THE 2018-2019 PRICE MEDIA

MOOT COURT COMPETITION

UNGER RAS AND UCONNECT

(Applicants)

v.

THE STATE OF MAGENTONIA

(Respondent)

MEMORIAL FOR THE RESPONDENT

[4,998 words]

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LIST OF ABBRIEVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Human Convention on Human Rights
ACommHPR	African Commission on Human and Peoples' Rights
CJEU	Court of Justice of the European Union
Commission	Information and Data Protection Commission of Magentonia
ECHR	European Convention on Human Rights
EHRR	European Human Rights Reports
EU	European Union
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
PIDPA	Public Information and Data Protection Act of 2016
OHCHR	United Nations Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council

LIST OF AUTHORITIES

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MISCELLANEOUS

STATEMENT OF RELEVANT FACTS

Background of Magentonia

A. Magentonia is a democratic society with a population of 1 million. The two main political parties – the United Magentonia Party (UMP) and the Magentonian Popular Front (MPF) – contest in national parliamentary elections every five years. In August 2013, the UMP won by a broad margin at the national parliamentary election, securing 65% of the seats in parliament.

B. Notably, Magentonia also saw a significant influx of around 65,000 refugees from the neighbouring country, Cyanisia between January and December 2010.

C. In February 2018, the market crash in natural gas led to widespread fears that Magentonia would enter a period of economic recession. In the lead up to the parliamentary election in June 2018, the opposition party Magentonian Popular Front (MPF) promised to take steps to prevent the further influx of immigrants and secure employment for 'native' Magentonians. The campaign framed Cyanisian refugees as a major strain on the Magentonian economy and the main cause of the economic crisis.

Background of UConnect

D. UConnect is a social media platform with its headquarters in Magentonia. It is recognized as a legal person under Magentonian law, with over 100 million users worldwide. In 2017, UConnect's advertising revenue was approximately USD 250 million. It is actively used in both Cyanisia and Magentonia. It allows users to post news stories and stories about their personal lives, and to comment and share other stories they see on the platform. 'Promoted' and 'trending' content can appear on a user's 'live feed', and includes the posts of users that

a particular user is not currently following. 'Promoted' content can include posts by advertisers who pay the platform to have their posts 'promoted'.

E. UConnect also includes a search function which allows users to search for content on the Internet, including 'public' posts on UConnect. When a user searches for a particular search term, the platform displays the search results on the user's personal page. Search results are only visible to the user concerned, and are organized according to user preferences. Users receive customized search results for the search terms they enter, which depends on users' stated preferences, user behavior, including the types of content a user posts and shares on his or her personal page.

F. UConnect has a Complaints Portal through which any person can complain about a post visible in the person's country and request its removal on the grounds that it violates UConnect's Community Standards. Complaints are assessed by a team of dedicated human reviewers and usually processed within 72 hours.

The events leading to Ras' request to remove search results relating to *The Cyanisian Times* 2001 story

G. Unger Ras was a former professor of the State University of Cyanisia. In 1995, Ras was accused of misconduct following an investigation by the University. In 2000, Ras established the Democratic Party of Cyanisia (DPC), the main opposition party. In February 2001, it was reported in the state newspaper *The Cyanisian Times* that a warrant had been issued against Ras for alleged misappropriation of university funds during his previous tenure as a professor. The article quoted the Director of State Police as having issued instructions for Ras' immediate arrest. Subsequently, the University issued a statement in April 2001 clarifying

that Ras had been accused of misconduct in 1995 but was fully exonerated following an investigation by the University.

H. Soon after the 2001 story broke, Ras fled to Magentonia in 2001 and joined the United Magentonian Party (UMP). In January 2018, Ras announced that he was running for office and would work to ensure that Cyanisian refugees receive a faster track to Magentonian citizenship if he did become a Member of Parliament.

I. On 1 April 2018, a privately owned news website in Magentonia named *The Magentonian Mail* published a so-called 'exposé' on Ras ("exposé on Ras"). The article claimed that Ras fled Cyanisia in 2001 following a 'corruption scandal' in his university, and that an arrest warrant had been issued against him. The article linked the online version of the story published in 2001 in *The Cyanisian Times* which appeared to corroborate the article's claims. Ras issued a statement clarifying that the contents of the story from 2001 were false, which was carried by the *Magentonian Mail* on 3 April 2018.

J. Ras wrote a formal letter using his official letterhead, referring to the UConnect Community Standards and requesting that the content be removed on the basis that it violated his privacy under the Magentonian Constitution. He did not use the online Complaints Portal provided by UConnect through which any person can complain and request the removal of posts which violate UConnect's Community Standards. Nevertheless, after two weeks, UConnect removed the expose by Ras.

K. However, by 15 April 2018, the exposé on Ras had begun to trend. Public posts that linked the article started appearing high on the search results page for search terms such as 'Ras' and 'Magentonia'. On 25 April 2018, an anonymous user named *TakeBackMag200* posted a web link to the online version of the original 2001 story appearing in *The Cyanisian Times*

with the caption 'you can't erase history' ("*TakeBackMag200's* post"). The user paid the platform to promote the story and it began to appear high on the list of search results relating to 'Ras' or 'Unger Ras'.

L. On 29 April 2018, Ras wrote to the head office of UConnect requesting that *TakeBackMag200*'s post be taken down. UConnect responded to Ras on 30 April 2018 stating that it would remove *TakeBackMag200's* post but not remove search results depicting the 2001 story unless ordered to do so by the Commission.

M. On 10 May 2018, the Commission rejected Ras' request for an injunction and dismissed the petition as the information appearing in the search results was relevant to the public interest, and Ras was a public figure and a candidate at an upcoming election. On 1 July 2018, the High Court of Magentonia dismissed Ras' appeal as UConnect was entitled to retain the information in the 'public interest'.

The events leading to Magentonia's prosecution and conviction of UConnect

N. In early May 2018, an organization calling itself Take Back Magentonia (TBM) began posting on UConnect regularly characterizing Ras as a 'thief' and a 'fraudster', referring to Cyanisian refugees as bottom feeders – a derogatory term often associated with Cyanisian refugees.

O. One of the posts appearing on UConnect's platform on 26 May 2018 ("the 26 May post") stated that the refugees were 'kicked out of Cyanisia for plotting terrorist attacks and protecting thieves and fraudsters'. It stated that the refugees were championed by Ras and that they wanted to 'form their own nation', kicking the Magentonians out. Another post by TBM on 30 May 2018 claimed that the 'University of Magentonia had revealed that Cyanisian refugees would outnumber Magentonians by 2025' ("the 30 May post").

P. The 26 May 2018 post was reported by UConnect users, reviewed by UConnect's team and removed on 30 May 2018. No complaints were made about the 30 May post and it was not removed.

Q. Between 10-31 May 2018, several thousand users subscribed to UConnect, and began to share and view content posted by TBM and other anti-UMP users. The posts generally claimed that re-electing UMP would result in further influx of Cyanisian refugees. On a separate occasion, UConnect removed a post by an anonymous user named *TBM6000* that stated 'bottom feeders should be swimming with the fishes'. UConnect's review team deemed the post to be incitement to violence and terminated the said user's account.

R. Owing to the proliferation of anti-refugee posts on UConnect, the Magentonian government filed action before the High Court of Magentonia seeking an injunction against UConnect under the PIDPA. The next day, the High Court issued an interim injunction ordering UConnect to suspend all operations in Magentonia until the conclusion of the trial on 10 July 2018.

S. UMP narrowly won the parliamentary election of 4 June 2018, securing 50% of the seats in parliament. Ras failed to secure a seat in parliament. The final report of an independent civil society organization, Magentonia Watch, argued that the significant decline in the UMP's seats and Ras' unexpected electoral failure might be attributed to the successful campaign conducted by TBM via UConnect.

T. The High Court of Magentonia prosecuted and convicted UConnect under Section 3 of the PIDPA for the failure to prevent the advocacy of national and/or racial hatred that constituted incitement to hostility as it did not take down the 26 May post. UConnect was also convicted

under Section 5 of the PIDPA for the 30 May post for the reckless dissemination of false propaganda. UConnect was ordered to pay a fine of US$100,000.

STATEMENT OF JURISDICTION

The Applicants, Ras and UConnect, and the Respondent, the State of Magentonia, have submitted the present dispute to the Universal Court of Human Rights ("this Court"), and hereby submit to this Court their disputes concerning articles 17 and 19 of the ICCPR.

All parties have agreed to accept the judgment of this Court as final and binding and execute it in good faith in its entirety. On the basis of the foregoing, this Court is requested to adjudge the dispute in accordance with the rules and principle of international law, including any applicable declarations and treaties.

QUESTIONS PRESENTED

1. Whether Magentonia's decision not to grant Ras any rectification, erasure or blocking of search results depicting The Cyanisian Times story of 2001 violated article 17 of the ICCPR.
2. Whether Magentonia's decision of 2 June 2018 to direct UConnect to suspend all operations until the conclusion of the trial violated article 19 of the ICCPR.
3. Whether Magentonia's prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA violated article 19 of the ICCPR.

SUMMARY OF ARGUMENTS

MAGENTONIA'S DECISION NOT TO RECTIFY, ERASE OR BLOCK THE SEARCH RESULTS DEPICTING THE CYANISIAN TIMES STORY OF 2001 DOES NOT VIOLATE ARTICLE 17 OF THE ICCPR.

A. Article 17 of the ICCPR admittedly obliges States to both refrain from interfering with the right to privacy ("the negative obligation") under Article 17(1), and to protect individuals from such third-party interference ("the positive obligation") under Article 17(2). However, Magentonia's Decision did not violate either of those obligations.

B. Magentonia's decision not to recitfy, erase or block the search results did not violate its negative obligation under Article 17(1) as it did not constitute an interference with Ras' right to privacy. The interference with Ras' right to privacy, if any, took the form of UConnect's display of search results. The most that can be said of Magentonia for deciding not to rectify, erase or block those search results is that it permitted the interference to continue. Such permission does not itself constitute an interference as it did not cause the interference. Thus, any question of Magentonia's decision possibly violating Article 17 is more appropriately examined in light of its positive obligation under Article 17(2).

C. Magentonia was not obligated under Article 17(2) to rectify, erase or block search results because doing so would be inconsistent with its Constitution. Pursuant to the declaration made by Magentonia when it ratified the ICCPR, the ICCPR does not "require… action by Magentonia that would… recognize any right in a manner inconsistent" with its Constitution. Here, the rectification, erasure or blockage would be inconsistent with Article 7 of the Magentonian Constitution because as it would require Magentonia to recognise a right to rectify, erase or block the search results even when it was necessary in the public interest for

the search results to be displayed. Thus, Article 17(2) does not obligate Magentonia to rectify, erase or block the search results. As such, Magentonia's decision did not violate Article 17(2).

D. Notwithstanding Magentonia's declaration, Magentonia's decision did not violate its positive obligation under Article 17(2) as it was made on the basis of laws which protect Ras' right to privacy, and struck a fair balance between the right to privacy and freedom of expression.

E. First, Magentonia's enactment of Section 22 of the PIDPA and Article 7 of its Constitution struck a fair balance between those competing interests because they (1) provide protection for the right to privacy, while (2) allowing exceptions to be made where necessary for the protection of the right to freedom of expression.

F. Secondly, Magentonia's decision not to rectify, erase or block the search results also struck a fair balance between the competing interests, within Magentonia's margin of appreciation. This is so because Magentonia's decision took into consideration (1) the heightened degree of protection that should be given to UConnect users' right to receive information about Ras, a political candidate, in the poitical context of upcoming elections, and (2) the fact that Ras is a political figure who voluntarily subjected himself to public scrutiny. It also took into account the fact that (3) not rectifying, erasing or blocking the results would not greatly interfere with Ras' privacy.

G. Thirdly and alternatively, even if any other measures need be taken to protect Ras' right to privacy, rectification, erasure or blockage would not be appropriate because it would infringe too greatly on the right to freedom of expression. Rectification was unnecessary because the Cyanisian Times Story of 2001 was factually accurate, and Ras' own clarificatory story had been published and was similarly displayed in the list of search results. Blocking and erasure

could not be justified because they would completely eradicate an avenue of access to the 2001 story.

H. In any case, Magentonia acted within its broad margin of appreciation here in coming to its decision.

MAGENTONIA'S DECISION TO DIRECT UCONNECT TO SUSPEND ALL OPERATIONS UNTIL THE CONCLUSION OF THE TRIAL DID NOT VIOLATE ARTICLE 19 OF THE ICCPR.

I. The suspension was a permissible restriction of the freedom of expression under Article 19(3) as it was prescribed by law; in pursuit of a legitimate aim; and necessary in a democratic society.

J. The suspension was prescribed by law. National courts possess the power to issue interim injunctions as a remedyto prevent the possible abrogation of the rights of others. Since the anti-refugee posts constituted hate speech, and abrogated the rights of Cyanisian refugees, UConnect was able to reasonably foresee that an interim injunction might be issued against it to prevent further proliferation of anti-refugee posts on its platform. This is especially because there were no alternative measures that Magentonia could have taken to completely prevent further circulation of such posts.

K. The suspension pursued the legitimate aims of preserving the rights and reputations of the refugees, and of maintaining public order. This is because suspending access to hate speech pursues the legitimate aim of preserving the rights and reputations of others, and the anti-refugee posts that were being proliferated constituted hate speech. Thus, prevention of further proliferation pursues those legitimate aims.

L. The suspension was necessary in a democratic society because it (1) corresponds to a pressing social need and (2) is proportionate to the legitimate aims of preserving the rights and reputations of the refugees, and of maintaining public order..

M. There was a pressing social need to suspend UConnect's operations because the anti-refugee posts were hate speech published (1) with the intention to create hostile feelings towards the refugees, (2) in a situation where there was socio-political tension between the Magentonian citizens and refugees because of the upcoming elections and recent economic downturn, (3) on the most popular social media platform in Magentonia, which would amplify the reach and impact of the post. There was also a pressing social need to suspend UConnect's operations because the anti-refugee posts had the potential to cause public disorder.

N. The suspension was proportionate as it did not go any further than necessary to protect the rights and reputations of the Cyanisian refugees, and maintain public order. This is because there was no viable alternative method which could ensure that the anti-refugee posts would no longer be proliferated. Filtering by themes and words, removing posts, or terminating and suspending offending accounts would all be inadequate. This, coupled with the speed at which content can go viral would make it extremely difficult to filter out the offending messages before they reach a wider audience, or are saved or shared onto other platforms using these alternative methods. Further, the fact that the posts were proliferated in the context of an electoral campaign exacerbated the harmful impact of the speech, justifying the suspension. Ultimately, Magentonia acted within its margin of appreciation in issuing the suspension order.

MAGENTONIA'S PROSECUTION AND CONVICTION OF UCONNECT UNDER SECTIONS 3 AND 5 OF THE PIDPA DID NOT VIOLATE ARTICLE 19 OF THE ICCPR.

O. The prosecution and conviction of UConnect was justfied under Article 19(3), as it was: (A) prescribed by law; (B) in pursuit of a legitimate aim; and (C) necessary in a democratic society.

P. The prosecution and conviction of UConnect under Section 3 were prescribed by law as Sections 3 was formulated with sufficient precision to allow UConnect to reasonably foresee that its conduct would attract liability. Preliminarily, UConnect qualifies as "person" under both sections. Further, UConnect was able to reasonably foresee liability for failure to expeditiously remove illegal user-published content such as the 26 May post because it was alerted that there was such a post, it had control over the post, and yet it failed to expeditiously remove it. Additionally, intermediaries are capable of "engag[ing] in the advocacy" of hate speech such as the 26 May post.

Q. The prosecution and conviction of UConnect under Section 5 were prescribed by law as Sections 5 was formulated with sufficient precision to allow UConnect to reasonably foresee that its conduct would attract liability. UConnect must or should have known of the 30 May post since it was the most viewed post in Magentonia. Further, it must or should have known the content of the post was patently "false" since it was numerically impossible that the information contained within would be accurate. UConnect must or should also have been able to reasonably foresee that the post might mislead mumbers of the public into voting for the MPF instead of the UMP.

R. The prosecution and conviction pursued the legitimate aims of preserving the rights and reputations of the refugees and maintaining public order because they prevent the dissemination of hate speech contained within the 26 May post, and maintain public order since the 30 May post created the inevitable risk of arousing within Magentonians feelings of distrust, rejection or hatred towards the refugees.

S. The prosecution and conviction were necessary in a democratic society because they (1) corresponded to a pressing social need and (2) were proportionate to the legitimate aims of preserving the rights and reputations of the refugees and maintaining public order. There was a pressing social need to prosecute and convict UConnect in order to prevent the dissemination of odious hate speech, and to maintain public order. The prosecution and conviction were proportionate because the fine of US$100,000 did not go any further than necessary to achieve its protective function. Given the large size and revenue of Magentonia, a larger fine had to be imposed to effectively promote responsible behavior from UConnect and other social media intermediaries in Magentonia. The fine was also proportionate pursuant to international standards.

ARGUMENTS

I. MAGENTONIA'S DECISION NOT TO RECTIFY, ERASE OR BLOCK THE SEARCH RESULTS ("MAGENTONIA'S DECISION") DEPICTING THE CYANISIAN TIMES STORY OF 2001 ("THE 2001 STORY") DOES NOT VIOLATE ARTICLE 17 OF THE ICCPR.

1. The right to privacy set out in Article 17 of the ICCPR is not absolute.[1] It may yield to the State's duty to protect the right to freedom of expression, as enshrined in Article 19 of the ICCPR,[2] which forms "the foundation stone for every free and democratic society".[3] Social media has become a primary avenue through which freedom of expression is exercised, as it "facilitates public debates",[4] and acts "as a watchdog of government and the powerful".[5] It is thus incumbent upon the State to protect access to the marketplace of ideas propagated within social media.

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[1] UNHRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 para 21; UNHRC, 'General Comment 16' (8 April 1988) UN Doc HRI/GEN/1/Rev para 3; *Antonius Cornelis Van Hulst v Netherlands* UN Doc CCPR/C/82/D/903/1999 (HRC, 1 November 2004) para 7.3; *Toonen v Australia* UN Doc CCPR/C/50/D/488/1992 (HRC, 31 March 1994) para 8.3.

[2] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 17.

[3] UNHRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 para 2; *Bowman v UK* App no 24839/94 (ECtHR, 19 February 1998) para 42; *Claude-Reyes v Chile*, Merits, Reparations and Costs Judgment (IACtHR, 19 September 2006) para 85.

[4] Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information (3 March 2017) FOM.GAL/3/17, p 1.

[5] Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information (3 March 2017) FOM.GAL/3/17, p 1.

2. Article 17 of the ICCPR admittedly obliges States to both refrain from interfering with the right to privacy[6] ("the negative obligation"), and to protect individuals from such third-party interference[7] ("the positive obligation"). However, Magentonia's Decision did not violate either of those obligations. They will be discussed in turn in the following sections of this memorial.

A. Magentonia's Decision did not violate its negative obligation under Article 17(1) as it did not constitute an interference with Ras' right to privacy.

3. Magentonia's Decision does not constitute an interference with Ras' privacy *per se,* even if UConnect's display of the search results was such an interference.
4. A State breaches its negative obligation to protect rights where its act directly causes the interference to occur.[8] In *Fernandez Martinez v Spain,* key to the ECtHR's finding that the State had breached its negative obligation was the fact that, but for the State's enforcement of a third party's recommendation, the interference would not have occurred.[9] Following this analysis, Magentonia's Decision does not constitute direct interference because, but for Magentonia's Decision, the interference (namely, the display of the search results) would still have occurred. Magentonia's Decision thus did not cause or exacerbate the interference.

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[6] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 17(1).

[7] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 17(2); *Lozovyye v Russia* App no 4587/09 (ECtHR, 24 April 2018) para 36.

[8] *S. H and Others v Austria* App no 57813/00 (ECtHR, 1 April 2010); *Fernández Martínez v Spain* App no 56030/07 (ECtHR, 12 June 2014); *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017).

[9] *Fernández Martínez v Spain* App no 56030/07 (ECtHR, 12 June 2014) para 27.

5. Magentonia's Decision simply deemed the interference permissible. Subsequent decisions by the State deeming the interference permissible are not considered to themselves constitute an interference.[10] Such subsequent decisions are instead examined from the standpoint of the State's positive obligations.[11] Thus, any question of Magentonia's Decision possibly violating Article 17 is more appropriately examined in light of its positive obligation under Article 17(2).

B. Magentonia was not obligated under Article 17(2) to rectify, erase or block the search results because doing so would be inconsistent with its Constitution.

6. Article 17 of the ICCPR does not "require… action by Magentonia that would… recognize any right in a manner inconsistent" with its Constitution.[12] This is the effect of the declaration submitted by Magentonia upon its ratification of the ICCPR,[13] which functions substantively as a reservation.[14] Such reservations are valid where they are compatible with the object and purpose of the treaty.[15] The object and purpose of the ICCPR is to "promote… respect for, and observance of, human rights and freedoms"[16] by "creating legally binding

[10] *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017).

[11] *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) para 111.

[12] Fact Pattern, para 2.4.

[13] Fact Pattern, para 2.4.

[14] [14] Vienna Convention on the Law of Treaties UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969); *Golder v United Kingdom*App no 4451/70 (ECtHR, 21 February 1975).

[15] Vienna Convention on the Law of Treaties UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), Article 19(c).

[16] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Preamble.

standards for human rights".[17] As Articles 7 and 10 of Magentonia's Constitution offer protection for privacy and freedom of expression to a substantially similar standard as Articles 17 and 19, the reservation is compatible with the object and purpose of the ICCPR and therefore valid.

7. Article 7 of Magentonia's Constitution provides that the right to privacy shall be subject to reasonable limitations necessary in the public interest.[18] As there is public interest in retaining the search results, as will be discussed below,[19] to require rectification, erasure or blockage of the results would be to require Magentonia to take action that would recognize the right to privacy in a manner inconsistent with Article 7 of its Constitution.

C. Notwithstanding Magentonia's declaration, Magentonia's Decision did not violate its positive obligation under Article 17(2) as it was made on the basis of laws which protect Ras' right to privacy, and struck a fair balance between the right to privacy and freedom of expression.

8. The State's positive obligation under Article 17(2) may require the adoption of measures designed to secure respect for privacy against third party interference.[20] To determine whether such measures are sufficient to fulfill this obligation, regard must be had to the fair balance that has to be struck between the competing interests of the right to privacy and

[17] UNHRC, 'General Comment 24', (4 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6.

[18] Fact Pattern, para 4.6.

[19] Para 15 of this Memorial.

[20] *Evans v the United Kingdom* App no 6339/05 (ECtHR, 10 April 2007) para 75; *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979); *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) para 26; *Von Hannover v Germany (No 2)* App nos 40660/08, 60641/08 (ECtHR, 7 February 2012) paras 98-99; *Tamiz v UK* App no 3877/14 (ECtHR, 19 September 2017) para 77.

freedom of expression, subject to State's margin of appreciation.[21] Such measures encompass both (i) the legislation enacted by the State to protect the right to privacy, and (ii) the Decision made by the State applying that legislation.[22]

1. Magentonia's enactment of Section 22 of the PIDPA and Article 7 of its Constitution struck a fair balance between the competing interests.

9. Ras' right to privacy conflicts with the right to freedom of expression.[23] This freedom comprises both UConnect's right to impart information, and the public's right to receive it.[24]
10. Magentonia struck a fair balance between these rights by enacting Section 22 of the PIDPA and Article 7 of the Magentonian Constitution. They (1) provide protection for the right to privacy by giving aggrieved persons a means of redress for purported violations of privacy by private actors, while (2) allowing exceptions to be made where necessary for the protection of the right to freedom of expression. The obligation is of ensuring process, not outcome.
11. *First*, Section 22 and Article 7 provided avenues through which Ras could take action to protect his right to privacy. He could apply for the rectification, erasure or blockage of the search results pursuant to Section 22, as he did, or bring an action against UConnect for a violation of Article 7.

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[21] *Palomo Sánchez and Others v Spain* App no 28955/06 (ECtHR, 12 September 2011) para 62; *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) para 112.

[22] *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) para 86.

[23] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 19.

[24] *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) para 76.

12. *Secondly*, Section 22 and Article 7 both permit reasonable limitations to the right to privacy where it "is in the public interest" to do so. This provides Magentonian authorities with the flexibility required to protect the right to freedom of expression. While the term "public interest" might seem broad, it has been widely utilized in jurisprudence relating to the freedom of expression.[25] Specifically, it has been recognized that information published about political figures contributes to a debate "of public interest in a democratic society".[26] Further, use of the term "public interest" is necessary to avoid "excessive rigidity and to keep pace with changing circumstances".[27] As the legal framework devised by the State should be "shaped in a manner which allows the different… interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention",[28] the permitted limitations under Section 22 and Article 7 fulfill this criteria.

2. Magentonia's Decision struck a fair balance between the competing interests within its margin of appreciation.

13. As this court has recognized in earlier cases, its task is not to substitute its own assessment of the facts for that of the national court's.[29] Rather, it should only strike down a national

[25] *Bladet Tromsø and Stensaas v. Norway* App no 21980/93 (ECtHR, 20 May 1999) paras 59 and 62; *Pedersen and Baadsgaard v. Denmark* App no. 49017/99 (ECtHR, 19 Jun 2003) para 71; *Von Hannover v Germany (No 2)* App nos 40660/08, 60641/08 (ECtHR, 7 February 2012) para 102.

[26] *Von Hannover v Germany (No 2)* App nos 40660/08, 60641/08 (ECtHR, 7 February 2012) para 85.

[27] *Müller and Others v Switzerland*, App no 10737/84 (ECtHR, 24 March 1988).

[28] *A, B and C v Ireland* App no 25579/05 (ECtHR, 16 December 2010) para 249.

[29] *Edwards v the United Kingdom* App no 46477/99(ECtHR,16 December 1992) para 34; *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) para 128.

court's Decision where it is incompatible with the provisions of the ICCPR.[30] The issue is thus whether Magentonia's Decision was compatible with its obligations under the ICCPR, rather than the precise manner in which Section 22 was applied by the Magentonian High Court.

14. Magentonia's Decision was compatible with its obligations as it struck a fair balance between the competing interests. The Magentonian High Court explicitly referred to Ras' right to privacy, the need for it "be balanced with UConnect users' freedom to receive information",[31] and the "public interest" in retention of the search results,[32] as such correctly identifying the interests involved.[33]
15. There was especial need to protect UConnect users' right to receive information, as it concerned political speech and public interest in upcoming elections. As Ras is a parliamentary candidate, there is great public interest in search results concerning him. This warrants a "heightened degree of protection" [34] for the freedom of expression, given the potential of the information to contribute to a debate of general interest.[35] This is because freedom of expression "affords the public one of the best means of discovering and forming an opinion of… political leaders."[36] Conversely, the greater the information value for the

[30] *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) para 86.

[31] Fact Pattern, para 6.1.

[32] Fact Pattern, para 6.1

[33] *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017).

[34] *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) para 42.

[35] *Von Hannover v Germany (No 2)* App nos 40660/08, 60641/08 (ECtHR, 7 February 2012) para 109.

[36] *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) para 42.

public, the more the interest of a person in being protected against its publication has to yield.[37] This is further heightened by the fact that the allegations within the 2001 Story relate to Ras' moral values and character, which would be of foremost importance in his discharge of public duties.[38] These factors have been recognised as relevant balancing criteria in the specific context of de-listing of search results.[39]

16. Further, Ras is a political figure who has voluntarily subjected himself to public scrutiny. The limits of acceptable statements are substantially wider where politicians are concerned, since they "knowingly expose themselves to public scrutiny by virtue of their positions."[40]

17. Conversely, the search results did not greatly interfere with Ras' privacy. *First*, the data is factually accurate.[41] The events mentioned in the Story, namely that a warrant had been issued against Ras, and that instructions for Ras' arrest had been issued,[42] had actually occurred.[43] Prohibitions on the dissemination of accurate information, even when portrayed

[37] *Von Hannover v Germany (No 2)* App nos 40660/08, 60641/08 (ECtHR, 7 February 2012) para 109.

[38] *Jorge Fontevecchia And Hector D'amico v Argentina* (IACtHR, 9 September 2011) para 46; *Karhuvaara and Iltalehti v Finland* App no 53678/00 (ECtHR, 16 November 2004).

[39] *NT1 and NT2 v. Google LLC* [2018] EWHC 799 (QB) para 137.

[40] *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) para 42; Article 29 Data Protection Working Party, 'Guidelines on The Implementation of The Court of Justice of The European Union Judgment On '*Google Spain And Inc. v Agencia Espaajola De Proteccion De Datos And Mario Costeja Gonzalez*' C-131/12 (2014).

[41] Article 29 Data Protection Working Party, 'Guidelines on The Implementation of The Court of Justice of The European Union Judgment On '*Google Spain And Inc. v Agencia Espaajola De Proteccion De Datos And Mario Costeja Gonzalez*' C-131/12 (2014) 15.

[42] Fact Pattern, para 1.2.

[43] Clarification no 5.

in a "non-objective" manner, are incompatible with the ICCPR.[44] *Secondly*, the data relates to his work life. A distinction may be drawn between a person's private and professional persona. Sharing information about the latter is more acceptable.[45]

18. Alternatively, even if any other measures need be taken to protect Ras' right to privacy, it can be done in a less restrictive way than rectification, erasure or blockage, as these options infringe too greatly on the countervailing right to freedom of expression.

19. Rectification, such as by bumping Ras' clarificatory story to the top of the search results, would be unjustifiable government interference with the right to freedom of expression, since it is not the State's role to be an arbiter of the relative importance of different information. Rectification should only ever be required where information is demonstrable false, which is not the case here, since the 2001 Story cannot be characterized as misinformation, as stated above.[46] Further, even if the information could be given more context, Ras has the ability to clarify and publish his own version of events. In fact, the newspaper that originally published the exposé on Ras subsequently published Ras' clarificatory Statement.[47] Ras' clarificatory Statement also appears in UConnect's search results.[48] Thus, rectification of the search results is not necessary.

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[44] Declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information (3 March 2017) FOM.GAL/3/17, p 3.

[45] Article 29 Data Protection Working Party, 'Guidelines on The Implementation of The Court of Justice of The European Union Judgment On '*Google Spain And Inc. v Agencia Espaajola De Proteccion De Datos And Mario Costeja Gonzalez*' C-131/12 (2014) 16.

[46] Para 15 of this Memorial.

[47] Fact Pattern, para 4.1.

[48] Clarification no 27.

20. Blockage or erasure would go even further in abrogating the right to freedom of expression, as they would completely eradicate an avenue of access to the 2001 Story. Thus, they would similarly constitute unjustified government interference with the right to freedom of expression.

21. In any case, Magentonia acted within the acceptable margin of appreciation[49] in coming to its Decision. Magentonia should be accorded a wide margin of appreciation here due to the competing interests involved,[50] and the absence of international consensus as to the relative importance of an individual's right to privacy with regard to the rectification, erasure or blockage of search results.[51]

[49] *Palomo Sánchez and Others v Spain* App no 28955/06 (ECtHR, 12 September 2011) para 62; *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) para 112.

[50] *Tamiz v UK* App no 3877/14 (ECtHR, 19 September 2017) para 79.

[51] *Tamiz v UK* App no 3877/14 (ECtHR, 19 September 2017) para 79.

II. MAGENTONIA'S DECISION TO DIRECT UCONNECT TO SUSPEND ALL OPERATIONS UNTIL THE CONCLUSION OF THE TRIAL ("THE SUSPENSION") DID NOT VIOLATE ARTICLE 19 OF THE ICCPR.

22. The suspension was a permissible restriction of the freedom of expression under Article 19(3) as it was: (A) prescribed by law; (B) in pursuit of a legitimate aim; and (C) necessary in a democratic society. These requirements have been endorsed by the IACtHR,[52] UNHRC,[53] ECtHR,[54] and ACommHPR.[55]

[52] *Francisco Martorell v Chile* (IACtHR, 3 May 1996) para 55; *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 120; IACHR, 'Report of the Special Rapporteur for Freedom of Expression' (2009) OEA/SER L/V/II Doc 51 231–233; IACHR, 'Freedom of Expression and the Internet' (2013) OEA/SER L/II CIDH/RELE/IN F11/13 paras 54–64.

[53] *Womah Mukong v Cameroon* UN Doc CCPR/C/51/D/458/1991 (HRC, 10 August 1994) para 9.7; *Sohn v Republic of Korea* UN Doc CCPR/C/54/D/518/1992 (HRC, 19 July 1995) para 10.4; *Malcolm Ross v Canada* UN Doc CCPR/C/70/D/736/1997 (HRC, 18 October 2000) para 11.2; *Velichkin v Belarus* UN Doc CCPR/C/85/D/1022/2001 (HRC, 20 October 2005) para 7.3; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (16 May 2011) UN Doc A/HRC/17/27 para 24; UNHRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 para 35; 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 para 29.

[54] *Handyside v UK* App no 5393/72 (ECtHR, 7 December 1976) para 49; *Sunday Times v UK (No 1)* App no 6538/74 (ECtHR, 26 April 1979) para 45; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) para 24; *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 January 2015) para 59; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) para 124.

[55] ACommHPR, 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa' (2002) ACHPR/Res 62(XXXII)02 Principle II; *Interights v Mauritania* AHRLR 87 Comm no 242/2001 (ACommHPR, 2004) paras 78–79; *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* AHRLR 268 Comm no 294/04 (ACommHPR, 2009) para 80.

A. The suspension was prescribed by law.

23. A measure is prescribed by law as long as it was issued on the basis of norm that is sufficiently precise such that a person, with the appropriate legal advice,[56] could reasonably foresee a risk that his conduct may be prohibited.[57] The word "law", in the expression "prescribed by law", covers "not only statute but also unwritten law".[58]

24. It is accepted that national courts possess the power to issue interim injunctions as a remedy to prevent the possible abrogation of the rights of others.[59] Such a power is a necessary corollary of a State's duty to protect the rights of its people. It has been explicitly recognized that such an injunction may be issued even in the clear absence of statutory basis.[60] Further, national courts of various jurisdictions, including Australia,[61] Japan,[62] Germany,[63] and the United Kingdom,[64] possess the power to issue, or have issued, injunctions against the

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[56] *Lindon, Otchakovsky-Laurens v France* App no 21275/02 (ECtHR, 22 October 2007) para 41; *Editorial Board of Pravoye Delo and Shtekel v Ukraine App* no 33014/05 (ECtHR, 5 August 2011) para 51; *Centro Europa 7 S.R.L. and Di Stefano v Italy* App no 38433 (ECtHR, 7 June 2012) para 142; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) para 122.

[57] *Silver v UK* App no 5947/72 (ECtHR, 25 March 1983) para 88; *Rekvényi v Hungary* App no. 25390/94 (ECtHR, 20 May 1999) para 34; *Tammer v Estonia* App no 41205/98 (ECtHR, 4 April 2001) para 37; *Sunday Times v UK (No 1)* App no 6538/74 (ECtHR, 26 April 1979) paras 49-50.

[58] *Sunday Times v UK (No 1)* App no 6538/74 (ECtHR, 26 April 1979) para 47.

[59] *Verlagsgruppe News GmbH and Bobi v Austria* App no 59631/09 (ECtHR, 4 March 2013) para 31.

[60] *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2016] EWCA Civ 658 (06 July 2016) para 48.

[61] *Australian Broadcasting Corporation v O'Neill* [2006] HCA 46.

[62] Junko Kotani, 'Proceed with Caution: Hate Speech Regulation in Japan' Hastings Constitutional Law Quarterly 45:3 603, 607.

[63] Associazione Arci, Report on Hate Crime and Hate Speech in Europe: Comprehensive Analysis of International Law Principles, EU-wide Study and National Assessments (preventing, Redressing and Inhibiting hate speech in new Media) p 56.

[64] Equality Act 2010 (United Kingdom); Human Rights Act 1998 (United Kingdom), section 8.

publication of hate speech without such powers having been expressly provided for in legislation. Additionally, a multitude of international law instruments, including the EU E-Commerce Directive[65] and the Enforcement Directive,[66] recognize the power of States to issue injunctions against intermediaries in order to block access to illegal content.

25. UConnect was able to reasonably foresee that an interim injunction might be issued against it due to the proliferation of anti-refugee posts on its platform. As a party to the ICCPR, Magentonia is obligated under Article 20(2) to prohibit by law the "advocacy of national… hatred that constitutes incitement to discrimination".[67] It is thus reasonably foreseeable that Magentonia would take action to prevent the further dissemination of the anti-refugee posts[68] that constitute hate speech.[69] It is reasonably foreseeable that Magentonia would specifically issue a suspension order because, as will be discussed below,[70] there were no alternative measures that could have completely prevented the circulation of such posts.
26. Additionally, UConnect is a large intermediary with its own team of lawyers,[71] and would have had access to appropriate legal advice on the matter.[72]

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[65] E- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/13 recital 45.

[66] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, OJ L 195, 2.6.2004.

[67] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 17, Article 20(2).

[68] Fact Pattern, para 5.4.

[69] Para 28 of this Memorial.

[70] Para 39 of this Memorial.

[71] Fact Pattern, para 5.2.

B. The suspension pursued the legitimate aims of preserving the rights and reputations of the refugees, and of maintaining public order.

27. Suspending access to hate speech pursues the legitimate aim of preserving the rights and reputations of others.[73] This is because blocking access to hate speech prevents the dissemination of speech that may incite such discrimination.[74]

28. The anti-refugee posts were hate speech. They constitute the "advocacy of national… hatred that constitutes incitement to discrimination"[75] as they regularly characterized the Cyanisian refugees as "bottom feeders",[76] a derogatory term[77] that ridicules them on the basis of their nationality. Further, the 26 May post accused them of criminal activity such as plotting terrorist attacks,[78] and associated them with local unemployment rates by insinuating that they would take over all Magentonian jobs. This is similar to the ECtHR case of *Féret v Belgium,* where the language of anti-immigrant leaflets that associated immigrants' presence with criminality rates, presented them as a burden to the economy, and held them to ridicule,

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[72] *Lindon, Otchakovsky-Laurens v France* App no 21275/02 (ECtHR, 22 October 2007) para 41; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) para 51; *Centro Europa 7 S.R.L. and Di Stefano v Italy* App no 38433 (ECtHR, 7 June 2012) para 142; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) para 122; *Malcolm Ross v Canada* UN Doc CCPR/C/70/D/736/1997 (HRC, 18 October 2000) para 11.5; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (16 May 2011) UN Doc A/HRC/17/27 para 25; UNHRC, 'Report of the Special Rapporteur on Minority Issues' (5 January 2015) UN Doc A/HRC/28/64 paras 52–54; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) paras 48, 131; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) paras 196, 204.

[73] *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009) para 59.

[74] *Balsyte-Lideikiene v Lithuania* App no 72596/01 (ECtHR, 4 December 2008) para 73; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) para 130.

[75] ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 17, Article 20(2).

[76] Fact Pattern, para 5.1.

[77] Fact Pattern, para 5.1.

[78] Fact Pattern, para 5.1.

was found to be hate speech.[79] As incitement to discrimination does not necessarily entail a call for an act of violence,[80] such characterization is sufficient for the posts to amount to hate speech.

29. The suspension also pursues the legitimate aim of maintaining public order. The anti-refugee posts had the potential to cause public disorder. This is because the inflammatory comments against the Cyanisian refugees were designed to present them in a negative light, thus creating the inevitable risk of arousing feelings of distrust, rejection or hatred[81] towards them. Such a risk was held to be sufficient to find that the State pursued the aim of maintaining public order,[82] even in the absence of actual violence, or indication that such violence would take place.[83]

C. The suspension was necessary in a democratic society.

30. An interference is necessary in a democratic society as long as it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aims pursued.[84]

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[79] *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009).

[80] *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009) para 73; *Vejdeland v Sweden* App no 1813/03 (ECtHR, 9 February 2012) paras 44-45.

[81] *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009).

[82] *Alinak v Turkey* App No 34520/97 (ECHR, 4 May 2006) at paras 27-8.

[83] *Alinak v Turkey* App No 34520/97 (ECHR, 4 May 2006) at paras 27-8.

[84] UNHRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 paras 22, 33–34; 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/UNHRC/23/40 para 29; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) para 131; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) paras 196, 228; UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 'Joint Declaration on Freedom of Expression and the Internet' (2011) <http://www.law-democracy.org/wp-content/uploads/2010/07/IRIS-piece- 2.11.08.TM_.rev_.pdf> accessed 28 January 2019.

1. The suspension corresponded to a pressing social need.

31. According to the UN Rabat Plan, the following factors must be considered: the intention of the speaker; the content of the speech; the context; the medium of the speech; and the likelihood of hatred, discrimination, or violence occurring.[85]

32. *First*, the content of the speech was discriminatory, and was likely published with the intention to create hostile feelings towards the refugees.

33. *Secondly*, the posts were greatly inflammatory when viewed in light of Magentonia's socio-political context. They were proliferated during the electoral period in Magentonia, where UMP campaigned to fight for the rights of refugees, while MPF promised to secure more employment for the "natives".[86] This would likely have created social tension between Magentonian citizens and Cyanisian refugees.

34. The tension between Magentonian citizens and Cyanisian refugees was also exacerbated by the economic downturn. Magentonia's economy relies heavily on the export of natural gas, which is coincidentally one of the only industries in which Cyanisian refugees are regularly employed.[87] This would cause social tension as Magentonian citizens might already view the refugees as unwanted competition in a bleak economic climate, and refugees retrenched from the gas industry might then begin to compete with Magentonian citizens for employment in other industries. The posts therefore only served to fuel greater anti-refugee sentiment.

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[85] UNHRC, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (11 January 2013) UN Doc A/HRC/22/17/Add 4; UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No 35 Combating Racist Hate Speech' (26 September 2013) UN Doc CERD/C/GC/35 para 15; UNHRC, 'Report of the Special Rapporteur on Freedom of Religion or Belief' (26 December 2013) UN Doc A/HRC/25/58 para 58.

[86] Fact Pattern, para 2.3.

[87] Fact Pattern, para 2.3.

35. Thirdly, UConnect is the most popular social media platform in Magentonia, with over 60% of the population actively using it.[88] Thus, its content is widely viewed and shared, which amplifies the reach and therefore impact of the posts.

36. Further, as a policy consideration, States should be less tolerant of hate speech against minorities. Minorities are more likely to face retaliation when speaking up against hate speech,[89] and have fewer means of recourse.

37. Lastly, there was a pressing social need to suspend UConnect as the posts had the potential to cause public disorder. While no actual violence was perpetuated, it was sufficient that these posts created the inevitable risk of arousing feelings of distrust, rejection or hatred[90] towards them. In *Alinak v Turkey*, the State prosecuted speech which had the potential to incite hostility by making distinctions between Turkish citizens based on regional identity. The ECtHR held that the prosecution pursued the legitimate aim of maintaining public order even though no violence had taken place, nor was there indication that it would.[91] As discrimination can be a slow poison rather than incendiary in nature, the State must take a pro-active stance against hate speech.

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[88] Fact Pattern, para 3.1.

[89] Price M. and Verhulst S., 'Self-Regulation and the Internet' (Kluwer Law International 2005) para 15.

[90] *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009).

[91] *Alinak v Turkey* App No 34520/97 (ECHR, 4 May 2006) at paras 27-8.

2. The suspension was proportionate as it was the only way to prevent the proliferation of anti-refugee posts until UConnect's criminal liability was determined.

38. The suspension was proportionate as it did not go any further than necessary to protect the rights and reputations of the Cyanisian refugees, and maintain public order[92] so as to balance the competing interests at hand.[93]

39. There was no viable alternative to suspending the platform because the engine of proliferation was in fact the platform itself. To stop the proliferation, it was simply necessary to stop the algorithm. All other methods would be inadequate. For instance, it would have been inadequate to require that posts be filtered by themes, as users would nonetheless be able to post content without categorizing it under a theme. Automatic word-based filters would also be inadequate as they "may fail to filter out odious hate speech… posted by users… as the words and expressions in question may include sophisticated metaphors or contain hidden meanings or subtle threats".[94] Further, terminating or suspending offending accounts would still allow anonymous users to create new accounts to continue posting. Simply removing posts would also not be viable, as this reactive method still leaves posts visible to users before they are taken down, where they may be screen-shotted and reposted.

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[92] UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) Annex, UN Doc E/CN 4/1984/4 principle 11; UNHRC, 'General Comment 22' (30 July 1993) UN Doc CCPR/C/21/Rev 1/Add 4 para 8; UNHRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 para 34.

[93] *Cossey v UK* App no 10843/84 (ECtHR, 27 September 1990) para 37; Rolv Ryssdal, 'Opinion: The Coming Age of the European Convention on Human Rights' (1996) 1 European Human Rights Law Review 18, 26; *Ozgur Gundem v Turkey* App no 23144/92 (ECtHR, 16 March 2000) para 43; *Christine Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002) para 72.

[94] *Delfi AS v Estonia App no 64569/09* (ECtHR, 16 June 2015) at para 156.

40. Basically, there exists an inherent mismatch between manual filtering mechanisms and the way the platform was engineered to automatically disseminate information, and amplify popular posts. This, coupled with the speed at which content can go viral (for example, the posts of 26 and 30 May trended within one to two days),[95] and the concerted manner in which TBM and other users[96] exploited the platform's inherent characteristics in the lead up to the election period to engineer this outcome, makes it extremely difficult to filter out the offending messages before they reach a wider audience, or are saved or shared onto other platforms.
41. Further, the fact that the posts were proliferated in the context of an electoral campaign exacerbated the harmful impact of the speech. In *Feret v Belgium,* the ECtHR held that the impact of xenophobic discourse is greater in the context of electoral campaigns[97] because it is aimed at reaching the electorate at large to stir up hatred and intolerance, allowing slogans or stereotypical formulas to take over reasonable arguments.[98] Similarly, in this case, the anti-refugee posts are xenophobic and likely disseminated for similar purposes.
42. Additionally, the suspension was merely an interim order[99] implemented as a stop-gap measure, operating for a definite amount of time. Given the technical intricacies involved and the urgency of the situation, it fell on UConnect to propose a technical solution, and to subsequently apply for the suspension order to be lifted.

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[95] Fact Pattern, paras 5.2 and 5.6.

[96] Fact Pattern, paras 5.1 and 5.4.

[97] *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009) para 76.

[98] *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009) para 76.

[99] Fact Pattern, para 5.5.

43. Ultimately, States are accorded a wide margin of appreciation to determine the appropriate reaction to hate speech.[100] National authorities are better placed to decide this based on the unique social context of the State.[101] Magentonia decided to suspend the operations of UConnect in its jurisdiction after having considered the needs and circumstances of Magentonia. The suspension was thus not excessive.

[100] *Sürek (No 1) v Turkey* App no 26682/95 (ECtHR, 8 July 1999) para 61; Foreign & Commonwealth Office, 'Hate Speech, Freedom of Expression and Freedom of Religion: A Dialogue' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/295276/March_14_Hate_speech_freedo m_of_expression_and_freedom_of_religion_final___.doc> accessed 28 January 2019.

[101] *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) para 96; Andrew Legg, The Margin of Appreciation in International Human Rights Law (OUP 2012) 153.

III. MAGENTONIA'S PROSECUTION AND CONVICTION OF UCONNECT UNDER SECTIONS 3 AND 5 OF THE PIDPA DID NOT VIOLATE ARTICLE 19 OF THE ICCPR.

44. The prosecution and conviction of UConnect was justfied under Article 19(3), as it was: (A) prescribed by law; (B) in pursuit of a legitimate aim; and (C) necessary in a democratic society.

A. The prosecution and conviction were prescribed by law.

45. As stated above,[102] a measure is provided by law where the statute it is based on is sufficiently precise such that a person, with the appropriate legal advice,[103] could reasonably foresee a risk that his conduct may be prohibited.[104] UConnect's prosecution and conviction under Sections 3 and 5 of the PIDPA were prescribed by law because the PIDPA was formulated with sufficient precision to allow UConnect to reasonably foresee that its conduct would attract liability.

[102] Para 23 of this Memorial.

[103] *Lindon, Otchakovsky-Laurens v France* App no 21275/02 (ECtHR, 22 October 2007) para 41; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) para 51; *Centro Europa 7 S.R.L. and Di Stefano v Italy* App no 38433 (ECtHR, 7 June 2012) para 142; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) para 122.

[104] *Silver v UK* App no 5947/72 (ECtHR, 25 March 1983) para 88; *Rekvényi v Hungary* App no. 25390/94 (ECtHR, 20 May 1999) para 34; *Tammer v Estonia* App no 41205/98 (ECtHR, 4 April 2001) para 37; *Sunday Times v UK (No 1)* App no 6538/74 (ECtHR, 26 April 1979) paras 49-50.

1. UConnect was able to reasonably foresee potential liability under Section 3 of the PIDPA for failing to expeditiously remove the 26 May 2018 post.

46. UConnect qualifies as a "person" under Section 3 read with Section 32 of the PIDPA, as it is an "incorporated [body] carrying out business… within the territory of the Republic of Magentonia".[105]

47. Liability is not limited to the obvious, legally uncontroversial case where the intermediary makes the statement. Rather, it is accepted that intermediaries like UConnect may be liable for failure to expeditiously remove illegal user-published content. Hence, UConnect may be liable under the PIDPA for the 26 May post, despite the fact that it did not itself publish that post. Liability may be imposed where intermediaries (1) are aware of said content,[106] (2) have control over the said content on their platform,[107] and yet (3) fail to expeditiously remove said content.[108] This encourages responsibility on the part of social media platforms to take greater responsibility in removing posts that are clearly illegal.[109]

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[105] Fact Pattern, para 5.5.

[106] Council Directive (EC) 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market [2000] OJ L178/1 Article 14(1)(d); *Demenuk v Dhadwal* (2013) BCSC 2111 para 9; *Delfi AS v Estonia App no 64569/09* (ECtHR, 16 June 2015) para 43.

[107] *Delfi AS v Estonia App no 64569/09* (ECtHR, 16 June 2015) para 43; *Google France, Google Inc v Louis Vuitton Malletier SA* C–236/08 (CJEU, 23 March 2010).

[108] Council Directive (EC) 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market [2000] OJ L178/1 Article 14(1)(d); *Demenuk v Dhadwal* 2013 BCSC 2111 para 9; Corey Omer, 'Intermediary Liability for Harmful Speech: Lessons from Abroad' Harvard Journal of Law & 28 Technology 289; *Delfi AS v Estonia App no 64569/09* (ECtHR, 16 June 2015) para 43.

[109] UNHRC, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (11 January 2013) UN Doc A/HRC/22/17/Add.4.

48. *First*, UConnect was aware of the offending post, as it had been reported by its users for violating UConnect's Community Standards.[110]

49. *Secondly*, UConnect has control over the user-published content on its platform. In distinguishing between active and passive intermediaries in *Delfi*, the crux of the ECtHR's analysis hinged on the amount of control the intermediary exercised over the user-published content on its platform.[111] The intermediary in *Delfi* exercised a substantial amount of control over the offending content as it created a space for user comments, and was able to remove comments and restrict users' ability to post them. The same could be said of UConnect, which has a similar amount of control over the posts published on its platform. Specifically, it was able to remove users' posts and restrict users' ability to publish posts by terminating or suspending their accounts.[112]

50. *Thirdly*, UConnect failed to expeditiously remove the 26 May post. It took five days to remove the post, which exceeds its own 72 hour processing standard,[113] and cannot be considered expeditious given the speed at which posts go viral on UConnect (for example, the 30 May post trended within a day of its publishing).[114]

51. This court should also reject any argument that the use of the words "engage in the advocacy of" in Section 3 automatically excludes intermediaries. It is reasonably foreseeable that intermediaries like UConnect could be capable of "engag[ing] in the advocacy".

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[110] Fact Pattern, para 5.2.

[111] *Delfi AS v Estonia App no 64569/09* (ECtHR, 16 June 2015) para 145.

[112] Fact Pattern, para 3.5.

[113] Fact Pattern, para 3.5.

[114] Fact Pattern, paras 5.1 and 5.4.

Intermediaries are capable of "engag[ing] in an expressive activity"[115] such as advocacy. To "engage" in means to participate in or become involved with.[116] Intermediaries like UConnect are not simply neutral platforms for speech; they also promote popular posts to their users for profit-making purposes. Where posts pushed to a larger audience constitute hate speech, intermediaries must be held appropriately liable. Further, the recognition that intermediaries may be liable for user-published content, as discussed in the preceding paragraph, must be founded on the basis that intermediaries bear some responsibility for the content they host[117] because they provide a platform for its dissemination, and thereby participate, or "engage", in the advocacy of such content.

52. As stated above,[118] it is clear that the 26 May post amounted to hate speech, and is thus illegal. As such, UConnect, with the advice of its legal team,[119] would have been able to reasonably foresee potential liability under Section 3 of the PIDPA, as their failure to expeditiously remove the 26 May 2018 post could be construed as engagement in the advocacy of hate speech.

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[115] *Delfi AS v Estonia App no 64569/09* (ECtHR, 16 June 2015) para 145.

[116] 'engage' (Oxford Living Dictionaries) <https://en.oxforddictionaries.com/definition/engage> accessed 28 January 2019.

[117] UNHRC, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (11 January 2013) UN Doc A/HRC/22/17/Add.4; *Delfi AS v Estonia App no 64569/09* (ECtHR, 16 June 2015) para 30.

[118] Para 28 of this Memorial.

[119] Fact Pattern, para 5.1.

2. UConnect was able to reasonably foresee that its failure to remove the 30 May post might constitute a breach of Section 5 of the PIDPA.

53. This Court should also reject any argument that statute cannot be breached by an entity because the statute contains intent words like "recklessly" or "knowingly". It is widely accepted that states of mind can be imputed to entities.[120]

54. Here, the fact that the 30 May post became the most viewed post on UConnect in Magentonia[121] must have, minimally, alerted UConnect to its existence and content. Such knowledge goes towards the requirement of a person having to "knowingly" engage in dissemination under Section 5. Alternatively, if UConnect had not taken note of the post and its content, it should have, given the popularity and reach of the post and consequently its potential influence on public behavior. This would go towards the requirement of a person having to "recklessly" engage in dissemination under Section 5.

55. Further, the 30 May post was patently "false". It states that a study by the University of Magentonia revealed Cyanisian refugees would outnumber Magentonians by 2025. This is implausible because even if every single Celadonese in Cyanisia migrated to Magetonia, Magentonia's one million strong population[122] would clearly outnumber even the entire Celadon minority tribe, which amounts to only approximately 500,000 persons.[123] With a team dedicated to reviewing the posts on UConnect, they would, or should, have known that the post contained false information.

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[120] *Delfi AS v Estonia App no 64569/09* (ECtHR, 16 June 2015).

[121] Fact Pattern, para 5.4.

[122] Fact Pattern, para 2.1.

[123] Fact Pattern, para 1.3.

56. UConnect was able to reasonably foresee that the post might "might mislead members of public to do or refrain from doing anything". Given the context of upcoming elections, and the fact that its own platform had been used in the preceding month for much political campaigning and propaganda by political parties, UConnect would, or should, also have known that such a post might cause citizens to vote for the MPF instead of the UMP.[124]

57. Courts have also recognized the impossibility of attaining absolute certainty in the framing of laws and have acknowledged the risk that the search for certainty may entail excessive rigidity.[125] Thus, the use of the phrase "to do or refrain from doing anything" is justified by the need for the statute to capture the wide range of situations in which the knowing or reckless dissemination of false propaganda causes harm to public order.

B. The prosecution and conviction pursued the legitimate aims of preserving the rights and reputations of the refugees and maintaining public order.

58. As discussed above,[126] prosecution of hate speech pursues the legitimate aim of preserving the rights and reputations of others.[127] This is because prosecuting hate speech prevents the dissemination of speech that may incite such discrimination.[128] As the 26 May post constituted hate speech, the prosecution pursues a legitimate aim.

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[124] Fact Pattern, para 5.6.

[125] *Silver v United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March para 88.

[126] Para 27 of this Memorial.

[127] *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009) para 59.

[128] *Balsyte-Lideikiene v Lithuania* App no 72596/01 (ECtHR, 4 December 2008) para 73; *Delfi AS v Estonia App no 64569/09* (ECtHR, 16 June 2015) para 130.

59. The suspension also pursues the legitimate aim of maintaining public order, as the 26 and 30 May posts had the potential to cause public disorder. This is because the inflammatory comments and the association of the refugees with economic difficulty created the inevitable risk of arousing feelings of distrust, rejection or hatred[129] towards them.

C. The prosecution and conviction were necessary in a democratic society.

60. As stated above,[130] an interference is necessary in a democratic society if it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aims pursued.[131]

1. The prosecution and conviction correspond to a pressing social need.

61. As discussed above,[132] there was a pressing social need for prosecution and conviction because the platform was disseminating hate speech which abrogated the rights and reputations of Cyanisian refugees, and which could create public disorder.

2. The prosecution and conviction were proportionate.

62. The prosecution and conviction are proportionate because the fine of US$100,000 did not go any further than necessary to achieve its protective function.[133] Fines are adjusted to match

[129] *Féret v Belgium* App no 15615/07 (ECtHR, 16 July 2009) para 59.

[130] Para 29 of this Memorial.

[131] UNHRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 paras 22, 33–34; 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 para 29; *Delfi AS v Estonia App no 64569/09* (ECtHR, 16 June 2015) paras 131,196and 228.

[132] See para 30 of this Memorial.

[133] *Cossey v UK* App no 10843/84 (ECtHR, 27 September 1990) para 37

the size of the company in order to ensure effectiveness.[134] UConnect is a popular social media platform with over 100 million users worldwide,[135] and advertising revenue of US$250 million in 2017.[136] A larger fine had to be imposed to effectively promote responsible behavior from UConnect and other social media intermediaries in Magentonia. Here, the fine imposed only amounted to 0.04% of its annual revenue. In comparison, other States have introduced legislation that impose harsher punishments on intermediaries for distributing false information. For example, Germany,[137] the Philippines[138] and Russia[139] have introduced legislation that subject intermediaries to fines between US$200,000 and US$60 million. In Germany, if social media platforms with more than two million users fail to take down posts containing hate speech within 24 hours, a €5 million penalty may be levied.[140]

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[134] *Microsoft Corp v Commission of the European Communities* T-201/04 (CJEU, 17 September 2007) paras 1360, 1363.

[135] Fact Pattern at para 3.1.

[136] Fact Pattern at para 3.6.

[137] CNBC Staff, 'Germany Approves Bill Curbing Online Hate Crime, Fake News' *CNBC* (6 April 2017) <https://www.cnbc.com/2017/04/06/germany-fake-news-fines-facebook-twitter.html> accessed 21 January 2018;

[138] Eimor Santos, 'Bill Filed vs Fake News: Up to P$10M fines, 10-year Jail Time for Erring Public Officials' *CNN Philippines* (22 June 2017) <http://cnnphilippines.com/news/2017/06/22/senate-bill-fake-news-fines- government-officials.html> accessed 28 January 2019; The Straits Times Staff, 'Jail Term, Fine Await Publishers of Fake News in the Philippines' *The Straits Times* (1 September, 2017) <http://www.straitstimes.com/asia/se- asia/jail-terms-fines-await-publishers-of-fake-news-in-the-philippines> accessed 28 January 2019.

[139] The Moscow Times Staff, 'United Russia Tries to Fight "Fake News" (In Its Own Way)' *The Moscow Times* (13 July 2017) <https://themoscowtimes.com/news/united-russia-tries-to-fight-fake-news-58376> accessed 28 January 2019.

[140] Joe Miller, 'Germany votes for 50m euro social media fines' *BBC News* (30 June 2017) <https://www.bbc.com/news/technology-40444354> accessed 28 January 2019.

PRAYER FOR RELIEF

For the foregoing reasons, the Respondent, Magentonia, respectfully requests this Honorable Court to:

1. **DECLARE** that Magentonia's decision not to rectify, ease or block the search results depicting *The Cyanisian Times* story of 2001 did not violate article 17 of the ICCPR;
2. **DECLARE** that Magentonia's decision of 2 June 2018 to direct UConnect to suspend all operations until the conclusion of the trial did not violate article 19 of the ICCPR; and
3. **DECLARE** that Magentonia's prosecution and conviction of UConnect under the PIDPA did not violate article 19 of the ICCPR.

Respectfully submitted,

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Agent for the Respondent, 103R