58).

<sup>112</sup> *ibid* [27], [28].

<sup>113</sup> Facts on Record [38].

40. Article 22 of the Cerovian Constitution provides that the interpretation of rights is subject to Cero's obligations in international law.<sup>114</sup> Since Cero has ratified ICCPR without reservation,<sup>115</sup> the three-pronged test of prescription, legitimacy, and necessity needs to be satisfied in adjudicating restrictions on free speech.

*Therefore*, Una was convicted and sentenced on insufficient grounds, contravening Article 19(3) of the ICCPR.

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<sup>114</sup> Fact on record [3].

<sup>115</sup> *ibid* [4].

**[II] CERO VIOLATED ONEAI'S RIGHTS UNDER ARTICLE 19 OF THE ICCPR BY IMPOSING  
A ONE-MONTH BAN ON ITS SERVICE 'RMSM'**

41. The High Court of Cero found OneAI guilty u/s 28 of the DSA<sup>116</sup> and imposed a ban on AI to offer RMSM as a tool for a month, along with a fine of \$50,000.<sup>117</sup> These penalties were confirmed by the Court of Appeal and Constitutional Court.<sup>118</sup> All domestic remedies have been exhausted.<sup>119</sup>
42. Corporate entities enjoy the right to freedom of expression,<sup>120</sup> including the right to impart information.<sup>121</sup> The punishments impose restrict OneAI's right to freedom of expression under Article 19 of the ICCPR. As submitted,<sup>122</sup> such restrictions must meet the conjunctive three-prong test of prescription, legitimacy, and necessity.
43. OneAI's conviction constitutes a restriction on its right to freedom of expression. It is submitted that OneAI's conviction violates Article 19 of the ICCPR because the restriction is neither prescribed by law **[A]** nor necessary in a democratic society **[B]**.

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<sup>116</sup> Facts on Record [36].

<sup>117</sup> *ibid.*

<sup>118</sup> *ibid* [37]-[38].

<sup>119</sup> *ibid* [42].

<sup>120</sup> GC 34 (n 5) [13]; *Sunday Times* (n 9) [45]; *Autronic AG v Switzerland* App no 12726/87 (ECtHR, 22 May 1990) [47]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) ('*Delfi AS*') [69], [70]. *Cengiz v Turkey* App nos48226/10, 14027/11 (ECtHR, 1 December 2015) [56]; See also *National Association for the Advancement of Colored People v Button* (1963) 371 US 415; *First National Bank of Boston v Bellotti* (1978) 435 US 765 [783]; *Pacific Gas & Electric v Public Utilities Commission* (1986) 475 US 1 [8]; *Federal Election Commission v Wisconsin Right to Life Inc* (2007) 551 US 449 [454].

<sup>121</sup> *Société Colas Est v France* App no 37971/97 (ECtHR, 16 April 2002) [40]-[42]; *Tamosius v UK* App no 62002/00 (ECtHR, 19 September 2002) [8]-[9]; *Centro Europa 7 S.R.L. and Di Stefano v Italy* App no 38433/09 (ECtHR, 7 June 2012) [214]; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 Nov 2015) [89]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017) [140]; See also Steve Peers and ors, *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) [07.14A].

<sup>122</sup> See [2] of Arguments.



**[A] ONEAI'S CONVICTION WAS NOT PRESCRIBED BY LAW**

44. As submitted,<sup>123</sup> any law must be sufficiently precise to allow individuals to foresee possible violations to regulate their conduct. Further, there must be adequate safeguards against arbitrariness.

45. As submitted,<sup>124</sup> the DSA is vague, overbroad, and lacks adequate safeguards. Additionally, it is submitted that the restriction is unforeseeable because RMSM cannot *publish* or *disseminate* information [1]. Further, OneAI cannot be held liable for content recklessly generated by RMSM [2].

**[1] RMSM DID NOT PUBLISH OR DISSEMINATE INFORMATION**

46. To be culpable u/s 28, that person must either *publish* or *disseminate* the information in question.<sup>125</sup>

47. Publishing entails making information accessible to the general public.<sup>126</sup> The Queen Bench in *Metropolitan Schools*<sup>127</sup> held that a search engine is not the publisher of summaries of search results.<sup>128</sup> This is because the information itself was not provided by Google but only phrased by it on an automated basis.<sup>129</sup> RMSM did not materially contribute to the generated content since it exercised no editorial control in the process.<sup>130</sup>

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<sup>123</sup> See [4] of Arguments.

<sup>124</sup> See Section I(A) of Arguments.

<sup>125</sup> Facts on Record [5].

<sup>126</sup> *Delfi AS* (n 120) [112]-[113].

<sup>127</sup> *Metropolitan Schools v DesignTechnica* [2010] EWHC 2411 (QB).

<sup>128</sup> *ibid* [17].

<sup>129</sup> *Ibid* [20].

<sup>130</sup> See Section 2[B](1)(a)(i) of Arguments.

It only rephrased information received from Una on a probabilistic basis and did not contribute to it.<sup>131</sup> *Therefore*, Una is the publisher.

48. Dissemination involves making information available at the request of the recipient of the service who provided the information to third parties.<sup>132</sup> RMSM itself cannot make information available to other people.<sup>133</sup> Its functionalities end once the content is posted on a social media platform.<sup>134</sup> It can only be made available online by the concerned social media, such as Facebook in the instant case.<sup>135</sup> *Therefore*, RMSM is not the disseminator.

*Therefore*, the restrictions under DSA were unforeseeable.

## [2] ONEAI COULD NOT HAVE BEEN RECKLESS

49. Section 28(2)(b) provides culpability for reckless acts. OneAI cannot be held reckless if it undertook due diligence in creating RMSM.<sup>136</sup> Holding RMSM guilty would amount to strict liability<sup>137</sup> which is absent in the DSA. Assessing due diligence is contextual and

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<sup>131</sup> *ibid.*

<sup>132</sup> Digital Services Act (EU), art 3(k).

<sup>133</sup> Facts on record [9]-[10].

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid* [28].

<sup>136</sup> Weston Kowert, 'The Foreseeability of Human - Artificial Intelligence Interactions' (2017) 96 Texas Law Review 181, 186-199; Matthew U. Scherer, 'Regulating Artificial Intelligence Systems: Risks, Competencies, and Strategies' (2016) 29(2) Harvard Journal of Law and Technology 353, 365; Ben Wagner, 'Algorithmic Accountability: Towards Accountable Systems' in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (OUP 2020) 685-686.

<sup>137</sup> Jurgita Grigiene and ors, 'Liability for damages caused by Artificial Intelligence' (2015) 31 (3) Computer Law and Security Review 376, 380.

flexible and depends upon the AI's role.<sup>138</sup> Obliging to the 'terms of service' further constitutes a business entity's due diligence.<sup>139</sup>

50. It is submitted that OneAI exercised general due diligence [a] and compliance with Facebook's community standards [b].

**[a] OneAI was duly diligent**

51. RMSM was a *new* tool of OneAI, a company that has developed the *most sophisticated AI programmes* globally.<sup>140</sup> Further, RMSM is based on an open source AI,<sup>141</sup> implying its higher explain ability and security.<sup>142</sup> Opensource AI tools are considered beneficial for society because they mitigate harms arising from the *black box* nature of AI.<sup>143</sup> Further, as submitted,<sup>144</sup> OneAI exercised proper *ex-ante* and *ex-post* control over AI, thus disposing of its specific responsibilities to mitigate possible harm from content generated by RMSM. Any further due diligence cannot be expected. The content generated by RMSM

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<sup>138</sup> OHCHR 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) UN Doc HR/PUB/11/04; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (26 October 2018) UN Doc A/73/348 ('**UNHRC AI Report 2018**') [72]; OECD, 'OECD Business and Finance Outlook 2021: AI in Business and Finance', (OECD Publishing 2021).

<sup>139</sup> Recommendation CM/Rec (2018) (n 67) [10], [2.1.5].

<sup>140</sup> Fact on record [8].

<sup>141</sup> *ibid* [11].

<sup>142</sup> Nick Bostrom, 'Strategic Implications of Openness in AI Development' in Roman V Yampolskiy (ed), *Artificial Intelligence Safety and Security* (Chapman and Hall 2018) 145; Arun Rai, 'Explainable AI: From black box to glass box' (2019) 48 *Journal of the Academic of Market Science* 137, 145.

<sup>143</sup> Yavar Bathaee, 'The Artificial Intelligence Black Box and The Failure of Intent and Causation' (2018) 31(2) *Harvard Journal of Law & Technology* 889, 895. See also Council of Europe (Committee of experts on internet intermediaries), 'Algorithms and human rights - Study on the human rights dimensions of automated data processing techniques and possible regulatory implications' (2018) DGI (2017)12 37; Thomas Wischmeyer, 'Artificial Intelligence and Transparency: Opening the Black Box' in Thomas Wischmeyer and Timo Rademacher (ed), *Regulating Artificial Intelligence* (Springer 2020) 81.

<sup>144</sup> See Section 2(B)(2)(1)(ii) of Arguments.

functions based on user data and is highly contingent on its user interaction,<sup>145</sup> which companies like OneAI cannot foresee.<sup>146</sup>

Therefore, OneAI exercised due diligence based on its specific role.

**[b] OneAI complied with its terms of service**

52. The impugned statement did not violate Facebook’s Community Standards. Una’s previous posts were not taken down despite their content being analogous to the impugned statement<sup>147</sup> Further, the impugned statement was neither flagged nor taken down for any violation despite having received severe criticism.<sup>148</sup>

53. Specifically, Facebook’s *Dangerous Organisations and Individuals* Policy was not violated. Under the policy, ELA is a Tier 2 entity because it engages in violence against *state and military actors* and does not *advocate for violence against citizens*.<sup>149</sup> The praise of *violence* of Tier-2 entities can be removed.<sup>150</sup> Una did not praise any specific act of violence of ELA.<sup>151</sup>

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<sup>145</sup> Nina Brown ‘Bots Behaving Badly: A Products Liability Approach to Chatbot-Generated Defamation’ [2023] 3(2) *Journal of Free Speech Law* 389, 412. See also Jorge Luis Morton Gutiérrez, ‘On actor-network theory and algorithms: ChatGPT and the new power relationships in the age’ (2023) *AI Ethics* <<https://link.springer.com/article/10.1007/s43681-023-00314-4#citeashttps://link.springer.com/article/10.1007/s43681-023-00314-4#citeas>> accessed 8 December 2023.

<sup>146</sup> JKC Kingston, ‘Artificial Intelligence and Legal liability’ in M Bramer and M Petrisids (ed), *Research and Development in Intelligent Systems XXXIII* (Springer 2016) 59.

<sup>147</sup> Facts on record [24]-[28].

<sup>148</sup> Fact on record [34].

<sup>149</sup> Facts on record [19]; ‘Dangerous organisations and individuals’ (*Meta*) <<https://transparency.fb.com/en-gb/policies/community-standards/dangerous-individuals-organizations/>> accessed 30 October 2023.

<sup>150</sup> Dangerous organisations and individuals (n 149).

<sup>151</sup> Facts on record [28].

54. The following statement violates the policy: *I stand with Brenton Tarrant*.<sup>152</sup> This is analogous to: *I stand in solidarity*. However, unlike the ELA, Brenton Tarrant directly targeted civilians,<sup>153</sup> constituting a Tier 1 entity. *Therefore*, OneAI complied with Facebook's *terms of service*.

*Therefore*, OneAI cannot be held reckless.

#### **[B] ONEAI'S CONVICTION WAS NOT NECESSARY IN A DEMOCRATIC SOCIETY**

55. As submitted,<sup>154</sup> a restriction is necessary in a democratic society if there exists a pressing social need to enforce the restriction. It is submitted that OneAI's conviction does not correspond to a pressing social need [1] and is disproportionate to the legitimate aims pursued [2].

#### **[1] ONEAI'S CONVICTION DOES NOT SERVE A PRESSING SOCIAL NEED**

56. As submitted,<sup>155</sup> the test for pressing social need concerns itself with whether the reasons adduced for a restriction are *relevant and sufficient*. There must be a direct and immediate connection between the expression and the relevant public interest.

57. It is submitted that OneAI's conviction does not correspond to a pressing social need because RMSM is a protected intermediary [a]. Further, there is no direct connection between the expression and the relevant public interest [b].

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<sup>152</sup> Dangerous organisations and individuals (n 149).

<sup>153</sup> Home Office, *Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (2020) pt 4; See also Praveen Menon, 'New Zealand court set to sentence killer in Christchurch Mosque massacre' *Reuters* (21 August 2020) <<https://www.reuters.com/article/us-newzealand-shooting/new-zealand-court-set-to-sentence-killer-in-christchurch-mosque-massacre-idUSKBN25H0FT/>> accessed 23 December 2023.

<sup>154</sup> See [25] of Arguments.

<sup>155</sup> See [20] of Arguments.

### **[a] RMSM in an intermediary**

58. Digital entities that merely host or facilitate information on the internet are intermediaries.<sup>156</sup> Punishing intermediaries for unlawful content is economically inefficient<sup>157</sup> and doctrinally inconsistent with the principle of liability and attributability.<sup>158</sup>
59. There are two preconditions required to avail immunity. An entity is an intermediary if it exercises no editorial control over the information.<sup>159</sup> The nature of its relationship should be *technical, passive, and automatic*.<sup>160</sup> It must be a mere *conduit, caching, or hosting* service.<sup>161</sup> Further, to receive protection, it is necessary that the entity exercises specific due diligence as an intermediary.<sup>162</sup> It should properly exercise ex-ante and ex-post

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<sup>156</sup> Graeme Dinwoodie, 'Who are Internet Intermediaries' in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (OUP 2020) 40.

<sup>157</sup> David Kaye April (n 11) [14].

<sup>158</sup> *Delfi AS* (n 120) [110], *MTE* [n 12] [62]-[63]; Jaani Riordian, *The Liability of Internet Intermediaries* (OUP 2016) 55. See also Article 19, 'Internet Intermediaries: Dilemma of Liability' (2013) <[www.article19.org/data/files/Intermediaries\\_ENGLISH.pdf](http://www.article19.org/data/files/Intermediaries_ENGLISH.pdf)> accessed 28 November 2023; Article 19, 'Prohibiting Incitement to Discrimination, Hostility or Violence' (December 2012) <<https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>> accessed 28 Nov 2023.

<sup>159</sup> See Communications Decency Act, 1996 (US) s 230; Information Technology Act 2000 (India) s 79. See also Eric Goldman, 'An Overview of the United States' Section 230 Internet Immunity' in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (OUP 2020) 155; Nicolo Zingales, 'Intermediary Liability in Africa: Looking Back, Moving Forwards?' in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (OUP 2020) 216-17.

<sup>160</sup> Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 [42].

<sup>161</sup> *ibid* art 12-14; Electronic Communications and Transaction Act, 2001 (South Africa) pt 11, Electronic Transactions Act (Ghana) art 90-93; Electronic Communications and Transactions Act 2021 (Zambia), ss 76-79.

<sup>162</sup> *Delfi AS* (n 120) [140]; *MTE* (n 12) [38]; Recommendation CM/Rec (2018) (n 67) [2.1.4]. See also Tarlach McGonagle, 'Free Expression and Intermediaries: The Changing Geometry of European Regulation' in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (OUP 2020) 480-481; Tambiama Madiaga, 'Reform of the EU Liability regime for online intermediaries: Background on the forthcoming digital services act' (European Parliament Research Service, 2020) <[https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS\\_IDA\(2020\)649404\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/649404/EPRS_IDA(2020)649404_EN.pdf)> accessed 29 October 2023, 16; Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (21 July 2020); Global Partners Digital, 'Business and Human Rights in the Digital Environment: Accompanying Notes' (*Global Partners Digital*, Feb 2020)

regulation of content.<sup>163</sup> Lastly, the extent of immunity corresponds to the contribution of the intermediary to democratic governance.<sup>164</sup>

60. It is submitted that RMSM is an intermediary because it does not exercise any editorial control over the information [i] and it is disposed of its responsibilities [ii]. Further, RMSM substantially contributes to democratic governance and is entitled to higher protection [iii].

***[i] RMSM did not exercise any editorial control***

61. Editorial content can be determined by analysing RMSM's policy on the generation and arrangement of content.<sup>165</sup>

62. RMSM was programmed to *imitate* the user and generate content that users will *ordinarily* generate by learning their habits, preferences, and views, from their online posts and activity.<sup>166</sup> Such natural language content-generators *learn* using a specific set of information and produce information on a purely probabilistic basis.<sup>167</sup> It only

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<[https://www.gp-digital.org/wp-content/uploads/2020/02/BHR-in-the-Digital-Environment\\_.pdf](https://www.gp-digital.org/wp-content/uploads/2020/02/BHR-in-the-Digital-Environment_.pdf)> accessed 3 December 2023.

<sup>163</sup> *Delfi AS* (n 120) [45]. Council of Europe (Expert Committee MSI-AUT), 'A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework' (2019) 68; Miriam C Buiten, 'The Digital Services Act from Intermediary Liability to platform regulation' (2021) 12(5) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 361, \_; Marcelo Thompson, 'Beyond Gatekeeping: The Normative Responsibility of Internet Intermediaries' (2016) 18 *Vanderbilt Journal of Entertainment and Technology Law* 793, \_; Rob Frieden, 'Ex Ante versus Ex Post Approaches to Network Neutrality: A Comparative Assessment' (2015) 30 *Berkeley Tech Law Journal* 1561, 1563.

<sup>164</sup> Council of Europe, Recommendation CM/Rec (2011) 7 of the Committee of Ministers to member states on a new notion of media (21 September 2011) [7].

<sup>165</sup> *Delfi AS* (n 120) [46]; Council of Europe, Recommendation CM/Rec (2011)7 of the Committee of Ministers to member states on a new notion of media (21 September 2011) Appendix [30].

<sup>166</sup> Fact on Record [8]; Clarification [3].

<sup>167</sup> See also Derek E Bambauer and Mihai Surdeanu, 'Authorbots' (2023) 3(2) *Journal of Free Speech Law* 375, 381, Alan M. Sears, 'Algorithmic Speech and Freedom of Expression' (2020) 53 *Vanderbilt Journal of Transnational Law* 1327, 1340.

repackages the information it receives.<sup>168</sup> Even Una was satisfied that the autogenerated posts capture her preferences.<sup>169</sup>

63. RMSM thus only exercises *choice* over what words to choose whereas the expressive content of the information is entirely contingent on the user. Such choice does not amount to editorial control. In *Google France SARL*,<sup>170</sup> the CJEU absolved Google from liability for algorithmically paraphrasing content for its AdWords-referencing service because it had no knowledge of the content stored.<sup>171</sup>

64. The algorithmic moderation of content does not amount to editorial control.<sup>172</sup> Entities that restate or summarise information in such an algorithmic manner are granted immunity as intermediaries in the US,<sup>173</sup> India,<sup>174</sup> and Australia.<sup>175</sup> Thus, entities cannot

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<sup>168</sup> Pengfei Lu and ors, 'Pre-train, Prompt, and Predict: A Systemic Survey of Prompting Methods in Natural Language Processing' (2023) 55(9) ACM Computing Surveys 1, 7.

<sup>169</sup> Facts on record [18], [28].

<sup>170</sup> *Google France SARL v Louis Vuitton Malletier SA*, [2010] ECR I-2417.

<sup>171</sup> *ibid* [23].

<sup>172</sup> *Frank Peterson v Google LLC* Joined Cases C-682/18 & C-683/18 (CJEU, 22 June 2021) [106].

<sup>173</sup> *Search King Inc v Google Technology Inc* CIV-02-1457-M [7]; *Langdon v Google Inc* 474 F Supp 2d 622 (D Del 2007) [16]. *O'Kroley v Fastcase, Inc.*, 831 F.3d 352 (6th Cir 2016); *Maughan v Google Tech., Inc.*, 49 Cal Rptr 3d 861 (Cal Ct App 2006). See also Derek E Bambauer (n 167) 381.

<sup>174</sup> *MySpace vs Super Cassettes* 2016 SCC OnLine Del 6382 [62]. See also Vasudev Devadasan, 'Report on Intermediary Liability in India' (NLUD Centre for Communication Governance, 2022) 96; Gautam Bhatia, 'Online Speech and Intermediary Liability: The Delhi High Court's MySpace Judgement' (*Indian Constitutional Law and Philosophy*, 16 January 2017) <<https://indconlawphil.wordpress.com/2017/01/16/online-speech-and-intermediary-liability-the-delhi-high-courts-myspace-judgment/>> accessed 22 November 2023.

<sup>175</sup> *Google INC vs ACCC* (2013) 249 CLR 435 [68]; See also Kylie Pappalardo and Nicolas Susar, 'The Liability of Australian Online Intermediaries' in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (OUP 2020) 239.



be held liable if they rearrange words in a probabilistic manner and retain their expressive value.<sup>176</sup> Therefore, RMSM has no editorial control over information it autogenerates.

65. Additionally, RMSM did not *glitch* and functioned as it is supposed to. The only difference between what Una manually posted and the impugned statement was the phrase: *I stand in solidarity with the ELA*.<sup>177</sup> However, Una had earlier posted # 🤝 Ela multiple times.<sup>178</sup> The emoji 🤝 is commonly associated with solidarity.<sup>179</sup> It is clear that Una is expressing solidarity because she has previously been critical of Cero's involvement in the crisis.<sup>180</sup> Considering that RMSM can interpret the meaning of emojis,<sup>181</sup> RMSM merely restated the emoji in text.

Therefore, RMSM did not contribute to the impugned statement and possibilities of a glitch can be ruled out.

***[ii] RMSM was a responsible intermediary***

66. As business entities and *governors of speech*,<sup>182</sup> intermediaries must exercise *ex-ante* and *ex-post* regulations on the content they host.<sup>183</sup> The extent of these obligations is assessed

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<sup>176</sup> Susan Corbett, 'Search engines and the automated process: Is a search engine provider a publisher of defamatory material?' (2014) 20 New Zealand Business Law Quarterly 200, 210. See also Jani McCutcheon 'The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law' (2012-13) 36 Melbourne University Law Review 915, 927.

<sup>177</sup> Fact on record [18].

<sup>178</sup> *ibid* [24]-[27].

<sup>179</sup> *ibid* [24].

<sup>180</sup> *ibid* [24]-[27].

<sup>181</sup> Clarifications [7].

<sup>182</sup> Yu Wenguang, 'Internet Intermediaries' Liability for Online Illegal Hate Speech' (2018) 13(3) *Frontiers of Law in China* 342, 356.

<sup>183</sup> Recommendation CM/Rec (2018) (n 67) [1.3.7].

in a *graduated and differentiated* manner<sup>184</sup> and is based on their specific functions and technical role in the media process.<sup>185</sup> It is a contextual approach that takes into account the extent of harm posed by the intermediary.<sup>186</sup>

67. *First*, OneAI exercised sufficient ex-ante regulations. Intermediaries are expected to automatically filter content.<sup>187</sup> OneAI disposed of this obligation by guaranteeing compliance with the community standards of social media.<sup>188</sup> The moderation is completely algorithmic.<sup>189</sup> Unlike the community standards which possess sufficiently precise definitions, designations for entities, and illustrations to assess foreseeability,<sup>190</sup> the DSA is vague and overbroad.<sup>191</sup> Such preciseness in regulation to prevent vague and broad legislations like the DSA is impossible.<sup>192</sup> Further, broad algorithmic regulation by intermediaries is harmful to freedom of expression and should be kept to the minimum.<sup>193</sup> *Therefore*, OneAI exercised proper ex-ante control.

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<sup>184</sup> *ibid* [1.3.9]; Council of Europe, ‘Recommendation CM/Rec (2011) to member states on a new notion of media’ [21 September 2011] [7]; Committee on Artificial Intelligence, Council of Europe ‘Consolidated Working Draft of the Framework Convention on Artificial Intelligence, Human Rights, Democracy, and the Rule of Law’ 5.

<sup>185</sup> Council of Europe, ‘Recommendation CM/Rec (2011) to member states on a new notion of media’ [21 September 2011] [7].

<sup>186</sup> Recommendation CM/Rec (2018) 2 (n 67) [2.1.2].

<sup>187</sup> David Kaye April (n 11) [16]; European Commission, ‘Recommendation on measures to effectively tackle illegal content online’ (1 March 2018) C (2018) 1177 final [3].

<sup>188</sup> Facts on record [13].

<sup>189</sup> Clarification [9].

<sup>190</sup> Dangerous organisations and individuals (n 149).

<sup>191</sup> See Section 1[A][1].

<sup>192</sup> Philipp Hacker, ‘The European AI liability directives – Critique of a half-hearted approach and lessons for the future’ (2023) 51 *Computer Law & Security Review* 1, 8.

<sup>193</sup> David Kaye April (n 11) [26]; UNHRC AI Report 2018 (n 184) [14]; European Commission, ‘Commission recommendation on measures to effectively tackle illegal content online’ (1 March 2018) C(2018) 1177 final; OHCHR, ‘UNESCO’s Input in reply to the OHCHR report on the Human Rights Council Resolution 47/23 entitled “New and emerging digital technologies and human rights”’ UN Common Agenda 2023 17. See also

68. *Second*, substantial ex-post control cannot be expected from OneAI due to its technical role in media. Unlike social media which is expected to actively monitor content and implement notice-and-takedown procedures,<sup>194</sup> RMSM cannot host content. RMSM does not provide an online *space* for information – a logical prerequisite for direct *ex-post* regulation of content.<sup>195</sup> Its specific function is of a preliminary nature and is limited to generation and posting of content.<sup>196</sup>

69. As an AI tool, it might be expected to mandatorily label posts as generated by AI.<sup>197</sup> This is because AI content-generators can spread misinformation.<sup>198</sup> However, RMSM only *imitates* what users say.<sup>199</sup> Unlike ChatGPT or Bard, RMSM is not used educationally by eliciting factual information.<sup>200</sup> Thus, harms of misinformation are mostly mitigated. Further, responsibility should be proportionately distributed between developers and the user of AI and the latter should not be unduly burdened.<sup>201</sup> Since the content generated by

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Daphne Keller, 'Comment in response to European Commission's March 2018 recommendation on measures to further improve the effectiveness of the fight against illegal content online' (Stanford Law School, Center for Internet and Society, 29 March 2018); Thiago Oliva Dias and ors, 'Fighting Hate Speech, Silencing Drag Queens' (2021) 25 *Sexuality and Culture* 714, 720; Natalie Alkiviadou, 'The Internet, Internet Intermediaries and Hate Speech: Freedom of Expression in Decline?' (2023) 20(1) *SCRIPTed* 243, 255.

<sup>194</sup> Aleksandra Kuczerawy, 'From 'Notice and Takedown' to 'Notice and Stay Down': Risks and Safeguards to Freedom of Expression' in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (OUP 2020) 528.

<sup>195</sup> Jack M. Balkin, 'How to Regulate (and Not Regulate) Social Media' (2021) 1 *Journal of Free Speech Law* 71, 73.

<sup>196</sup> Fact on record, [9], [10], [13].

<sup>197</sup> Philippe Lorenz, Karine Perset, and Jamie Berryhill, 'Initial policy considerations for generative artificial intelligence' (*OECD*, Sep 2023) 15.

<sup>198</sup> *ibid.*

<sup>199</sup> Fact on record [8].

<sup>200</sup> CK Lo, 'What is the impact of ChatGPT on Education? A rapid review of the literature' (2023) 13(4) *Education Sciences* 410.

<sup>201</sup> Christiane Wendehorst, 'Liability for Artificial Intelligence: The Need to Address Both Safety Risks and Fundamental Rights Risks' in *Silja Voeneke and ors* (eds), *The Cambridge Handbook of Responsible Artificial Intelligence* (CUP 2022) 187-200.

RMSM is user-specific,<sup>202</sup> it is efficient to put the burden on users to label posts.<sup>203</sup>

RMSM allowed the same. RMSM exercised appropriate ex-post control.

Therefore, RMSM disposed of its responsibilities properly.

### ***[iii] RMSM Contributes to democratic governance***

70. The Internet is the new *marketplace of ideas*.<sup>204</sup> In impairing information, intermediaries play a key role in the development of such a marketplace.<sup>205</sup> They facilitate discourse and promote transparency and accountability in governance, thereby contributing to its democratic character.<sup>206</sup> The functional role of each intermediary must be specifically analysed.<sup>207</sup>

71. RMSM substantially contributes to such democratic governance by producing information that adds to discourse and facilitates the exchange of ideas.<sup>208</sup> The freedom of expression protects the right to *receive* ideas and engage with them<sup>209</sup> - that AI content-

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<sup>202</sup> Nina brown (n 145) 415; Jorge Luis Morton Gutiérrez (n 145).

<sup>203</sup> Georgios Zekos, *Economics and Law of Artificial Intelligence* (Springer 2021); Mohammad Bashayreh and ors, 'Artificial intelligence and legal liability: towards an international approach of proportional liability based on risk sharing' (2021) 30(2) Information & Communications Technology Law 169, 174.

<sup>204</sup> *Abrams v United States* 250 US 616, 630 (1919); Dawn Carla Nunziato, 'The Marketplace of Ideas Online' (2019) 94 Notre Dame Law Review 1519; Rachael L. Jones, 'Can You Have Too Much of a Good Thing: The Modern Marketplace of Ideas' (2018) 83 Missouri Law Review 971; Jack M Balkin (n 235) 7.

<sup>205</sup> David Kaye May (n 34) [6]; Adam Lamparello, 'The Internet is the New Marketplace of Ideas: Why Riley v California Supports Net Neutrality' (2015) 25 DePaul Journal of Art, Technology & Intellectual Property Law 2, 5.

<sup>206</sup> Recommendation CM/Rec (2018) (n 67) [4].

<sup>207</sup> *Delfi AS* (n 120) [140]; David Kaye April (n 11) [20].

<sup>208</sup> *Times Newspapers* (n 100) [27]; *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012), [48]-[49]. See also Ronald Collins and David Skover, *Robotica: Speech Rights and Artificial Intelligence* (CUP 2019) 56-59; Jared Schroeder, 'Marketplace Theory in the Age of AI Communicators' (2018) 17(1) First Amendment Law Review 22, 24.

<sup>209</sup> Ronald Collins (n 208) 42-43; Jared Schroeder (n 208) 26.

generators substantially promote.<sup>210</sup> RMSM's posts furthered this goal. Una's posts attracted both criticism and support,<sup>211</sup> crucial to realising the goals of freedom of expression.<sup>212</sup> With 800,000 users,<sup>213</sup> RMSM furthered democratic governance with each of its posts. *Therefore*, RMSM is entitled to higher protection as an intermediary.

*Therefore*, there is thus no pressing social need to convict and sentence OneAI.

**[b] Even if RMSM is not an intermediary, there is no pressing social need**

72. As submitted,<sup>214</sup> there is no direct and immediate connection between the expression and the relevant public interest if it does not incite imminent violence. The impugned statement did not incite imminent violence.<sup>215</sup> *Therefore*, there is no pressing social need to convict OneAI because the impugned statement did not incite imminent violence.

**[2] ONEAI'S CONVICTION WAS DISPROPORTIONATE**

73. As submitted,<sup>216</sup> any measure restricting free speech must be proportionate to the legitimate aims pursued. Further, it must be the least restrictive measure and the benefits, and the harms of the restriction must be balanced. The reasoning of the national courts is

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<sup>210</sup> Toni M. Massaro, Helen Norton, and Margot E. Kaminski, 'SIRI-OUSLY 2.0: What Artificial Intelligence Reveals about the First Amendment' (2017) 101 Minnesota Law Review 2481, 2486; Toni M. Massaro and Helen Norton, 'SIRI-OUSLY? Free Speech Rights and Artificial Intelligence' (2016) 110(5) Northwestern University Law Review 1170, 1175; James B Garvey, 'Let's Get Real: Weak Artificial Intelligence Has Free Speech Rights' [2022] 9(3) Fordham Law Review 953, 961.

<sup>211</sup> Facts on record [28].

<sup>212</sup> Council of Europe, Recommendation of the Committee of Ministers to member States on the protection of human rights with regard to search engines, CM/Rec (2012) 3 [1]; *Aydin Tatlav v Turkey* App no 50692/99 (ECtHR, 2 May 2006) [23]; *Giniewski v France* App no 64016/00 (ECtHR, 30 April 2006) [49].

<sup>213</sup> Facts on record [12].

<sup>214</sup> See [20] of Arguments.

<sup>215</sup> See Section 1(B)(1)(b) of Arguments.

<sup>216</sup> See [29] of Arguments.

considered relevant. Further, as submitted, the state enjoys no margin of appreciation under the ICCPR.<sup>217</sup>

74. It is submitted that OneAI's conviction was disproportionate because the one-month ban [a] and the \$50,000 fine [b] are excessive. Further, the chilling effect caused by the restriction is a serious harm [c] and OneAI was convicted on insufficient grounds [d].

**[a] The one-month ban on RMSM is disproportionate**

75. There was a one-month ban on the provision of RMSM.<sup>218</sup> Such a generic ban is an extremely disproportionate measure (analogous to banning a broadcaster or a newspaper), which can only be justified in extreme cases (such as child pornography).<sup>219</sup> The impact of such restrictions can further be investigated to identify proportionality.<sup>220</sup> The harmful impact of such a ban on tools like RMSM is evident by the loss of 75% of RMSM's user base in a single month.<sup>221</sup>

76. Additionally, alternate measures such as the mandatory labelling of autogenerated content<sup>222</sup> and pausing virality through *circuit-breakers* (by restricting *how much* content RMSM can generate per user) can be implemented to avoid the *algorithmic amplification* of content.<sup>223</sup> Further, the ban should have been content-specific.<sup>224</sup>

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<sup>217</sup> See [30] of Arguments.

<sup>218</sup> Facts on record [36].

<sup>219</sup> GC 34 (n 5) [43]; Council of European Union, 'EU Guidelines on Freedom of Expression Online and Offline (2014) 18.

<sup>220</sup> *Cumpănă*' (n 82) [118].

<sup>221</sup> Facts on record [39].

<sup>222</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 25 November 2023. See also Philippe Lorenz (n 197) 16; Kingston (n 146) 72.

<sup>223</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-](https://informationdemocracy.org/wp-content/uploads/2020/11/ForumID_Report-on-)

Therefore, a generic one-month ban on OneAI was disproportionate.

**[b] The \$50,000 fine is disproportionate**

77. High fines on intermediaries are generally criticised when the restriction concerns terrorism.<sup>225</sup> Even when entities have been actively involved, they have only been fined (E)321<sup>226</sup> and (e)1500.<sup>227</sup> Since RMSM's involvement is passive,<sup>228</sup> a lower fine is warranted.

78. In determining proportionality, the maximum applicable fine provided by the law is considered.<sup>229</sup> Under the DSA, \$50,000 was the maximum fine.<sup>230</sup> That implies OneAI's conviction corresponds to the gravest offence possible. However, OneAI was fined for *recklessly* causing *indirect* encouragement, clearly less grave than the intentional and direct encouragement of terrorism.

Therefore, a fine of \$50,000 is disproportionate.

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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 6R November 2023.

<sup>224</sup> David Kaye April (n 11) [35]-[36]; Recommendation CM/Rec (2018) (n 67) [2.1.3].

<sup>225</sup> Eliza Bechtold, 'Terrorism, the internet and the threat to freedom of expression: the regulation of digital intermediaries in Europe and United States' [2020] 12(1) Journal of Media Law 13, 20.

<sup>226</sup> *Delfi AS* (n 20) [160].

<sup>227</sup> *Leroy v France* App no 36109/03 (ECtHR, 6 April 2009) [65].

<sup>228</sup> See Section 2[B][1](a)(i) of Arguments.

<sup>229</sup> *Soares v Portugal* App no 79972/12 (ECtHR, 21 June 2016) [50]; *Benitez Moriana and Iñigo Fernandez v Spain* App nos 36537/15 and 36539/15 (ECtHR, 9 March 2021) [20].

<sup>230</sup> Facts on record [5].

**[c] The chilling Effect on the freedom of expression is a serious harm**

79. Chilling effect refers to the deterrence that may result from a state action because of the consequence that flows from an expressive act under that law.<sup>231</sup> Punishing facilitators that assist people in expressing themselves harms public discourse,<sup>232</sup> thereby imposing a *significant chilling effect* on freedom of expression.<sup>233</sup> The ban inflicted a loss of approximately \$8 million on OneAI.<sup>234</sup> Such severe bans incentivise self-regulation, leading to increased private censorship of speech,<sup>235</sup> especially when the concerned law is vague.<sup>236</sup> Such restrictions impede the rights of the corporation,<sup>237</sup> instrumental in improving governance and promoting human rights.<sup>238</sup>

*Therefore*, the restriction on OneAI imposes a chilling effect.

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<sup>231</sup> Frederick Schauer (n 105) 692.

<sup>232</sup> David Kaye April (n 11) [65]; Recommendation CM/Rec (2018) 2 (n 67) [1.3.6] See also Eugene Volokh and Donald M. Falk, 'Google First Amendment Protection for Search Engine Search Results' (2012) 8(4) *Journal of Law, Economics and Policy* 883, 884; George G. Brenkert, 'Corporate Control of Information: Business and the Freedom of Expression' (2010) 115(1) *Business and Society Review* 121, 132.

<sup>233</sup> David Kaye April (n 11) [65].

<sup>234</sup> Facts on record [12], [39].

<sup>235</sup> *Turner Broadcast Inc v FCC* 512 US 622, 656-657 (1994); Jack M Balkin, 'The Future of Free Expression in a Digital Age' (2009) 36 *Pepperdine Law Review* 427, 432; Felix Wu, 'Collateral Censorship and the Limits of Intermediary Immunity' (2011) 87 *Notre Dame Law Review* 293, 304; Corey Omer, 'Intermediary Liability for Harmful Speech: Lessons from Abroad' (2014) 28 *Harvard Journal of Law & Technology* 289, 295; T Riss and S Schwemer, 'Leaving the European Safe Harbour, Sailing Towards Algorithmic Content Regulation' (2019) 22(7) *Journal of Internet Law* 14, 20.

<sup>236</sup> David Kaye May (n 34) [39]. See Section 1[A][1] of Arguments.

<sup>237</sup> UNHRC AI Report 2018 [20]; See also Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (21 April, 2021) COM(2021) 206 final.

<sup>238</sup> European Commission, 'White Paper on Artificial Intelligence: A European Approach to Excellence and Trust' COM (2020) 65 final, 24; OECD, 'Recommendation of the Council on Artificial Intelligence' (2019) <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>> accessed 1 December 2023; Kate Crawford, *The Atlas of AI: Power, Politics, and the Planetary Costs of Artificial Intelligence* (YUP 2021) 78.



**[d] OneAI Was convicted on insufficient grounds**

80. As submitted,<sup>239</sup> the confirmation of conviction of Una and OneAI by the Cerovian Supreme Court was done on insufficient grounds, making the restriction disproportionate.

*Therefore*, the restrictions on OneAI are not proportionate.

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<sup>239</sup> See Section 1[B][2](C) of Arguments.

**PRAYER FOR RELIEF**

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

- I. Una's conviction and sentencing under the DSA and punishment imposed violated her freedom of expression under Article 19 of the ICCPR.
- II. OneAI's conviction under the DSA violated its freedom of expression and imparting information under Article 19 of the ICCPR.

All of which is humbly prayed

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Counsel for Applicants.