

THE 2015–2016 PRICE MEDIA LAW
MOOT COURT COMPETITION

UMANI & CHATTER
(APPLICANTS)

V.

THE REPUBLIC OF OMERIA
(RESPONDENT)

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACommHPR	African Commission on Human and Peoples' Rights
ATEL	Anti-Terrorism & Extremism Law of 2012
CERD	Committee on the Elimination of Racial Discrimination
CJEU	Court of Justice of the European Union
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
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
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICTR	International Criminal Tribunal for Rwanda
IMADR	The International Movement Against All Forms of Discrimination and Racism
NHA	No Hate Act of 2011
OECD	The Organization for Economic Co-operation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights
SCOTUS	Supreme Court of the United States of America
UDHR	Universal Declaration of Human Rights
UK	United Kingdom

UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations Human Rights Council
US	United States of America

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STATEMENT OF RELEVANT FACTS

Background of Omeria

A. Omeria is a country of 25 million inhabitants which was once a part of Brinnah. Following a war in 1952, an armistice brokered by world powers resulted in the partitioning of the two states. This separation led to a mass immigration of Omerians and Brinnans to Omeria and Brinnah, respectively. To this day, particularly along the border of the countries, there are enclaves of ethnic Omerians living in Brinnah, and ethnic Brinnans living in Omeria. Despite the separation, tensions remain high between the two nations, particularly regarding the border settlements.

B. The Night Watch, a designated terrorist and extremist group, has been perpetrating violence to rid Omeria of Brinnans. Violent flare-ups often occur around the anniversary of the 1952 Armistice. While Omeria and Brinnah are swift to condemn such violence, they struggle with controlling radicalised citizens.

Omeria's efforts to protect national security

C. The ATEL was enacted in response to increasingly frequent violent acts of terrorism near the border region, principally perpetrated by The Night Watch.

D. The ATEL criminalises the publication of extremist statements, such as any calls for the deaths of individuals living in Omeria. Additionally, the ATEL provides for the issuance of emergency court orders to provisionally remedy violations of the ATEL. A violation of the ATEL will result in either criminal or civil punishment.

Omeria's efforts to curb online anonymous hate speech

E. Omeria is one of the heaviest users of internet bandwidth per capita in the world. Notably, the use of social media is particularly popular in Omeria.

F. Chatter is the most popular social media platform for communication in Omeria. It operates as a web-based and mobile application, and allows users to broadcast messages of no more than 150 characters per post. Users can interact with each other by re-chatting and responding to each other's posts.

G. The NHA was passed to deal with the growing problem of individuals on Chatter and other social media platforms who would anonymously make shocking and offensive statements meant to cause distress to their targets. There were several highly publicised cases of individuals committing suicide after being the target of online harassment and hate speech.

H. The NHA criminalises the online dissemination of statements that threaten, insult, or degrade a group of persons on the basis of ethnicity, amongst others. The NHA also provides that an intermediary may be responsible for facilitating another's statement prohibited under the NHA. However, the intermediary will only be liable for a monetary penalty.

Omeria's prosecution of Umani and Chatter

I. Umani, the Deputy Justice Minister of Omeria, runs a very popular anonymous Chatter account under the name @TheVigilanteInsider. With 844, 056 followers, @TheVigilanteInsider has a greater following compared to some of Omeria's politicians such as the Justice Minister, Tavarini.

J. In addition to satirical jokes, @TheVigilanteInsider has posted a number of controversial statements. These included diatribes against Brinnans such as posts #1–6. Post #3 for instance, labeled Brinnans as ‘child killers’, whereas post #5 called Omerians to ‘[d]o [their] part to purify Omeria’. Post #5, in particular, received the attention of @NightWatcher00 who responded with ‘hearing you loud and clear!’ Umani subsequently affirmed @NightWatcher00 with ‘God willing’.

K. While Umani’s controversial posts had always prompted complaints to Chatter, the outcry in response to posts #4–6 was particularly strong. Following this outcry, Omeria obtained a court order pursuant to the ATEL, for Chatter to delete posts #4–6, and reveal @TheVigilanteInsider’s identity. Chatter initially refused to reveal @TheVigilanteInsider’s identity, and thus the court imposed a daily fine of US\$ 10,000. Chatter eventually cooperated, after seven days.

L. Charges were brought against Umani for posts #1–3, under the NHA, and for posts #4–6, under the ATEL. Umani was found liable for all posts, and sentenced to a two-year jail term.

M. Charges were brought against Chatter under the NHA, for facilitating posts #1–3. Charges were brought against Chatter under the ATEL, for reckless monitoring and control of posts #4–6. Chatter was found liable for all posts, except post #2, over which it had temporarily suspended @TheVigilanteInsider’s account. On top of the US\$ 70,000 fine for refusing to disclose Umani’s identity, Chatter was fined US\$ 5 million.

STATEMENT OF JURISDICTION

Umani, Chatter, and the Republic of Omeria, which is a member of the UN, have submitted their differences to the Universal Court of Free Expression ('this Court'), and hereby submit to this Court their dispute concerning Articles 12 and 19 of the UDHR and Articles 17 and 19 of the ICCPR.

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

QUESTIONS PRESENTED

1. Whether Omeria violated Umani's rights to freedom of expression and privacy by prosecuting Umani, for publishing hateful diatribes against Brinnans, an ethnic minority, on the most popular social media platform in Omeria.
2. Whether Omeria violated Chatter's rights to freedom of expression and privacy by prosecuting Chatter, for failing to regulate the content of one of its most popular users, despite having received multiple complaints.
3. Whether Omeria violated Umani's rights to freedom of expression and privacy by prosecuting Umani, an influential online figure, for publishing extremist statements, in a region suffering from escalating violence.
4. Whether Omeria violated Chatter's rights to freedom of expression and privacy by prosecuting Chatter, for reckless monitoring and control of posts that sparked particularly strong public outcry.

SUMMARY OF ARGUMENTS

OMERIA'S PROSECUTION OF UMANI UNDER THE NHA FOR POSTS #1-3 WAS JUSTIFIED

A. States have a duty to curb hate speech. The prosecution of Umani under the NHA did not violate Umani's rights to freedom of expression and privacy as it was prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society.

B. The prosecution was prescribed by law as Umani could foresee liability for publishing posts #1-3, which threaten, insult, or degrade Brinnans. While certain terms in the NHA may appear broad, laws are invariably couched in broad terms to keep pace with changing circumstances. Further, Omeria does not have unfettered discretion to sanction speech as it must first establish the elements of hate speech and show that the exceptions do not apply, before liability is triggered. Additionally, it cannot be argued that there was no legal basis to prosecute Umani. First, it is immaterial that the prosecution under the NHA was based on information procured under the ATEL court order. This is because states may use personal data for different purposes if the use is compatible with the initial purpose of collecting the data. Secondly, although these posts were made before the enactment of the NHA, the prosecution was not retroactive as posts #1-2 continued to exist after the NHA was enacted.

C. The prosecution pursued the legitimate aims of protecting public order and preserving the rights and reputations of others. This is because it was in response to posts #1-3, in which Umani called his followers to 'burn' Brinnans, and labelled Brinnans as 'child killers'.

D. There was a pressing social need to prosecute Umani as posts #1–3 were hate speech. First, the content of posts #1–3 was particularly hostile. Secondly, posts #1–3 must be read in light of Omeria’s socio-political context. Thirdly, @TheVigilanteInsider’s suspected status as a ‘high-level government insider’ exacerbates the severity of posts #1–3, as they may be misinterpreted as governmental endorsement of discrimination. This could encourage reactions that tend to undermine peace and tolerance in society. Finally, posts #1–3 were published on Chatter, a social media platform with extensive reach. Ultimately, while artistic expression should warrant greater tolerance, it is not a *carte blanche* against hate speech prosecutions. Omeria should be accorded a wide margin of appreciation in determining if speech is hate speech, given the unique cultural context of every state.

E. The two-year jail term was proportionate. Umani’s sentence was comparable to punishments for similar offences in other democracies such as Canada, the UK, and Brazil. Furthermore, Umani’s punishment was proportionate given the socio-political climate of Omeria. Additionally, the two-year jail term did not solely involve the violation of the NHA, but also of the ATEL. Umani’s violation of the ATEL was in itself sufficient to warrant the two-year jail term.

OMERIA’S PROSECUTION OF CHATTER UNDER THE NHA FOR POSTS #1 AND #3 WAS JUSTIFIED

F. The prosecution of Chatter under the NHA did not violate Chatter’s right to privacy, as it does not have such a right. While corporations are capable of possessing the right to disseminate information, the same cannot be said about the right to privacy. Corporations do not possess the qualities of natural persons with privacy interests at stake. Even if social media platforms, such as Chatter, assert a derivative right to privacy in defence of the privacy interests of its customers, such

a derivative right does not exist when the corporation is shielding a suspected criminal from investigation.

G. In any event, the prosecution did not violate Chatter's rights to freedom of expression and privacy, as it was prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society.

H. The prosecution was prescribed by law as Chatter could foresee responsibility for facilitating posts #1 and #3, which threaten, insult, or degrade Brinnans. This is because section D explicitly provides that an 'entity responsible for facilitating another's statement prohibited under the Act may be held liable.'

I. Holding intermediaries, such as Chatter, liable for hosting hate speech pursued the legitimate aims of protecting public order and preserving the rights or reputations of others. This is due to the wide reach and extensive spread of communications facilitated and enabled by intermediaries.

J. There was a pressing social need to prosecute Chatter for its failure to regulate posts #1 and #3. First, Chatter is an active intermediary as it exercises control over its user content and was aware of the controversial nature of posts #1 and #3. Secondly, Chatter's commercial interest in hosting posts justifies requiring Chatter to regulate posts #1 and #3. Thirdly, internet-related misconduct is sanctioned most effectively through the imposition of responsibility on intermediaries as they have the technical means to detect hate speech and manage it quickly. Finally, while Chatter suspended Umani's account on a single occasion, this was insufficient given the severity of posts #1 and #3.

K. The US\$ 5 million fine was proportionate. First, in comparison to states that impose criminal penalties on corporations, the fine was not excessive. Secondly, Chatter is the most popular social media platform operating in Omeria, which is one of the heaviest users of internet bandwidth per capita in the world. The quantum of US\$ 5 million was justified to ensure the effectiveness of the fine.

OMERIA’S PROSECUTION OF UMANI UNDER THE ATEL FOR POSTS #4–6 WAS JUSTIFIED

L. The prosecution of Umani under the ATEL was justified, as it was prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society.

M. The prosecution was prescribed by law. The ATEL is sufficiently precise as it is reasonably foreseeable that posts #4–6 are offences under Section 3. Additionally, the ATEL contains adequate safeguards. First, Section 3 delineates the scope of Omeria’s discretion as Omeria must first establish the elements of extremist speech, before liability under the ATEL is triggered. Secondly, while Section 5 does not provide for a maximum sentence, Umani’s right to appeal was not restricted. In any event, it would be difficult to stipulate a meaningful maximum sentence given the broad range of offences under the ATEL.

N. The prosecution pursued the legitimate aim of protecting national security, as it was part of Omeria’s counter-extremism efforts. Given the increasingly frequent violent acts of terrorism arising from anti-Brinnan sentiments in Omeria, the extremist nature of posts #4–6 was a matter of national security.

O. There was a pressing social need to prosecute Umani. First, Umani intended to incite imminent violence as posts #4–6, published near the anniversary of the Armistice, made explicit reference to Brinnans. Secondly, while no violence occurred during the anniversary of the Armistice, incitement as an inchoate crime does not require that the incitement has been acted upon. Finally, the likelihood of violence arising from posts #4–6 is exacerbated by the nature of social media as individuals can spread extremist statements without fear of consequences under the shroud of online anonymity.

P. Both the removal of Umani’s online anonymity and prosecution were proportionate. The removal of Umani’s anonymity was proportionate as revealing his identity indicates that the government does not condone violence against Brinnans. Additionally, an individual’s identity is conferred less protection where the subject matter is of public interest. The prosecution was proportionate as a deterrent sentence was warranted for the severe nature of posts #4–6. Additionally, the wide reach of posts #4–6 due to Umani’s deliberate use of social media warranted an increased sentence.

OMERIA’S PROSECUTION OF CHATTER UNDER THE ATEL FOR POSTS #4–6 WAS JUSTIFIED

Q. As stated above, Chatter does not have a right of privacy. In any event, the prosecution of Chatter under the ATEL was justified, as it was prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society.

R. The prosecution was prescribed by law. The ATEL is sufficiently precise as it is foreseeable that Chatter’s failure to regulate posts #4–6 satisfies the element of recklessness in Section 3(ii)(2).

S. The prosecution pursued the legitimate aim of protecting national security as it was part of Omeria's counter-extremism efforts. This is because Chatter failed to regulate posts #4–6 despite their extremist nature.

T. There was a pressing social need to require Chatter to disclose Umani's identity as it was a necessary step to prosecute Umani for his extremist posts. Furthermore, it is insufficient to merely shut down @TheVigilanteInsider's account as Umani could easily create another anonymous account to continue posting extremist statements. Instead, Omeria had to obtain Umani's identity to prosecute him to prevent further propagation of extremism by Umani.

U. There was also a pressing social need to fine Chatter as Chatter is an active intermediary. Furthermore, the gravity of extremist speech goes beyond other forms of content for which intermediary liability is already being imposed. Ultimately, extremist content online has a greater propensity to radicalise, due to its extensive reach and accessibility. It is therefore necessary to ensure that intermediaries such as Chatter remain responsible for regulating user content to effectively eradicate extremism.

V. Both the fines of US\$ 70, 000 and US\$ 5 million were proportionate as they are in line with the punishments imposed by other states. Further, the fines are necessary to encourage intermediaries to be more proactive in regulating user content. This is especially important given the increasingly frequent acts of terrorism in Omeria.

ARGUMENTS

I. OMERIA DID NOT VIOLATE UMANI'S RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY BY PROSECUTING UMANI UNDER THE NHA FOR POSTS #1–3

1. The rights to freedom of expression¹ and privacy² are not absolute.³ These rights may yield to a state's duty to protect society from hate speech.⁴ In executing this duty, social media poses new challenges. This is because social media intermediaries are a 'powerful and virulent platform... for many forms of hatred that are directly linked to... real-world violence'.⁵

¹ UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 19; ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 132 art 10; ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19(2); ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13; ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9.

² UDHR art 12; ECHR art 8; ICCPR art 17(1); ACHR art 11; ACHPR art 6.

³ UDHR art 29(2); ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 132 arts 8(2) and 10(2); ICCPR arts 17(1) and 19(3); ACHR (adopted 22 November 1969, entered into force 18 July 1978) arts 11(2) and 13(2); ACHPR (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9(2); HRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 ('General Comment 34') para 21; Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users (adopted 16 April 2014) para 2.

⁴ ICCPR art 20(2). See also ICERD (adopted 21 December 1965, entered into force 4 January 1969) art 4; ACHR art 13(5); UN Economic and Social Council, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (30 January 2002) UN Doc E/CN4/2002/75 para 64; 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 ('UNHRC May 2011 Report') para 25; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (10 August 2011) UN Doc A/66/290 ('UNHRC August 2011 Report') para 26; UNHRC, 'Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence' (2012) <http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf> accessed 17 January 2016 ('UNHRC Rabat Plan') para 14; IACHR, 'Freedom of Expression and the Internet' (2013) CIDH/RELE/IN F11/13 ('IACHR 2013 Report') para 135.

⁵ 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 paras 2, 16–19. See also UNHRC, 'Report of the Special Rapporteur on Minority Issues' (5 January 2015) UN Doc A/HRC/28/64 ('UNHRC January 2015 Report') paras 35–42, 76.

2. In response to posts #1–3, Omeria removed Umani’s online anonymity⁶ and imposed a two-year jail term.⁷ It is accepted that the prosecution interfered with Umani’s rights to freedom of expression and privacy, as any sanctions and restrictions on an individual’s anonymity are interferences with the rights to freedom of expression⁸ and privacy,⁹ respectively.

3. However, the prosecution of Umani under the NHA was justified 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 UNHRC,¹⁰ the IACtHR,¹¹ the ECtHR,¹² and the ACommHPR.¹³

⁶ Para 17 of the facts.

⁷ Para 19 of the facts.

⁸ Guðmundur Alfreðsson and Asbjørn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 409; Dirk Ehlers, *European Fundamental Rights and Freedoms* (Walter de Gruyter 2007) 106; General Comment 34 (n 3) para 11.

⁹ General Comment 34 (n 3) paras 11–16; *R v Spencer* [2014] 2 SCR 212 paras 47–50; UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (22 May 2015) UN Doc A/HRC/29/32 (‘UNHRC May 2015 Report’) para 47; *Perincek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) (‘*Perincek*’) para 117.

¹⁰ *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) (‘*Malcolm Ross*’) para 11.2; *Velichkin v Belarus* UN Doc CCPR/C/85/D/1022/2001 (HRC, 20 October 2005) para 7.3; UNHRC May 2011 Report (n 4) para 24; UNHRC August 2011 Report (n 4) para 15; General Comment 34 (n 3) 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 (‘UNHRC April 2013 Report’) para 29.

¹¹ *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 para 626; IACHR 2013 Report (n 4) paras 58–64.

¹² *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) (‘*Sunday Times*’) para 45; *Ceylan v Turkey* App no 23556/94 (ECtHR 8 July 1999) (‘*Ceylan*’) para 24; *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 January 2015) (‘*Murat Vural*’) para 59; *Perincek* (n 9) para 124.

¹³ 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 PROSECUTION WAS PRESCRIBED BY LAW

4. A statute is prescribed by law if: (1) it is sufficiently precise; (2) it contains adequate safeguards; and (3) any prosecution under it had a legal basis.¹⁴

1. The NHA is sufficiently precise as Umani could foresee liability for publishing hate speech

5. The NHA is sufficiently precise as Umani could reasonably foresee the limits to online speech. Section A prohibits speech ‘threatening, insulting or degrading’ a group of persons based on ethnicity.¹⁵ As posts #1–3 explicitly insult Brinnans,¹⁶ Umani could reasonably foresee liability.

6. It cannot be argued that the terms ‘threatening, insulting or degrading’ or ‘disseminates’ are broad. Laws need not be absolutely precise to ‘keep pace with changing circumstances’.¹⁷ The level of precision required ‘depends... on the content... [and] the field it is designed to cover’.¹⁸

¹⁴ *Silver v UK* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) (‘*Silver*’) paras 85–90; *Malone v UK* App no 8691/79 (ECtHR, 2 August 1984) (‘*Malone*’) paras 67–68; *Weber and Saravia v Germany* App no 54934/00 (ECtHR, 29 June 2006) (‘*Weber*’) para 23; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) (‘*Editorial Board*’) para 51; *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012) (‘*Ahmet*’) paras 57–59; UNHRC April 2013 Report (n 10) para 29; ICCPR, ‘Concluding Observations on the Fourth Periodic Report of the United States of America’ (23 April 2014) CCPR/C/USA/CO/4 para 22; UNHRC, ‘The Right to Privacy in the Digital Age, Report of the Office of the United Nations High Commissioner for Human Rights’ (30 June 2014) UN Doc A/HRC/27/37 (‘UNHRC June 2014 Report’) para 28.

¹⁵ Para 10(a) of the facts.

¹⁶ Paras 14(a)–(c) of the facts.

¹⁷ *Müller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) (‘*Müller*’) para 29; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) (‘*Kokkinakis*’) para 40; *Lindon, Otchakovsky-Laurens and July v France* App no 21275/02 (ECtHR, 22 October 2007) (‘*Lindon*’) para 41; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) (‘*Delfi October 2013*’) paras 71, 75.

¹⁸ *Editorial Board* (n 14) para 52; *Centro Europa 7 S R L and Di Stefano v Italy* App no 38433 (ECtHR, 7 June 2012) (‘*Centro Europa*’) para 142; *Delfi October 2013* (n 17) para 72; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) (‘*Delfi June 2015*’) para 122.

The NHA was passed in response to irresponsible online speech.¹⁹ Given the peculiar challenges of regulating online speech,²⁰ and the many guises of hate speech,²¹ the NHA had to be drafted in broader terms.

2. The NHA has adequate safeguards as Omeria must establish the elements set out in the NHA and decisions can be appealed

7. The NHA has adequate safeguards against unfettered discretion. The ‘law must indicate with sufficient clarity the scope of any... discretion and the manner of its exercise’.²² Omeria does not have unfettered discretion to sanction speech as it must first establish the elements of hate speech²³ and show that the exceptions²⁴ do not apply, before liability is triggered.

8. Furthermore, the right to an appeal is an adequate safeguard.²⁵ As highlighted by the UNHRC, the judiciary is an appropriate check against the executive.²⁶ Umani’s appeal to the Supreme Court of Omeria²⁷ demonstrates that the NHA has adequate safeguards.

¹⁹ Para 9 of the facts.

²⁰ UNESCO, *Countering Online Hate Speech* (UNESCO Publishing 2015) 13–15.

²¹ UNHRC January 2015 Report (n 5) para 52. See also UNESCO, *Countering Online Hate Speech* (n 20) 10.

²² *Malone* (n 14) para 68; *Liu v Russia (no 2)* App no 29157/09 (ECtHR, 26 July 2011) (‘*Liu*’) para 88. See also *Silver* (n 14) para 90; *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990) (‘*Huvig*’) para 34; *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990) (‘*Kruslin*’) para 35.

²³ Para 10(a) of the facts.

²⁴ Para 10(d) of the facts.

²⁵ *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1978) (‘*Klass*’) para 56; *Malcolm Ross* (n 10) para 11.4; *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010) (‘*Uzun*’) para 72; *Gurtekin v Cyprus* App nos 60441/13, 68206/13, 68667/13 (ECtHR, 11 March 2014) (‘*Gurtekin*’) para 28.

²⁶ *Malcolm Ross* (n 10) para 11.5. See also *Klass* (n 25) para 56.

²⁷ Para 21 of the facts.

3. There was a legal basis to prosecute Umani

9. There was a legal basis to prosecute Umani: (a) as Omeria was justified in using Umani's information obtained under the ATEL; and (b) the prosecution for posts #1–2 was not retroactive.

a. *The prosecution under the NHA was justified as the use of Umani's information was compatible with the initial purpose of collecting the information*

10. It is immaterial that the prosecution under the NHA was based on information procured by the ATEL court order. The right to privacy requires that the 'gathering and holding of personal information... be regulated by law'.²⁸ However, a state may use personal data for different purposes if the use is compatible with the initial purpose of collecting the data.²⁹ The ATEL and the NHA both criminalise harmful speech.³⁰ The posts that attracted liability under the ATEL and NHA were published on the same account.³¹ Umani could thus foresee that his identity, obtained under the ATEL court order,³² may be used for different speech-related prosecutions regarding his posts as @TheVigilanteInsider.

²⁸ HRC, 'General Comment 16' (8 April 1988) UN Doc HRI/GEN/1/Rev 1 ('General Comment 16') para 10; Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edition, NP Engel 2009) 382.

²⁹ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (adopted January 1981, entered into force 10 January 1985) 1496 UNTS 66 art 5(b); General Comment 16 (n 28) para 10, Council Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data [1995] OJ L281 of 23 November 1995 art 6(b); Council of the European Union Framework Decision 2008/977/JHA on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters [2008] OJ L350 of 30 December 2008 art 3(2)(a); Els De Busser, *Data Protection in EU and US Criminal Cooperation: A Substantive Law Approach to the EU Internal and Transatlantic Cooperation in Criminal Matters Between Judicial and Law Enforcement Authorities* (Maklu 2009) 103; Article 29 Data Protection Working Party, 'Opinion 03/2013 on Purpose Limitation' (2 April 2013) <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf> accessed 17 January 2016, 20–27.

³⁰ Paras 4(c), 9 of the facts.

³¹ Para 14 of the facts.

³² Para 17 of the facts.

b. The prosecution under the NHA was not retroactive

11. There is no legal basis for a prosecution where it is retroactive.³³ However, while posts #1–2 were made before the enactment of the NHA, the prosecution was not retroactive. Posts #1–2 were still accessible after the NHA was enacted.³⁴ Unlike traditional media, online content is presented contemporaneously despite being posted years ago.³⁵ Furthermore, online content may be revived and made viral at a later time.³⁶ Chatter users can continue to re-chat and comment on posts #1–2.³⁷ Due to the continued availability of posts #1–2, liability arose after the enactment of the NHA.

B. THE PROSECUTION PURSUED THE LEGITIMATE AIMS OF PROTECTING PUBLIC ORDER AND PRESERVING THE RIGHTS AND REPUTATIONS OF OTHERS AS POSTS #1–3 WERE HATE SPEECH

12. Prosecuting hate speech pursues the legitimate aims of protecting public order and preserving the rights and reputations of others.³⁸ This is because protecting public order includes

³³ *Kimmel v Argentina* (IACtHR, 2 May 2008) paras 66–68. See also *Ricardo Canese v Paraguay* (IACtHR, 31 August 2004) para 175.

³⁴ Paras 14(a)–(b) of the facts.

³⁵ Association of Certified Fraud Examiners, ‘Sample Social Media Policy’ (2014) <www.acfe.com/uploadedfiles/acfe_website/content/documents/sample-documents/sample-social-media-policy.pdf> accessed 17 January 2016, 1. See also McLaughlins Lawyers, ‘Think Before You Post – Social Media and Misleading and Deceptive Conduct’ (2014) <<http://www.mclaughlins.com.au/think-post-social-media-misleading-deceptive-conduct/>> accessed 17 January 2016; Todd Seelig, Christian Davis and Eileen Pomento, ‘Social Media: I Know What You Did Last Weekend, Part 2’ (2 June 2015) <www.portal.state.pa.us/portal/server.pt?open=18&objID=1506122> accessed 17 January 2016, 10.

³⁶ Stephanie Marcus, ‘That Viral Jennifer Aniston Facebook Post was Actually Posted by a Redditor 5 Years Ago’ (11 October 2015) <http://www.huffingtonpost.com/entry/jennifer-aniston-facebook-post-reddit_564271b3e4b060377346c5f7> accessed 17 January 2016; The Sport Bible, ‘Another Old Post from Jamie Vardy’s Facebook is Going Viral’ (1 December 2015) <<http://www.thesportbible.com/articles/another-old-post-from-jamie-vardy-s-facebook-is-going-viral-and-it-could-be-better-than-chat-sh-t-get-banged>> accessed 17 January 2016.

³⁷ Para 7 of the facts.

³⁸ UNHRC, ‘Report of the Special Rapporteur on the Protection of the Right to Freedom of Opinion and Expression’ (7 September 2012) UN Doc A/67/357 (‘UNHRC September 2012 Report’) paras 36–40; UNHRC April 2013 Report (n 10) para 28. See also *Malcolm Ross* (n 10) para 11.5.

sanctioning speech that may incite violence.³⁹ Additionally, preserving the rights and reputations of others includes sanctioning hate speech against other ethnic groups.⁴⁰ The prosecution pursued these aims as posts #1–3 were diatribes against Brinnans.⁴¹

C. THE PROSECUTION WAS NECESSARY IN A DEMOCRATIC SOCIETY

13. 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.⁴²

1. There was a pressing social need to prosecute Umani as he engaged in hate speech

14. A state may interfere with an individual's rights to freedom of expression and privacy if he engages in hate speech.⁴³ 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 status of the speaker; the medium of the speech; and the likelihood of hatred, discrimination, or violence occurring.⁴⁴

³⁹ *Gunduz v Turkey* App no 3571/97 (ECtHR, 4 September 2003) ('*Gunduz*') para 28; *Alinak v Turkey* App no 40287/98 (ECtHR, 29 March 2005) paras 27–28; General Comment 34 (n 3) para 31.

⁴⁰ *Balsyte-Lideikiene v Lithuania* App no 72596/01 (ECtHR, 4 December 2008) ('*Balsyte-Lideikiene*') para 73; *Delfi June 2015* (n 17) para 130.

⁴¹ Para 14(b) of the facts.

⁴² General Comment 34 (n 3) paras 22, 33–34; UNHRC April 2013 Report (n 10) para 29; *Delfi June 2015* (n 17) para 131; *Perincek* (n 9) paras 196, 228.

⁴³ *Malcolm Ross* (n 10) para 11.5; UNHRC May 2011 Report (n 4) para 25; UNHRC January 2015 Report (n 5) paras 52–54; *Delfi June 2015* (n 17) paras 48, 131; *Perincek* (n 9) paras 196, 204.

⁴⁴ UNHRC Rabat Plan (n 4). See also 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 ('General Recommendation No 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.

15. There was a pressing social need to prosecute Umani as posts #1–3 were hate speech. First, the content of posts #1–3 was particularly hostile. This is evinced by the strong words used against Brinnans. Post #3, in particular, labelled Brinnans as ‘child killers’.⁴⁵

16. Secondly, posts #1–3 must be read in light of Omeria’s socio-political context. ‘[C]ultural paradigms must be... taken into account when considering whether certain comments... constitute hate speech’.⁴⁶ Existing racial tensions are therefore a consideration.⁴⁷ Posts #1–3 were made during a time of recurring ethnic violence.⁴⁸ Furthermore, Omeria and Brinnah’s current peace is due to an ‘armistice brokered by world powers’⁴⁹ and is not stable, as evidenced by the war in 1974.⁵⁰ While artistic expression should warrant greater tolerance, it is not a *carte blanche* against prosecutions.⁵¹

⁴⁵ Para 14(b) of the facts.

⁴⁶ UNHRC January 2015 Report (n 5) para 52. See also *Prosecutor v Akayesu* (Judgment) ICTR-96-4-T, T Ch I (2 September 1998) para 557; *Sürek v Turkey* App no 23927/94 (ECtHR, 8 July 1999) para 62; *Karatas v Turkey* App no 23168/94 (ECtHR, 8 July 1999) para 48; *Catch the Fire Ministries Inc v Islamic Council of Victoria* [2006] VSCA 284 para 159; *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* (Appeal Judgment) ICTR-99-52-A (28 November 2007) para 698; UNHRC January 2015 Report (n 5) para 52; UNHRC Rabat Plan (n 4) para 22; Susan Benesch, ‘Dangerous Speech: A Proposal to Prevent Group Violence’ (12 January 2012) <<http://www.worldpolicy.org/sites/default/files/Dangerous%20Speech%20Guidelines%20Benesch%20January%202012.pdf>> accessed 17 January 2016, 5; University of Oxford, ‘Comparative Hate Speech Law: Memorandum’ (2012) <http://www3.law.ox.ac.uk/denning-archive/news/events_files/2012_-_LRC_Hate_Speech_Memorandum.pdf> accessed 17 January 2016, para 49; Article 19, ‘Prohibiting Incitement to Discrimination, Hostility or Violence’ (21 December 2012) <<http://www.article19.org/resources.php/resource/3572/en/prohibiting-incitement-to-discrimination,-hostility-or-violence>> accessed 17 January 2016, 29–30.

⁴⁷ *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008) para 45. See also *Balsyte-Lideikiene* (n 40) para 78; *Soulas v France* App no 15948/03 (ECtHR, 10 July 2009) paras 37–39; *Perincek* (n 9) para 205.

⁴⁸ Para 3 of the facts.

⁴⁹ Para 1 of the facts.

⁵⁰ Para 15 of the facts.

⁵¹ UNHRC, ‘Report of the Special Rapporteur in the Field of Cultural Rights’ (14 March 2013) UN Doc A/HRC/23/34 para 33; *Prosecutor v Simon Bikindi* (Judgment) ICTR-01-72-T (2 December 2008) paras 254, 264.

17. Thirdly, the widespread belief that the @TheVigilanteInsider was a ‘high-level government insider’⁵² exacerbated the severity of posts #1–3. Influential political standing is relevant in determining the severity of speech.⁵³ This is because discriminatory speech by perceived government sources could legitimise sentiments that undermine tolerance in society.⁵⁴ Such legitimisation has contributed to violence in Nigeria,⁵⁵ India,⁵⁶ among others.⁵⁷

18. Finally, posts #1–3 were published on Chatter, a social media platform with extensive reach. Chatter is the most popular social media platform in Omeria,⁵⁸ and @TheVigilanteInsider has 844,056 followers,⁵⁹ far more than the Justice Minister.⁶⁰ Such reach makes it a potent source for disseminating hate speech.⁶¹ Furthermore, the ease of anonymity emboldens individuals to spread

⁵² Para 13 of the facts.

⁵³ *Malcolm Ross* (n 10) para 11.6; *African Institute for Human Rights and Development v Guinea* AHRLR 57 Comm no 249/2002 (ACommHPR, 7 December 2004) para 73.

⁵⁴ *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006) (‘*Erbakan*’) para 64; UNHRC September 2012 Report (n 38) para 24.

⁵⁵ Aaron Sayne, ‘Rethinking Nigeria’s Indigene-Settler Conflicts’ (2012) <<http://www.usip.org/sites/default/files/SR311.pdf>> accessed 17 January 2016, 7–8.

⁵⁶ John Dayal, ‘300 Days: Documenting Sangh Hate and Communal Violence Under the Modi Regime’ (21 March 2015) <<http://www.kractivist.org/wp-content/uploads/2015/03/Modi-300-days-Use-for-Printing-1-1.pdf>> accessed 17 January 2016, 10.

⁵⁷ Committee on the Protection of Human Rights of the Central Head Office of the Korean Residents Union in Japan, ‘Report on the issue of Racism and Hate Speech in Japan’ (18 July 2014) <http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/JPN/INT_CERD_NGO_JPN_17699_E.pdf> accessed 17 January 2016, 22; Emily Harris, ‘Israel, Palestine Both Link Violence to Inflammatory Speech’ *National Public Radio* (23 October 2015) <<http://www.npr.org/sections/parallels/2015/10/23/451176896/israel-palestinians-both-link-violence-to-inflammatory-speech>> accessed 17 January 2016.

⁵⁸ Para 6 of the facts.

⁵⁹ Para 13 of the facts.

⁶⁰ Para 12 of the facts.

⁶¹ Abraham Foxman and Christopher Wolf, *Viral Hate: Containing its Spread on the Internet* (Palgrave Macmillan 2013) 75, UNHRC January 2015 Report (n 5) paras 41–42.

hate speech.⁶² Thus, the abuse of social media has led to loss of lives in Myanmar,⁶³ Sri Lanka,⁶⁴ and Israel,⁶⁵ among others.⁶⁶

19. While online hate speech may be capable of self-regulation,⁶⁷ states should be less tolerant of hate speech against minorities. This is because minorities are more likely to face retaliation when speaking up against hate speech.⁶⁸ As Brinnans are an ethnic minority in Omeria,⁶⁹ there is a greater need to address posts #1–3.

⁶² UNHRC September 2012 Report (n 38) para 30; UNHRC January 2015 Report (n 5) paras 75–76.

⁶³ Hereward Holland, ‘Facebook in Myanmar: Amplifying Hate Speech?’ *Aljazeera* (14 June 2014) <<http://www.aljazeera.com/indepth/features/2014/06/facebook-myanmar-rohingya-amplifying-hate-speech-2014612112834290144.html>> accessed 17 January 2016.

⁶⁴ Shilpa Samaratunge and Sanjana Hattotuwa, ‘Liking Violence: A Study of Hate Speech on Facebook in Sri Lanka’ (2014) <<http://www.cpalanka.org/liking-violence-a-study-of-hate-speech-on-facebook-in-sri-lanka/>> accessed 17 January 2016, 10.

⁶⁵ Jodi Rudoren, ‘Leaderless Palestinian Youth, Inspired by Social Media, Drive Rise in Violence in Israel’ *New York Times* (13 October 2015) <<http://www.nytimes.com/2015/10/14/world/middleeast/leaderless-palestinian-youth-inspired-by-social-media-drive-a-rise-in-violence.html>> accessed 17 January 2016.

⁶⁶ Index on Censorship, ‘Free Speech in India: Uptick in Defamation, Attacks on Media Cause for Concern’ (19 December 2014) <<https://www.indexoncensorship.org/2014/12/free-speech-india-uptick-defamation-attacks-media-cause-concern/>> accessed 17 January 2016; Bhanu Bhakta Acharya, ‘War on the Web’ *The Kathmandu Post* (4 September 2015) <<http://kathmandupost.ekantipur.com/news/2015-09-04/war-on-the-web.html>> accessed 17 January 2016.

⁶⁷ Monroe Price and Stefaan Verhulst, *Self-Regulation and the Internet* (Kluwer Law International 2005) para 15.

⁶⁸ UNHRC January 2015 Report (n 5) para 33; The International Movement against All Forms of Discrimination and Racism, ‘IMADR Oral Statement: 28th Session of the Human Rights Council Item 3: Interactive Dialogues with the Special Rapporteur on Minority Issues’ (18 March 2015) <http://imadr.org/wordpress/wp-content/uploads/2015/03/Oral-Statement_HRC-28th_item-3-ID-with-the-SR-on-minority-issues_18MAR2015.pdf> accessed 17 January 2016.

⁶⁹ Paras 2–3 of the facts.

2. The prosecution was proportionate as it was in line with the punishments imposed by other states and it was necessary due to Omeria's socio-political context

20. Proportionality requires that states go no further than necessary to achieve the relevant legitimate aim,⁷⁰ so as to balance the community's and the individual's interests.⁷¹

21. The two-year jail term was proportionate. First, the nature and severity of the punishment imposed are relevant.⁷² Jail sentences of 1–2 years have been imposed for hate speech even in stable democracies such as Canada,⁷³ the UK,⁷⁴ and Brazil.⁷⁵

22. Secondly, the punishment has to be seen in the context of Omeria's grave socio-political climate. In countries such as Germany,⁷⁶ Turkey,⁷⁷ and Pakistan,⁷⁸ where there exists a history of

⁷⁰ 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; HRC, 'General Comment 22' (30 July 1993) UN Doc CCPR/C/21/Rev.1/Add.4 para 8; General Comment 34 (n 3) para 34.

⁷¹ *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) ('*Ozgur*') para 43; *Christine Goodwin v UK* App no 28957/95 (ECtHR, 11 July 2002) para 72.

⁷² *Ceylan* (n 12) para 37; *Gündüz v Turkey* App no 3571/97 (ECtHR, 4 September 2003) ('*Gündüz*') para 42; *Salov v Ukraine* App no 65518/01 (ECtHR 6 September 2005) para 115; *Kwiecień v Poland* App no 51744/99 (ECtHR, 9 January 2007) para 56; *Murat Vural* (n 12) para 64.

⁷³ Paul Fromn, 'Canadian Police State vs Brad Love' *American Free Press* (31 December 2013) <<http://americanfreepress.net/canadian-police-state-vs-brad-love/>> accessed 17 January 2016; Vincent McDermott, 'Anti-Immigrant Activist Arrested for Allegedly Violating Probation' *Fort McMurray Today* (2 March 2015) <<http://www.fortmcmurraytoday.com/2015/03/02/anti-immigrant-activist-arrested-for-allegedly-violating-probation>> accessed 17 January 2016; Christie Blatchford, 'Convicted Hate Monger Gets Added Jail Time for His Muslim-Offending "Social Experiment"' *Postmedia News* (6 January 2015) <<http://o.canada.com/news/blatchford-convicted-hate-monger-gets-added-jail-time-for-his-muslim-offending-social-experiment>> accessed 17 January 2016.

⁷⁴ Gary Young, 'Man Jailed for 12 Months for Stirring Up Racial Hatred' *Birmingham Mail* (8 January 2014) <<http://www.birminghammail.co.uk/news/midlands-news/man-jailed-12-months-stirring-6481580>> accessed 17 January 2016; Jasbir Authi, 'Ku Klux Klan Racist Sent Back to Jail for New Far Right Facebook Tirade' *Birmingham Mail* (1 May 2015) <<http://www.birminghammail.co.uk/news/ku-klux-klan-racist-sent-9164246>> accessed 17 January 2016.

⁷⁵ Dara Kerr, 'Twitter User in Brazil Gets Prison Sentence for Inciting Prejudice' *CNET* (17 May 2012) <<http://www.cnet.com/news/twitter-user-in-brazil-gets-prison-sentence-for-inciting-prejudice/>> accessed 17 January 2016.

ethnic violence, hate speech is correspondingly more dangerous. Hence, harsher jail terms of 4–5 years have been meted out in these states. Given the severity and rapid proliferation of online hate speech,⁷⁹ Umani’s punishment was justified.

23. Finally, the two-year jail term did not solely involve violations of the NHA, but also of the ATEL.⁸⁰ The violation of the ATEL itself justified the two-year jail term.⁸¹

24. Ultimately, states are accorded a wide margin of appreciation to determine the appropriate punishment for hate speech.⁸² National authorities are better placed to decide this based on the unique social context of the state.⁸³ Umani’s sentence was thus not excessive.

⁷⁶ Kate Connelly, ‘Holocaust Denial Writer Jailed for Five Years’ *The Guardian* (16 February 2007) <<http://www.theguardian.com/world/2007/feb/16/historybooks.secondworldwar>> accessed 17 January 2016.

⁷⁷ Council of Europe, ‘Freedom of Expression in Europe’ (2007) <[http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-18(2007).pdf)> accessed 17 January 2016.

⁷⁸ Staff Reporter, ‘Prayer Leader Jailed for Five Years over Hate Speech’ *Dawn News* (20 May 2015) <<http://www.dawn.com/news/1183023>> accessed 17 January 2016.

⁷⁹ UNHRC September 2012 Report (n 38) para 30; Samaratunge and Hattotuwa (n 64) paras 41–42.

⁸⁰ Para 19 of the facts.

⁸¹ See paras 55–56 of this Memorial.

⁸² *Sürek (No 1) v Turkey* App no 26682/95 (ECtHR, 8 July 1999) (‘*Sürek (No 1)*’) para 61. See also Wolfgang Benedek and Matthias Kettemann, *Freedom of Expression and the Internet* (Council of Europe 2014) para 5.1; 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_freedom_of_expression_and_freedom_of_religion_final_.doc> accessed 17 January 2016, 6;

⁸³ *Perincek* (n 9) para 96; Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (OUP 2012) 153.

II. OMERIA DID NOT VIOLATE CHATTER'S RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY BY PROSECUTING CHATTER UNDER THE NHA FOR POSTS #1 AND #3

25. Social media, as an unprecedented medium for public discourse, fulfills an important democratic function.⁸⁴ By providing anonymity to users, social media platforms encourage greater participation in the public sphere.⁸⁵ However, users may be irresponsible, as evidenced by posts that have sparked violence.⁸⁶ Hence, whilst states have a duty to regulate their citizens' conduct, social media platforms also shoulder certain responsibilities.⁸⁷

26. Chatter's right to privacy was not violated as (A) it does not have such a right. Even if it were accepted that Chatter has a right to privacy, the prosecution of Chatter under the NHA was justified as it was: (B) prescribed by law; (C) in pursuit of a legitimate aim; and (D) necessary in a democratic society.

⁸⁴ UNHRC May 2011 Report (n 4) para 2; *Delfi June 2015* (n 17) para 110.

⁸⁵ UNHRC April 2013 Report (n 10) para 23; UNHRC May 2015 Report (n 9) para 47.

⁸⁶ Christian Fuchs, 'Behind the News Social Media, Riots, and Revolutions' (2011) 36(3) *Capital & Class* 383, 384; Karim Sorour and Bidit Lal Dey, 'Energising the Political Movements in Developing Countries: The Role of Social Media' (2014) 38(3) *Capital & Class* 508, 509. See also Sam Gustin, 'Social Media Sparked, Accelerated Egypt's Revolutionary Fire' (2 November 2011) <<http://www.wired.com/2011/02/egypts-revolutionary-fire/>> accessed 17 January 2016; Fiona Broom, 'Rubbish Revolution: How Social Media Sparked Mass Protests in Beirut' (2015) <<http://www.thevocal.com.au/rubbish-revolution-how-social-media-sparked-mass-protests-in-beirut/>> accessed 17 January 2016; Jay Michaelson, 'How Social Media has Already Enflamed the Latest Israel-Palestine Conflict' (14 October 2015) <<http://www.thedailybeast.com/articles/2015/10/14/the-intifada-will-be-instagrammed-how-social-media-has-already-enflamed-the-latest-israel-palestine-conflict.html>> accessed 17 January 2016; Geraint Vincent, 'Analysis: Palestinian Anger, Bloodshed, Plays Out on Social Media' *NBC News* (15 October 2015) <<http://www.nbcnews.com/news/world/analysis-palestinian-anger-bloodshed-plays-out-social-media-n445046>> accessed 17 January 2016.

⁸⁷ UNHRC May 2015 Report (n 9) para 54; *Delfi June 2015* (n 17) para 111.

A. CHATTER HAS NO RIGHT TO PRIVACY AS IT DOES NOT POSSESS THE QUALITIES OF NATURAL PERSONS WITH PRIVACY INTERESTS AT STAKE

27. While corporations may possess the right to disseminate information,⁸⁸ it is unclear if corporations have the right to privacy.⁸⁹ First, corporations do not possess the qualities of natural persons with privacy interests.⁹⁰ The recognition of the right to privacy arises from a person's autonomy, an intrinsic value of being human.⁹¹

28. Secondly, even if social media platforms like Chatter assert a derivative right to privacy in defence of the privacy interests of its users, this right does not extend to shielding suspected criminals from investigation.⁹² The 'public's interest in the information sought outweighs a legitimate expectation of privacy'.⁹³ This is because corporations are 'creatures... invented for the public benefit'.⁹⁴ Chatter does not have a derivative right to privacy in respect of Umani as it cannot shield a suspected criminal from investigations.

⁸⁸ *Sunday Times* (n 12) para 47; *News Verlags GmbH v Austria* App no 31457/96 (ECtHR, 11 April 2000) para 39; *Federal Election Commission v Wisconsin Right to Life Inc* (2007) 551 US 449, 28–29. See also UDHR art 19(1).

⁸⁹ Bryce Clayton Newell, 'Rethinking Reasonable Expectations of Privacy Online Social Networks' (2011) 17 *Richmond Journal of Law and Technology* 12, 24; Elizabeth Pollman, 'A Corporate Right to Privacy' (2014) 99 *Minnesota Law Review* 27, 39. See also *Federal Communications Commission v AT&T* no 09-1279 (131 S Ct 1177) 6.

⁹⁰ Pollman (n 89) 39. See also *Fleck & Associates Inc v City of Phoenix* (2006) 471 F 3d 1100 paras 16–18.

⁹¹ Nowak (n 28) 377; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd edition, OUP 2004) para 16.01.

⁹² Pollman (n 89) 58. See also *Whalen v Roe* (1977) 429 US 589 ('Whalen') 599; *Nixon v Administrator of General Services* (1977) 433 US 425; Thaddeus Hoffmeister, *Social Media in the Courtroom: A New Era for Criminal Justice* (Praeger 2014) 90; Rick Kubler, 'Recent Development in Discovery of Social Media Content' (4 March 2015) <http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_inscle_materials/written_materials/24_1_recent_developments_in_discovery_of_social_media_content.authcheckdam.pdf> accessed 17 January 2016, 4.

⁹³ Pollman (n 89) 57. See also *Whalen* (n 92) 599.

⁹⁴ Kayla Robinson, 'Corporate Rights and Individual Interests: The Corporate Right to Privacy as a Bulwark against Warrantless Government Surveillance' (2015) 36 *Cardozo Law Review* 2283, 2294. See also *California Bankers Association v Shultz* (1974) 416 US 21, 66; *Marshall v Barlow's Inc* (1978) 436 US 307, 313.

B. THE PROSECUTION WAS PRESCRIBED BY LAW AS CHATTER COULD FORESEE LIABILITY FOR FACILITATING POSTS #1 AND #3

29. As stated above,⁹⁵ a statute is prescribed by law where it is sufficiently precise.⁹⁶ Section D, which holds an ‘entity responsible for facilitating another’s statement’,⁹⁷ is sufficiently precise. A statute is sufficiently precise even if an entity has to take appropriate legal advice to assess the consequences of a given action.⁹⁸ This is especially so if the entity carries on professional activities that entail a high degree of caution.⁹⁹ Since Chatter is the most popular social media platform in Omeria¹⁰⁰ and there was a risk that posts can go beyond the boundaries of acceptable speech, it should have sought legal advice on the scope of Section D.

C. THE PROSECUTION PURSUED THE LEGITIMATE AIMS OF PROTECTING PUBLIC ORDER AND PRESERVING THE RIGHTS AND REPUTATIONS OF OTHERS AS POSTS #1 AND #3 WERE HATE SPEECH

30. Holding intermediaries like Chatter liable for hosting hate speech ensures the protection of public order¹⁰¹ and respect for the rights or reputations of others.¹⁰² This is especially so given the

⁹⁵ See para 4 of this Memorial.

⁹⁶ *Silver* (n 14) paras 85–90; *Malone* (n 14) paras 67–68; *Weber* (n 14) para 23; *Editorial Board* (n 14) para 51; *Ahmet* (n 14) paras 57–59; UNHRC April 2013 Report (n 10) para 29; ICCPR, ‘Concluding Observations on the Fourth Periodic Report of the United States of America’ (n 14) para 22; UNHRC June 2014 Report (n 14) para 28.

⁹⁷ Para 10(d) of the facts.

⁹⁸ *Sunday Times* (n 12) para 49; *Editorial Board* (n 14) para 51; *Centro Europa* (n 18) para 141; *Delfi June 2015* (n 17) 121.

⁹⁹ *Delfi October 2013* (n 17) para 72; *Delfi June 2015* (n 17) para 129.

¹⁰⁰ Para 6 of the facts.

¹⁰¹ ICCPR art 19 3(b).

¹⁰² ICCPR art 19 3(a).

extensive spread of communications facilitated by intermediaries.¹⁰³ Hence, the greatest increase in online hate speech has occurred on social media.¹⁰⁴ For example, social media enabled the extensive dissemination of hate speech that caused conflicts in Iraq, Afghanistan, Gaza, Ukraine, and Kenya.¹⁰⁵ This is evident also in Omeria as the NHA was passed in response to ‘a growing problem of’ hate speech on social media platforms, like Chatter.¹⁰⁶

D. THE PROSECUTION WAS NECESSARY IN A DEMOCRATIC SOCIETY

31. As stated above,¹⁰⁷ 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.¹⁰⁸

¹⁰³ Roy Balleste, ‘Persuasions and Exhortations: Acknowledging Internet Governance and Human Dignity for All’ (2011) 38 *Syracuse Journal of International Law and Commerce* 227, 254; Béatrice Farano, ‘Internet Intermediaries’ Liability for Copyright and Trademark Infringement: Reconciling the EU and US Approaches’ (2012) *Transatlantic Technology Law Forum Working Paper* no 14, 146; Peter Yu, ‘Region Codes and the Territorial Mess’ (2012) 30 *Cardozo Arts and Entertainment Law Journal* 187, 229; Ira Nathenson, ‘Super-Intermediaries, Code, Human Rights’ (2013) 8 *Intercultural Human Rights Law Review* 19, 81; Molly Land, ‘Toward an International Law of the Internet’ (2013) 54 *Harvard International Law Journal* 393, 445. See also UNHRC May 2011 Report (n 4) para 74. See also UNESCO, ‘Background Note: Case Studies on the Role of Internet Intermediaries in Promoting Freedom of Expression on Internet’ (12 August 2013) <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/news/background_note_cs_role_of_internet_intermediaries.pdf> accessed 17 January 2016.

¹⁰⁴ Danielle Citron, ‘Intermediaries and Hate Speech: Fostering Digital Citizenship for our Information Age’ (2011) 91 *Boston University Law Review* 1435, 1437; Inter-Parliamentary Coalition for Combating Anti-Semitism, ‘Report and Recommendations of Yuli Edelstein, Speaker of the Knesset, and Christopher Wolf, Chair, National Civil Rights Committee of the Anti-Defamation League, Co-Chairs of the Task Force on Internet Hate of the Inter-Parliamentary Coalition for Combating Anti-Semitism’ (29 May 2013) <<http://www.adl.org/assets/pdf/press-center/ICCA-Report.pdf>> accessed 17 January 2016, 5. See also Reuters, ‘Social Networks are New Sites for Hate Speech’ (13 May 2009) <<http://www.pcmag.com/article2/0,2817,2347004,00.asp>> accessed 17 January 2016; UNESCO, *Countering Online Hate Speech* (n 20) 13; UN News Centre, ‘UN Seeks to Enlist Citizens of World as Foot Soldiers in Battle Against Hate Speech’ *UN News Centre* (2 December 2015) <<http://www.un.org/apps/news/story.asp?NewsID=52717#.VnJYiZN95R0>> accessed 17 January 2016.

¹⁰⁵ Curtis Houghland, ‘Things Fall Apart: How Social Media Leads to a Less Stable World’ (2014) <<http://knowledge.wharton.upenn.edu/article/how-social-media-leads-to-a-less-stable-world>> accessed 17 January 2016; UNESCO, *Countering Online Hate Speech* (n 20) 36.

¹⁰⁶ Para 9 of the facts.

¹⁰⁷ See para 13 of this Memorial.

¹⁰⁸ General Comment 34 (n 3) paras 22, 33–34; UNHRC April 2013 Report (n 10) para 29; *Delfi June 2015* (n 17) para 131; *Perincek* (n 9) paras 196, 228.

1. There was a pressing social need to prosecute Chatter as it did not regulate Umani's hate speech

32. The wide reach afforded by social media, coupled with the increasing ease with which hate speech can be uploaded and accessed, requires that intermediaries play an active role in regulating online content.¹⁰⁹

33. There was a pressing social need to prosecute Chatter for failing to regulate posts #1 and #3. To determine intermediary liability, the ECtHR¹¹⁰ and the CJEU¹¹¹ provide the following factors: the nature of the intermediary; the measures the intermediary has taken against the user; and the nature of its user content.

34. First, Chatter is an active intermediary. Liability may be imposed on active intermediaries.¹¹² An intermediary is active where it exercises control over its user content, and has knowledge of its controversial nature.¹¹³ While Chatter does not generate its own content,¹¹⁴ Chatter

¹⁰⁹ Mathias Klang and Andrew Murray, *Human Rights in the Digital Age* (Cavendish Publishing 2005) 121–122; UNHRC May 2011 Report (n 4) para 45; Balleste (n 103) 254; Farano (n 103) 146; Yu (n 103) 229; Nathenson (n 103) 81; Land (n 103) 445. See also UNESCO, *Countering Online Hate Speech* (n 20) 26–27.

¹¹⁰ *Delfi October 2013* (n 17) para 85; *Delfi June 2015* (n 17) paras 142–143. See also *Payam Tamiz v Google Inc* [2013] EWCA Civ 68 (*'Payam Tamiz'*) paras 7–8, 13–14, 23–25.

¹¹¹ *Google France, Google Inc v Louis Vuitton Malletier SA* C-236/08 (CJEU, 23 March 2010) (*'Google France'*) para 114; *L'Oreal SA v eBay* C-324/09 (CJEU, 12 July 2011) paras 111–113. See also Alex Comminos, 'The Liability of Internet Intermediaries in Nigeria, Kenya, South Africa and Uganda: An Uncertain Terrain' (2012) Association for Progressive Communications 11–12

¹¹² *Delfi June 2015* (n 17) paras 145–146. See also Eleonora Rabinovich, 'Challenges Facing Freedom of Expression: Intermediary Liability in Argentine Case-Law' (31 March 2012) Association for Civil Rights 9.

¹¹³ *Google France* (n 111) para 114; *Delfi June 2015* (n 17) paras 144–146. See also Rabinovich (n 112) 9.

¹¹⁴ Para 6 of the facts.

nevertheless exercises control over its user content.¹¹⁵ Additionally, Chatter knew of the controversial nature of posts #1 and #3 as they had prompted complaints.¹¹⁶

35. Secondly, Chatter generates profits from its user content. The ECtHR has emphasised the commercial interest of intermediaries in hosting posts, when imposing liability.¹¹⁷ As Chatter's very business is the hosting of its user content,¹¹⁸ this commercial interest justifies requiring Chatter to regulate posts #1 and #3.

36. Thirdly, internet-related misconduct is 'sanctioned most effectively through the indirect imposition of responsibility on intermediaries'.¹¹⁹ Intermediaries have the technical means to detect and manage hate speech.¹²⁰ Furthermore, depending on governments¹²¹ or courts¹²² to issue takedown notices would be a less timely measure. This is because online content may become viral in

¹¹⁵ Para 14(b)(i) of the facts.

¹¹⁶ Para 16 of the facts.

¹¹⁷ *Delfi June 2015* (n 18) paras 112–113, 126.

¹¹⁸ Para 6 of the facts.

¹¹⁹ Ronald Mann and Seth Belzley, 'The Promise of Internet Liability' (2005) 47 *William & Mary Law Review* 239, 265. See also Lilian Edwards, 'Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights' (2010) <http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf> accessed 17 January 2016, 26.

¹²⁰ Mann and Belzley (n 119) 268; Rabinovich (n 112) 7–9. See also Brian Lucas, 'Methods for Monitoring and Mapping Online Hate Speech' (2014) <<http://www.gsdrc.org/docs/open/HDQ1121.pdf>> accessed 17 January 2016, 2; SAS Institute, 'Using Social Media to Tackle Crime' (2015) <http://www.sas.com/en_us/insights/articles/risk-fraud/using-social-media.html> accessed 17 January 2016.

¹²¹ Center for Democracy and Technology, 'Chile's Notice-and-Takedown System or Copyright Protection: An Alternative Approach' (1 August 2012) <<https://www.cdt.org/files/pdfs/Chile-notice-takedown.pdf>> accessed 17 January 2016, 1, 3; International Intellectual Property Alliance, 'Chile: 2014 Special 301 Report on Copyright Protection and Enforcement' (2014) <<http://www.iipa.com/rbc/2014/2014SPEC301CHILE.PDF>> accessed 17 January 2016, 20.

¹²² OECD, 'The Role of Internet Intermediaries in Advancing Public Policy Objectives' (2011) OECD Publishing 154.

seconds.¹²³ Thus, intermediaries, such as Twitter, Facebook, and Snapchat, have recognised their role in regulating hate speech.¹²⁴ This problem is exacerbated by Chatter's re-chat function,¹²⁵ which furthers the rapid transmission of hate speech. Furthermore, posts on Chatter remain re-chatted even if the original author removed the post.¹²⁶

37. Finally, while Chatter suspended Umani's account once,¹²⁷ this is insufficient given the severity of posts #1 and #3.¹²⁸ Intermediaries, like Chatter, are expected to exercise 'a degree of caution' where there exists a 'higher-than-average risk that negative comments could go beyond the boundaries of acceptable criticism and reach the level of... hate speech'.¹²⁹ Chatter received continued complaints regarding @TheVigilanteInsider's controversial posts.¹³⁰ This indicated a high-than-average risk that posts #1 and #3 were hate speech. Chatter should have exercised caution by monitoring @TheVigilanteInsider. Alternatively, Chatter should have adopted tools, such as content filters,¹³¹ that would have identified posts #1 and #3 as potentially illegal content.

¹²³ Stephen Waddington, *Chartered Public Relations: Lessons from Expert Practitioners* (Kogan Page Limited 2015) 129; Pamela Engel, 'They can go Viral in a Matter of Seconds: An Inside Look at how ISIS Sympathies Spread in the US' *Business Insider* (28 December 2015) <<http://www.businessinsider.sg/isis-twitter-in-us-2015-12/#.VpL6I1KhJso>> accessed 17 January 2016.

¹²⁴ Twitter Help Centre, 'Hate Content, Sensitive Topics and Violence' <<https://support.twitter.com/articles/20170425#>> accessed 17 January 2016; Facebook, 'Community Standards' <<https://www.facebook.com/communitystandards>> accessed 17 January 2016; Snapchat, 'Terms of Service' (28 October 2015) <<https://www.snapchat.com/terms>> accessed 17 January 2016.

¹²⁵ Para 14(c)(i) of the facts.

¹²⁶ Clarification 10 (International Clarifications).

¹²⁷ Para 14(b)(i) of the facts.

¹²⁸ See paras 15–19 of this Memorial.

¹²⁹ *Delfi October 2013* (n 17) para 86. See also *Delfi June 2015* (n 18) para 159.

¹³⁰ Para 16 of the facts.

¹³¹ Chris Bingham and Tim Hautekiet, 'Copyright on YouTube: Covering Songs, Covering Backs' (21 May 2014) <<http://teneightymagazine.com/2014/05/21/copyright-on-youtube-covering-songs-covering-backs>> accessed 17 January 2016; Alex Hern, 'Twitter Announces Crackdown on Abuse with New Filter and Tighter Rules' *The Guardian* (21 April 2015) <<http://www.theguardian.com/technology/2015/apr/21/twitter-filter-notifications-for-all-accounts-abuse>> accessed 17 January 2016.

2. The prosecution was proportionate as it was in line with the punishments imposed by other states and it was necessary for deterrence

38. The fine was proportionate as Omeria is plagued with ethnic tension.¹³² First, other states impose harsher punishments on intermediaries. Under the NHA, an intermediary may be held liable for ‘monetary penalty only’.¹³³ In comparison, other states impose jail terms on directors of intermediaries,¹³⁴ and block intermediaries.¹³⁵

39. Secondly, the fine was proportionate due to Chatter’s large size. In instances of corporate liability, fines are adjusted to the size of the company to ensure their effectiveness.¹³⁶ As Chatter is the most popular social media platform,¹³⁷ operating in a country with high internet penetration and popular usage of social media,¹³⁸ a larger fine had to be imposed to ensure its effectiveness.

¹³² Para 3 of the facts.

¹³³ Para 1(d) of the facts.

¹³⁴ Sorcha Pollack, ‘Google Executive Arrested as Brazil Bans Anti-Muslim Film’ *Time* (27 September 2012) <<http://newsfeed.time.com/2012/09/27/google-executive-arrested-as-brazil-bans-anti-muslim-film/>> accessed 17 January 2016. See also Samuel Gibbs, ‘WhatsApp Blocked in Brazil for 48 Hours by Court’ *The Guardian* (17 December 2015) <<http://www.theguardian.com/technology/2015/dec/17/whatsapp-blocked-brazil-48-hours-facebook>> accessed 17 January 2016.

¹³⁵ Beeline Telecom Blog, ‘Как и почему происходит блокировка сайтов. [How and Why Websites are Blocked/Published on the Habrahabr Website] (in Russian)’ (8 August 2012) <<http://habrahabr.ru/company/beeline/blog/149249/>> accessed 17 January 2016; Arjun Kharpal, ‘Russia Threatens Block on Google, Twitter, Facebook’ *CNBC* (22 May 2015) <<http://www.cnn.com/2015/05/22/russia-threatens-block-on-google-twitter-facebook.html>> accessed 17 January 2016.

¹³⁶ European Commission, ‘Fines for Breaking EU Competition Law’ (2011) <http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf> accessed 17 January 2016, 1; *Microsoft Corp v Commission of the European Communities* T-201/04 (CJEU, 17 September 2007) (*‘Microsoft Corp’*) paras 1344, 1352, 1360–61, 1363.

¹³⁷ Para 6 of the facts.

¹³⁸ Paras 5–6 of the facts.

III. OMERIA DID NOT VIOLATE UMANI'S RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY BY PROSECUTING UMANI UNDER THE ATEL FOR POSTS #4-6

40. While social media is an important facilitator of freedom of expression,¹³⁹ it has also been abused to incite extremism.¹⁴⁰ In particular, the ease of online anonymity¹⁴¹ has emboldened individuals to incite extremism.¹⁴² Thus, while states have a duty to safeguard the rights to freedom

¹³⁹ UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (28 February 2008) UN Doc A/HRC/7/14 ('UNHRC February 2008 Report') para 23; Center for Democracy and Technology, 'Regardless of Frontiers: The International Right to Freedom of Expression in the Digital Age' (2011) <https://cdt.org/files/pdfs/CDT-Regardless_of_Frontiers_v0.5.pdf> accessed 17 January 2016, 2; UNHRC May 2011 Report (n 4) paras 2, 20; UNHRC August 2011 Report (n 4) paras 10-13; Frank LaRue, 'Joint Declaration on Freedom of Expression and the Internet' (2011) <<http://www.osce.org/fom/78309?download=true>> accessed 17 January 2016, preamble; UNHRC April 2013 Report (n 10) para 13; Monroe Price, *Free Expression, Globalism, and the New Strategic Communication* (Kindle edition, CUP 2014) ch 2; UNHRC May 2015 Report (n 9) para 11.

¹⁴⁰ UN Counter-Terrorism Committee, 'Global Survey of the Implementation of Security Council Resolution 1373' (2001) UN Counter-Terrorism Committee 7. See also UNHRC August 2011 Report (n 4) para 12; Committee on Homeland Security, 'Statement of Chairman Meehan (R-PA) Subcommittee on Counterterrorism & Intelligence: "Jihadist Use of Social Media – How to Prevent Terrorism and Preserve Innovation"' (6 December 2011) <<https://homeland.house.gov/hearing/subcommittee-hearing-jihadist-use-social-media-how-prevent-terrorism-and-preserve-innovation/>> accessed 17 January 2016; Dave Lee, 'James Foley: Extremists Battle with Social Media' *BBC* (20 August 2014) <<http://www.bbc.com/news/technology-28870777>> accessed 17 January 2016; Declan Harvey, 'How Islamic State Extremists Use Social Media to Recruit' *BBC* (23 February 2015) <<http://www.bbc.co.uk/newsbeat/article/31574846/how-islamic-state-extremists-use-social-media-to-recruit>> accessed 17 January 2016; Journalist's Resource, 'Social and News Media, Violent Extremism, ISIS and Online Speech: Research Review' (10 March 2015) <<http://journalistsresource.org/studies/society/social-media/social-media-violent-extremism-isis-online-speech-research-review>> accessed 17 January 2016; UNHRC May 2015 Report (n 9) para 2; UK Home Office Department for Education, 'How Social Media is Used to Encourage Travel to Syria and Iraq: Briefing Note for Schools' (1 July 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440450/How_social_media_is_used_to_encourage_travel_to_Syria_and_Iraq.pdf> accessed 17 January 2016, 3; Voice of America News, 'IS has "Mastered Social Media" Like No Other Extremist Group' *Voice of America* (21 October 2015) <<http://www.voanews.com/content/islamic-state-has-mastered-social-media-like-no-other-extremist-group/3017239.html>> accessed 17 January 2016.

¹⁴¹ UNHRC May 2011 Report (n 4) para 23; Lord Neuberger 'What's in a Name? – Privacy and Anonymous Speech on the Internet' (2014) <<https://www.supremecourt.uk/docs/speech-140930.pdf>> accessed 17 January 2016, 23.

¹⁴² Foxman and Wolf (n 61) 223; Jim Canfield, 'Does Anonymity Embolden the Trolls' (9 September 2015) <<https://davescomputertips.com/does-anonymity-embolden-the-trolls/>> accessed 17 January 2016; Daveed Gartenstein, 'The Social Science of Online Radicalization' (29 October 2015) <<http://warontherocks.com/2015/10/the-social-science-of-online-radicalization/>> accessed 17 January 2016.

of expression and privacy, states also have a ‘duty to take effective counter-terrorism measures’.¹⁴³

The prosecution of Umani under the ATEL was justified as it was: (A) prescribed by law; (B) in pursuit of a legitimate aim; and (C) necessary in a democratic society.

A. THE PROSECUTION WAS PRESCRIBED BY LAW

41. As stated above,¹⁴⁴ a statute is prescribed by law if it: (1) is sufficiently precise; and (2) contains adequate safeguards.¹⁴⁵

1. The ATEL is sufficiently precise as Umani could foresee liability for publishing posts #4–6

42. The ATEL is sufficiently precise as it is reasonably foreseeable that posts #4–6 are offences under Section 3. Section 3 imposes liability for the publishing of extremist statements,¹⁴⁶ such as ‘calls for the death of individuals living within [Omeria]’.¹⁴⁷ In post #4, Umani suggested that Brinnans should ‘magically disappear’ with a ‘kaboom!’¹⁴⁸ Similarly, in post #5, Umani

¹⁴³ OHCHR, ‘Human Rights, Terrorism and Counter-Terrorism – Fact Sheet no 32’ (2008) <<http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>> (‘OHCHR Fact Sheet no 32’) accessed 17 January 2016, 9. See also UN Security Council ‘Resolution 1373’ S/RES/1373 (28 September 2001) para 2(e); Organization for Security and Co-operation in Europe, ‘Countering Terrorism, Protecting Human Rights’ (2007) <<http://www.osce.org/odihr/29103?download=true>> accessed 17 January 2016, 15; OHCHR, ‘Terrorism’ <<http://www2.ohchr.org/english/issues/terrorism/>> accessed 17 January 2016.

¹⁴⁴ See para 4 of this Memorial.

¹⁴⁵ *Silver* (n 14) paras 85–90; *Malone* (n 14) paras 67–68; *Weber* (n 14) para 23; *Editorial Board* (n 14) para 51; *Ahmet* (n 14) paras 57–59; UNHRC April 2013 Report (n 10) para 29; ICCPR, ‘Concluding Observations on the Fourth Periodic Report of the United States of America’ (n 14) para 22; UNHRC June 2014 Report (n 14) para 28.

¹⁴⁶ Para 4(c) of the facts.

¹⁴⁷ Para 4(a) of the facts.

¹⁴⁸ Para 14(d) of the facts.

commanded his readers to ‘[d]o [their] part to purify Omeria’.¹⁴⁹ The word ‘purify’ is particularly revealing of Umani’s call for the deaths of Brinnans, as ‘purify’ is often used to incite the elimination of certain groups of people.¹⁵⁰ Alternatively, it is reasonably foreseeable that posts #4–6 are offences under Section 3, as they are contrary to the values of ‘individual liberty’ and ‘mutual respect and tolerance’.¹⁵¹

43. While the ATEL contains terms such as ‘fundamental Omerian values’¹⁵² which may be broad, as stated above,¹⁵³ absolute certainty is not required, as laws must be broad enough to keep pace with societal changes.¹⁵⁴

2. The ATEL has adequate safeguards as Omeria must establish the elements set out in the ATEL and decisions can be appealed

44. The ATEL contains adequate safeguards against unfettered discretion. First, Section 3 delineates the scope of Omeria’s discretion. The delineation of discretion is a safeguard.¹⁵⁵ Here, Omeria does not have unfettered discretion to sanction speech, as it must first establish the elements

¹⁴⁹ Para 14(e) of the facts.

¹⁵⁰ Permanent Mission of Israel to the UN, ‘Incitement to Terror and Violence’ (28 February 2013) <<http://embassies.gov.il/un/statements/Pages/Incitement-to-Terror-and-Violence.aspx>> accessed 17 January 2016; Stuart Winer, ‘Fatah Official Calls for Blood to ‘Purify’ Jerusalem of Jews’ *The Times of Israel* (16 November 2014); Steven Emerson, ‘A List of Recent Palestinian Incitement, Attacks, Glorification’ *The Algemeiner* (19 November 2014); JTA, ‘Leader of Islamic Movement in Israel Handed 11 Month Sentence for Inciting Violence’ *The Jerusalem Post* (28 March 2015); Marissa Newman, ‘In First, Palestinian Official Jailed for Facebook Posts’ *The Times of Israel* (12 May 2015); UN Women, ‘Arab States/North Africa Voices of Women Survivors of Violence: Mona’s “Purification”’ (24 November 2015) <<http://arabstates.unwomen.org/en/news/stories/2015/11/mona>> accessed 17 January 2016.

¹⁵¹ Para 4(a) of the facts.

¹⁵² Para 4(a) of the facts.

¹⁵³ See para 6 of this Memorial.

¹⁵⁴ *Müller* (n 17) para 29; *Kokkinakis* (n 17) para 40; *Lindon* (n 17) para 41; *Delfi October 2013* (n 17) paras 71, 75.

¹⁵⁵ *Malone* (n 14) para 68; *Liu* (n 22) para 88. See also *Silver* (n 14) para 90; *Huvig* (n 22) para 34; *Kruslin* (n 22) para 35.

of extremist speech,¹⁵⁶ before liability is triggered. Similarly, emergency orders are only granted ‘upon application and sufficient showing’, and only for the purpose of ‘provisionally remedy[ing] violations’ of the ATEL.¹⁵⁷

45. Secondly, although Section 5 does not provide a maximum punishment, the ATEL has adequate safeguards as it does not restrict Umani’s right to appeal.¹⁵⁸ The right to appeal is a safeguard.¹⁵⁹ Furthermore, it would be difficult to stipulate a meaningful maximum punishment given the broad range of offences under the ATEL – from making a statement opposing the rule of law to providing weapons to terrorists.¹⁶⁰ Moreover, with the ever-changing digital landscape, it is difficult to stipulate the range of punishments as terrorism can take various forms.¹⁶¹ Hence, many states prescribe either broad maximum punishments, such as life imprisonment,¹⁶² or do not stipulate a maximum at all.¹⁶³

¹⁵⁶ Para 4(c) of the facts.

¹⁵⁷ Para 4(f) of the facts.

¹⁵⁸ Para 21 of the facts.

¹⁵⁹ *Klass* (n 25) para 56; *Malcolm Ross* (n 10) para 11.4; *Uzun* (n 25) para 72; *Gurtekin* (n 25) para 28.

¹⁶⁰ Para 4 of the facts.

¹⁶¹ Matt A. Mayer, ‘Changing Today’s Law Enforcement Culture to Face 21st-Century Threats’ (23 June 2011) <<http://www.heritage.org/research/reports/2011/06/changing-todays-law-enforcement-culture-to-face-21st-century-threats>> accessed 17 January 2016. See also Graeme Newman, ‘Policing Terrorism: An Executive’s Guide’ (2008) <<http://www.popcenter.org/library/reading/pdfs/policingterrorism.pdf>> accessed 17 January 2016, 36; Bill Lamb, ‘Terrorism Takes Many Forms’ (18 November 2015) <<http://www.wdrb.com/story/30537721/pov-terrorism-takes-many-forms>> accessed 17 January 2016.

¹⁶² Penal Code 1956 (Thailand) s 135; Penal Code 1974 (Oman) art 132; Penal Code 1999 (Vietnam) art 84(1); Anti-Terrorism Act no 21 of 2007 (Zambia) s 10–11.

¹⁶³ UN (Anti-Terrorism Measures) Regulations 2003 (Singapore) s 11.

B. THE PROSECUTION PURSUED THE LEGITIMATE AIM OF PROTECTING NATIONAL SECURITY AS POSTS #4–6 WERE EXTREMIST STATEMENTS

46. The prosecution pursued the legitimate aim of protecting national security, as it is part of Omeria’s counter-extremism efforts. The rights to freedom of expression¹⁶⁴ and privacy¹⁶⁵ may be restricted to protect national security, which encompasses a state’s counter-extremism efforts.¹⁶⁶ States are given latitude to determine what their national security requires.¹⁶⁷ Given the escalating acts of terrorism,¹⁶⁸ the extremist nature of posts #4–6 concerns national security. Furthermore, posts #4–6 were made close to the anniversary of the Armistice, when violence traditionally occurs.¹⁶⁹ The prosecution against Umani’s extremist speech therefore pursues the legitimate aims of countering-extremism.

C. THE PROSECUTION WAS NECESSARY IN A DEMOCRATIC SOCIETY

47. As stated above,¹⁷⁰ 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.¹⁷¹

¹⁶⁴ ICCPR art 19(3)(b); *Gündüz* (n 72) para 28; UNHRC May 2011 Report (n 4) para 36; General Comment 34 (n 3) para 21; UNHRC April 2013 Report (n 10) para 29.

¹⁶⁵ UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism’ (28 December 2009) UN Doc A/HRC/13/37 paras 16–18; *Uzun* (n 25) para 77; UNHRC April 2013 Report (n 10) paras 28–29; IACHR 2013 Report (n 4) para 157.

¹⁶⁶ OHCHR Fact Sheet no 32 (n 143) 24; Council of Europe, ‘Speaking of Terror’ (2008) <http://www.coe.int/t/dghl/standardsetting/media/doc/SpeakingofTerror_en.pdf> accessed 17 January 2016, 5; UNHRC May 2011 Report (n 4) para 25.

¹⁶⁷ *Klass* (n 25) para 49; *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987) para 59; *Malone* (n 14) para 81; *Hatton v UK* App no 36022/97 (ECtHR, 8 July 2003) (*‘Hatton’*) para 97; *Weber* (n 14) paras 96–100.

¹⁶⁸ Paras 3–4 of the facts.

¹⁶⁹ Para 3 of the facts.

¹⁷⁰ See para 13 of this Memorial.

¹⁷¹ General Comment 34 (n 3) paras 22, 33–34; UNHRC April 2013 Report (n 10) para 29; *Delfi June 2015* (n 18) para 131; *Perincek* (n 9) paras 196, 228.

1. There was a pressing social need to prosecute Umani as he engaged in extremist speech

48. There was a pressing social need to procure Umani's identity¹⁷² and imprison him.¹⁷³ A state may interfere with an individual's rights to freedom of expression and privacy if he engages in extremist speech.¹⁷⁴ According to the Johannesburg Principles the following factors must be satisfied: the speaker must intend to incite imminent violence; the speech must be likely to incite imminent violence; and there must be a direct connection between the expression, and the likelihood of such violence.¹⁷⁵ The Johannesburg Principles have been endorsed by multiple UN Special Rapporteurs.¹⁷⁶ Additionally, the Council of Europe,¹⁷⁷ the SCOTUS,¹⁷⁸ and the IACtHR¹⁷⁹ have recognised that an individual's rights should only be interfered with where the speaker intended to, and was likely to incite such violence.

¹⁷² Para 17 of the facts.

¹⁷³ Para 19 of the facts.

¹⁷⁴ *Malcolm Ross* (n 10) para 11.5; UNHRC January 2015 Report (n 5) paras 52–54; *Delfi June 2015* (n 18) paras 48, 131; *Perincek* (n 9) paras 196, 204.

¹⁷⁵ Article 19, 'The Johannesburg Principles on National Security, Freedom of Expression and Access to Information' (1996) <<https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>> accessed 17 January 2016, 9.

¹⁷⁶ UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (22 March 1996) UN Doc E/CN.4/1996/39 para 154; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (28 January 1998) UN Doc E/CN.4/1998/40 para 48; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (29 January 1999) UN Doc E/CN.4/1999/64 para 23; UNHRC May 2011 Report (n 4) para 36.

¹⁷⁷ Council of Europe, 'Council of Europe Convention on the Prevention of Terrorism' CETS no 196 (entered into force 1 June 2007) art 5(1); Council of the European Union Framework Decision 2008/919/JHA Amending Framework Decision 2002/475/JHA on Combating Terrorism [2008] OJ L330 of 9 December 2008.

¹⁷⁸ *Brandenburg v Ohio* (1969) 95 US 444, 447; *Hess v Indiana* (1973) 414 US 105, 108; *NAACP v Claiborne Hardware Co.* (1982) 458 US 886, 928; Michael Curtis, *Free Speech, 'The People's Darling Privilege'* (Michael Kent Curtis 2000) 394–397; Ivan Hare and James Weinstein, *Extreme Speech and Democracy* (OUP 2010) 41; Susan Gilles, 'Brandenburg v State of Ohio: An "Accidental", "Too Easy", and "Incomplete" Landmark Case' (2010) 38 *Capital University Law Review* 517, 522–525; Lucas Powe, 'Brandenburg: Then and Now' (2011) 44 *Texas Tech Law Review* 69, 75–77.

¹⁷⁹ IACtHR, 'Annual Report of the Inter-American Commission on Human Rights 1994' (17 February 1995) OEA/SerL/V/V 211 Doc 9; Sandra Coliver, 'Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information' (1998) 20 *Human Rights Quarterly* 12, 40.

49. Posts #4–6 were extremist speech. First, Umani intended to incite imminent violence. A speaker’s intention is discerned from the surrounding circumstances.¹⁸⁰ Posts #4–6, published near the anniversary of the Armistice, made explicit reference to Brinnans.¹⁸¹ In post #5, Umani even urged readers to ‘purify Omeria’.¹⁸² This is indicative of Umani’s intention to incite imminent violence. Furthermore, Umani subsequently affirmed¹⁸³ @NightWatcher00’s support of post #5.¹⁸⁴ This corroborates Umani’s intent to incite imminent violence, as The Night Watch is a designated terrorist group that frequently carries out attacks against Brinnans around the anniversary of the Armistice.¹⁸⁵ Umani’s encouragements of radicalism normalise and legitimise the sentiment that Brinnans should be treated with violence.

50. Secondly, posts #4–6 were likely to incite imminent violence. While no violence occurred during the anniversary of the Armistice,¹⁸⁶ ‘incitement as an inchoate crime does not require that the incitement has been acted upon’.¹⁸⁷ Omeria struggles ‘with controlling radicalized citizens’¹⁸⁸ and faces escalating acts of terrorism.¹⁸⁹ It was therefore necessary for Omeria to take proactive steps to

¹⁸⁰ *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) para 31. See also Toby Mendel, ‘Study on International Standards Relating to Incitement to Genocide or Racial Hatred: For the UN Special Advisor on the Prevention of Genocide’ (2006) <http://www.concernedhistorians.org/content_files/file/TO/239.pdf> accessed 17 January 2016, 48; Article 19, ‘Prohibiting Incitement’ (n 46) 27.

¹⁸¹ Para 3 of the facts.

¹⁸² Para 14(e) of the facts.

¹⁸³ Para 14(e)(ii) of the facts.

¹⁸⁴ Para 14(e) of the facts.

¹⁸⁵ Para 3 of the facts.

¹⁸⁶ Para 18 of the facts.

¹⁸⁷ General Recommendation No 35 (n 44) para 16. See also UNHRC Rabat Plan (n 4) para 22.

¹⁸⁸ Para 3 of the facts.

¹⁸⁹ Para 4 of the facts.

curb extremist speech. Several states, such as Italy,¹⁹⁰ Jordan,¹⁹¹ the UK,¹⁹² and Kenya¹⁹³ have similarly adopted preventative measures.

51. Furthermore, the likelihood of violence arising from posts #4–6 is exacerbated by the nature of social media. Individuals can spread extremist statements without fear of consequences¹⁹⁴ due to the ease of online anonymity¹⁹⁵ and the viral nature of social media.¹⁹⁶ Umani’s posts were circulated on the most popular social media platform in Omeria,¹⁹⁷ ‘one of the heaviest users of internet bandwidth per capita in the world’.¹⁹⁸ Notably, post #4 was re-chatted 3,500 times.¹⁹⁹

2. The prosecution was proportionate

52. In examining the proportionality of an interference, states ‘enjoy a wider margin of appreciation’ where ‘remarks incite to violence against... a sector of the population’.²⁰⁰ Both the: (a) removal of Umani’s anonymity; and (b) jail term were proportionate.

¹⁹⁰ Criminal Code 1931 (Italy) art 302.

¹⁹¹ Penal Code 1960 (Jordan) art 147.

¹⁹² Counter-Terrorism and Security Act 2015 (UK) ch 6.

¹⁹³ Prevention of Terrorism Act 2012 (Kenya) s 27.

¹⁹⁴ US Institute of Peace, ‘How Modern Terrorism Uses the Internet’ (2004) <<http://www.usip.org/sites/default/files/sr116.pdf>> accessed 17 January 2016, 1; UN Office on Drugs and Crime, ‘The Use of the Internet for Terrorist Purposes (2012) UN Office on Drugs and Crime 3, 17.

¹⁹⁵ UNHRC May 2015 Report (n 9) para 13. See also UNHRC January 2015 Report (n 5) para 76.

¹⁹⁶ UNHRC January 2015 Report (n 5) para 75; UNHRC May 2015 Report (n 9) para 11.

¹⁹⁷ Paras 6, 14 of the facts.

¹⁹⁸ Para 5 of the facts.

¹⁹⁹ Para 14(d)(i) of the facts.

²⁰⁰ *Ceylan* (n 12) para 34; *Sürek (No 1)* (n 82) para 61; *Sürek (No 3) v Turkey* App no 24735/94 (ECtHR, 8 July 1999) para 37; *Şener v Turkey* App no 26680/95 (ECtHR, 18 July 2000) para 40. See also *Klass* (n 25) para 59; *Hatton* (n 167) para 122; *Ždanoka v Latvia* App no 58278/00 (ECtHR, 16 March 2006) paras 106–111; Council of Europe, ‘Freedom of Expression in Europe’ (n 77) 77; *Lambert v France* App no 46043/14 (ECtHR, 5 June 2013) paras 31–41.

a. *Removing Umani's online anonymity was proportionate as there was public interest to disclose Umani's identity*

53. It was necessary to inform the media of Umani's identity.²⁰¹ First, as @TheVigilanteInsider is widely suspected to be a high-level government insider,²⁰² revealing his identity indicates that the government does not condone violence against Brinnans. This is important because incendiary speech by perceived government sources could legitimise extremist sentiments, thereby encouraging violence.²⁰³ Furthermore, it was necessary to dispel notions of the government's anti-Brinnan stance, as expressed in the editorial published by Omeria's leading newspaper,²⁰⁴ and given Tavarini's well-known hard line stance against Brinnans.²⁰⁵

54. Secondly, an individual's identity is conferred less protection where the matter is of public interest.²⁰⁶ This is especially so where the individual is a public figure.²⁰⁷ The 'right of the public to be informed can... extend to... the private life of public figures'.²⁰⁸ With escalating acts of terrorism committed by The Night Watch,²⁰⁹ the extremist nature of posts #4–6,²¹⁰ and

²⁰¹ Para 17 of the facts.

²⁰² Para 13 of the facts.

²⁰³ *Erbakan* (n 54) para 64; UNHRC September 2012 Report (n 38) para 24.

²⁰⁴ Para 16 of the facts.

²⁰⁵ Para 11 of the facts.

²⁰⁶ *Ozgur* (n 71) para 68; IACHR, 'Declaration on Principles on Freedom of Expression' (adopted 20 October 2000) principle 10; *Petrenco v Moldova* App no 20928/05 (ECtHR, 30 March 2010) ('*Petrenco*') para 55; *Fontevicchia v Argentina*, Merits, Reparations and Costs Judgment (IACtHR, 29 November 2011) para 71; *Von Hannover v Germany (no 2)* App nos 40660/08, 60641/08 (ECtHR, 7 February 2012) ('*Von Hannover*') para 109.

²⁰⁷ *Ozgur* (n 71) para 68; *Petrenco* (n 206) para 55; *Von Hannover* (n 206) para 110.

²⁰⁸ *Editions Plon v France* App no 58184/00 (ECtHR, 18 May 2004) para 53; *Von Hannover* (n 206) para 60; *Standard Verlags Gmbh v Austria (No 2)* App no 21277/05 (ECtHR, 4 June 2009) para 48.

²⁰⁹ Para 4 of the facts.

²¹⁰ Paras 14(d)–(e) of the facts.

@TheVigilanteInsider's correspondence with @NightWatcher00,²¹¹ @TheVigilanteInsider's identity is a matter of public interest. Furthermore, Umani is a public figure²¹² and there was a public interest in revealing Umani's identity, given the particularly strong outcry over posts #4–6.²¹³

b. Imprisoning Umani was proportionate as it was in line with the punishments imposed by other states and posts #4–6 were published on social media

55. The two year jail term is proportionate, as Omeria faces escalating acts of extremism.²¹⁴ Extremism-related offences are considered serious crimes in many jurisdictions, as extremism 'pose[s] a direct threat to international security... and undermine[s] universal values of peace, justice and human dignity'.²¹⁵ Given the gravity of the offence, the maximum punishment for

²¹¹ Para 14(e)(ii) of the facts.

²¹² Para 11 of the facts.

²¹³ Para 16 of the facts.

²¹⁴ Para 4 of the facts.

²¹⁵ UN News Centre, 'Growing Threat of Violent Extremism Demands Unified Response, UN Chief Tells Summit' *UN News Centre* (29 September 2015) <<http://www.un.org/apps/news/story.asp?NewsID=52041#.VpNfu5N95R0>> accessed 17 January 2016. See also Paul Thomas, *Responding to the Threat of Violent Extremism* (Bloomsbury Academic 2012) 104; Asian African Legal Consultative Organization, 'Background Paper: Special Half-day Meeting on Violent Extremism and Terrorism (Legal Aspects)' (18 September 2014) <<http://www.aalco.int/53rdsession/Background%20Paper%20Final%202014.pdf>> accessed 17 January 2016, 1–2; Marco Lombardi and others, *Countering Radicalization and Violent Extremism Among Youth to Prevent Terrorism* (IOS Press 2014) 31; Organization for Security and Co-operation in Europe, *Preventing Terrorism and Countering Violent Extremism and Radicalisation that Lead to Terrorism: A Community-Policing Approach* (Organization for Security and Co-operation in Europe 2014) 20, 29.

propagating extremist statements ranges from three-year jail terms to the death penalty.²¹⁶ Umani's two-year jail term is therefore justified to deter incitement of violence against Brinnans. This is necessary considering Omeria's struggle with radicalisation.²¹⁷

56. Secondly, Umani's abuse of social media to spread extremist statements warranted an increased sentence. Extremist statements propagated via mass communication deserve an increased sentence.²¹⁸ Umani's posts were made to 844,056 followers²¹⁹ and post #4 was re-chatted 3,500 times.²²⁰ Given Omeria's high internet penetration²²¹ and Chatter's popularity in Omeria,²²² the two-year jail term was justified.

²¹⁶ Penal Code 1999 (Vietnam) art 84(3); Law on Combating Terrorism Law no 15/2003 (Indonesia) art 14; Criminal Code 2004 Law no 5237 (Turkey) art 220(8); Penal Code 2005 (France) art 421–5; Terrorism Act 2006 Chapter 11 (UK) s 1(7)(a); Penal Code 2013 (Austria) s 282; Criminal Code 2014 (Canada) s 83.18. See also Council of Europe, 'Collection of Relevant Case-Law of the ECtHR Related to "Apologie du Terrorism" and "Incitement to Terrorism"' (2004) <[https://www.coe.int/t/dghl/standardsetting/media/ConfAntiTerrorism/CODEXTER\(2004\)19_en.pdf](https://www.coe.int/t/dghl/standardsetting/media/ConfAntiTerrorism/CODEXTER(2004)19_en.pdf)> accessed 17 January 2016, 14; BBC, 'Four Men Jailed over Cartoon Demo' *BBC* (18 July 2007) <<http://news.bbc.co.uk/2/hi/uk/6904622.stm>> accessed 17 January 2016; *R v Rahman and Mohammed* [2008] EWCA Crim 1465 para 8; El Pais, 'Rapper Given Two-Year Prison Sentence for Singing Praises of Terrorists' (1 April 2014) <http://elpais.com/elpais/2014/04/01/inenglish/1396368922_728869.html> accessed 17 January 2016; Preventing, Redressing and Inhibiting Hate Speech in New Media, 'Hate Crime and Hate Speech in Europe: Comprehensive Analysis of International Law Principles, EU-Wide Study and National Assessments' (2015) <<http://www.prismpoint.eu/wp-content/uploads/2015/11/Hate-Crime-and-Hate-Speech-in-Europe.-Comprehensive-Analysis-of-International-Law-Principles-EU-wide-Study-and-National-Assessments.pdf>> accessed 17 January 2016, 257; Maayan Lubell, 'Israel Sentences Islamic Leader to Jail for Incitement' *Reuters* (27 October 2015) <<http://www.reuters.com/article/us-israel-palestinians-sheikh-idUSKCN0SL2MA20151027>> accessed 17 January 2016.

²¹⁷ Para 3 of the facts.

²¹⁸ Council of Europe, 'Collection of Relevant Case-Law of the ECtHR Related to "Apologie du Terrorism" and "Incitement to Terrorism"' (2004) (n 216) 13; Penal Code 2015 (France) art 421–2–5; BBC, 'Anzac Day Terror Plot: Blackburn Boy Sentenced to Life' *BBC* (2 October 2015); Thomas Burrows, 'Blogger is Jailed for Five Years in Russia for Urging People to Protest' *Daily Mail* (30 December 2015) <<http://www.dailymail.co.uk/news/article-3378855/Russian-court-jails-blogger-five-years-extremist-posts.html>> accessed 17 January 2016.

²¹⁹ Para 4(a) of the facts.

²²⁰ Para 13 of the facts.

²²¹ Para 5 of the facts.

²²² Para 6 of the facts.

IV. OMERIA DID NOT VIOLATE CHATTER'S RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY BY PROSECUTING CHATTER UNDER THE ATEL FOR POSTS #4-6

57. Terrorists are increasingly relying on social media to incite extremism.²²³ Hence, while states have a duty to regulate its citizens' conduct, social media platforms also shoulder certain duties over their users.²²⁴ The prosecution of Chatter under the ATEL was justified as it was: (A) prescribed by law; (B) in pursuit of a legitimate aim; and (C) necessary in a democratic society.

A. THE PROSECUTION WAS PRESCRIBED BY LAW AS CHATTER COULD FORESEE LIABILITY FOR FAILING TO REGULATE POSTS #4-6

58. As stated above,²²⁵ a statute is prescribed by law if it: (1) is sufficiently precise; and (2) contains adequate safeguards.²²⁶

59. The ATEL is sufficiently precise²²⁷ as it is foreseeable that Chatter's failure to regulate posts #4-6 satisfies the element of recklessness in Section 3(ii)(2). Chatter was reckless in regulating

²²³ UN Counter-Terrorism Committee, 'Global Survey of the Implementation of Security Council Resolution 1373' (n 140) 7; Telegraph Reporters, 'How Terrorists are Using Social Media' *The Telegraph* (4 November 2014) <<http://www.telegraph.co.uk/news/worldnews/islamic-state/11207681/How-terrorists-are-using-social-media.html>> accessed 17 January 2016; UN Security Council Counter-Terrorism Committee, 'Ten Years On, Security Council Resolution 1624 on Incitement to Terrorism More Relevant Than Ever' (10 September 2015) <http://www.un.org/en/sc/ctc/news/2015-09-10_CTC_1624_10thAnniversary.html> accessed 17 January 2016. See also UN Counter-Terrorism Committee, 'Global Survey of the Implementation of Security Council Resolution 1373' (n 140) 7; UNHRC August 2011 Report (n 4) para 12; UNHRC May 2015 Report (n 9) para 2.

²²⁴ UNHRC May 2015 Report (n 9) para 54; *Delfi June 2015* (n 18) para 111.

²²⁵ See para 4 of this Memorial.

²²⁶ *Silver* (n 14) paras 85-90; *Malone* (n 14) paras 67-68; *Weber* (n 14) para 23; *Editorial Board* (n 14) para 51; *Ahmet* (n 14) paras 57-59; UNHRC April 2013 Report (n 10) para 29; ICCPR, 'Concluding Observations on the Fourth Periodic Report of the United States of America' (n 14) para 22; UNHRC June 2014 Report (n 14) para 28.

²²⁷ See paras 42-43 of this Memorial.

posts #4–6 as they were extremist statements,²²⁸ but nothing was done despite an outcry, which culminated in Omeria’s leading newspaper warning that ‘Chatter would have blood on [its] hands’ if violence occurred.²²⁹

B. THE PROSECUTION PURSUED THE LEGITIMATE AIM OF PROTECTING NATIONAL SECURITY AS POSTS #4–6 WERE EXTREMIST STATEMENTS

60. The protection of national security is a legitimate aim.²³⁰ The protection of national security includes a state’s counter-extremism efforts.²³¹ The prosecution pursued the protection of national security as Chatter failed to regulate posts #4–6 despite their extremist nature.²³²

C. THE PROSECUTION WAS NECESSARY IN A DEMOCRATIC SOCIETY

61. As stated above,²³³ 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.²³⁴

²²⁸ See paras 48–51 of this Memorial.

²²⁹ Para 16 of the facts.

²³⁰ *Delfi June 2015* (n 18) para 59. See also ICCPR art 19(3)(b); UDHR art 29(2); General Comment 34 (n 3) para 21.

²³¹ OHCHR Fact Sheet no 32 (n 143) 24; Council of Europe, ‘Speaking of Terror’ (2008) (n 166) 5; UNHRC May 2011 Report (n 4) para 25.

²³² See paras 48–51 of this Memorial.

²³³ See para 13 of this Memorial.

²³⁴ General Comment 34 (n 3) paras 22, 33–34; UNHRC April 2013 Report (n 10) para 29; *Delfi June 2015* (n 18) para 131; *Perincek* (n 9) paras 196, 228.

1. There was a pressing social need to prosecute Chatter

62. There was a pressing social need for Omeria to: (a) require Chatter to disclose Umani's identity; and (b) fine Chatter.

a. *It was necessary to require Chatter to disclose Umani's identity to protect national security*

63. The right to privacy is not absolute and 'must yield... to... the prevention of disorder or crime'.²³⁵ There was a pressing social need to require Chatter to disclose Umani's identity as it was a necessary step to prosecute Umani for his extremist posts. Further, it is insufficient to merely shut-down @TheVigilanteInsider's account. Terrorists have been exploiting the anonymity afforded by social media to create new accounts, frustrating the effectiveness of account suspensions.²³⁶ It was therefore necessary to obtain Umani's identity as Umani could easily create another anonymous account to continue posting extremist statements.

²³⁵ *KU v Finland* App no 2872/01 (ECtHR, 2 December 2008) para 49; *Delfi June 2015* (n 18) para 149.

²³⁶ Dave Lee, 'James Foley: Extremists Battle with Social Media' *BBC* (n 140); John Hall, 'ISIS Controls As Many As 90,000 Twitter Accounts Which It Uses to Spread Sick Propaganda and Radicalise Westerners, Terror Experts Reveal' *Daily Mail* (6 March 2015) <<http://www.dailymail.co.uk/news/article-2982673/ISIS-controls-90-000-Twitter-accounts-uses-spread-sick-propaganda-radicalise-Westerners-terror-experts-reveal.html>> accessed 17 January 2016; Jonathon Morgan, 'The ISIS Twitter Census: Defining and Describing the Population of ISIS Supporters on Twitter' (20 March 2015) <http://www.brookings.edu/~media/research/files/papers/2015/03/isis-twitter-census-berger-morgan/isis_twitter_census_berger_morgan.pdf> accessed 17 January 2016, 7; Julia Greenberg, 'Why Facebook and Twitter Can't Just Wipe Out ISIS Online' (21 November 2015) <<http://www.wired.com/2015/11/facebook-and-twitter-face-tough-choices-as-isis-exploits-social-media/>> accessed 17 January 2016; Rebecca Turner, 'Islamic State Recruiters Create Complex Network of Facebook Accounts to Entice Australian Teens' *ABC* (24 December 2015) <<http://www.abc.net.au/news/2015-11-30/islamic-state-using-facebook-to-gather-new-recruits/6968890>> accessed 17 January 2016.

b. *It was necessary to prosecute Chatter as it did not regulate Umani's extremist statements*

64. Following the factors for imposing liability on intermediaries for user content,²³⁷ there was a pressing social need to prosecute Chatter. First, Chatter is an active intermediary.²³⁸ Despite Chatter's power to regulate its user content,²³⁹ it did not regulate posts #4–6 even after the particularly strong outcry.²⁴⁰

65. Secondly, the nature of posts #4–6 is sufficiently severe for Chatter to attract liability. The gravity of extremist speech goes beyond other forms of content for which intermediary liability is imposed, such as defamation,²⁴¹ copyright infringements,²⁴² and child pornography.²⁴³ As extremist speech concerns national security,²⁴⁴ there is a need to sanction such speech. This is especially since social media platforms are often abused to propagate terrorism.²⁴⁵

²³⁷ See para 33 of this Memorial.

²³⁸ See para 34 of this Memorial.

²³⁹ Para 14(b)(i) of the facts.

²⁴⁰ Para 16 of the facts.

²⁴¹ *Payam Tamiz* (n 110) paras 7–8; *Delfi June 2015* (n 18) para 162.

²⁴² Digital Millennium Copyright Act 1998 (US) s 512(c)(1); Center for Democracy and Technology, 'Chile's Notice-and-Takedown System or Copyright Protection: An Alternative Approach' (n 121); Farano (n 103).

²⁴³ Child Pornography Prevention Act 1996 (US) ss 2251–60; Communications Decency Act 1996 (US) s 223; Council of the European Union Framework Decision 2004/68/JHA on Combating the Sexual Exploitation of Children and Child Pornography [2004] OJ L13 of 22 December 2003 art 3; Martin Bright, 'BT Puts Block on Child Porn Sites' *The Guardian* (6 June 2004) <<http://www.guardian.co.uk/technology/2004/jun/06/childrenservices.childprotection>> accessed 17 January; UNHRC May 2011 Report (n 4) para 32.

²⁴⁴ OHCHR Fact Sheet no 32 (n 143) 24; Council of Europe, 'Speaking of Terror' (2008) (n 4) para 25.

²⁴⁵ Morgan (n 236); Yoree Koh, 'African Militants Turn More to Social Media' *The Wall Street Journal* (22 September 2013) <<http://www.wsj.com/articles/SB10001424052702304713704579091720477473610>> accessed 17 January 2016; Stewart Bertram, 'Sub Saharan African Terrorist Groups' Use of the Internet' (10 February 2014) <<http://jtr.st-andrews.ac.uk/articles/10.15664/jtr.825/>> accessed 17 January 2016.

66. Thirdly, social media intermediaries have the capacity to filter extremist speech. Social media intermediaries such as Weibo,²⁴⁶ YouTube,²⁴⁷ Twitter,²⁴⁸ and Google²⁴⁹ regulate content that incites violence.

67. Fourthly, an obligation to regulate extremist content prior to a court order is crucial. This is because extremist content online has a greater propensity to radicalise, due to its extensive reach and accessibility.²⁵⁰ Here, Chatter is a mobile application, thus increasing its accessibility.²⁵¹ Furthermore, given the popularity of social media amongst youths, there is a greater risk of radicalization, as youths tend to be more impressionable.²⁵²

68. Finally, online extremist speech tends to be highly virulent given its sensational nature.²⁵³ It is therefore necessary to require intermediaries like Chatter to pay close attention in regulating extremist speech.²⁵⁴

²⁴⁶ Jon Russell, 'Chinese Microblog Service Sina Weibo's New Rules and Punishment System Go Live' (28 May 2012) <<http://thenextweb.com/asia/2012/05/28/chinese-microblog-service-sina-weibos-new-rules-and-punishment-system-go-live/>> accessed 17 January 2016.

²⁴⁷ YouTube, 'YouTube Help: Harmful or Dangerous Content' <<https://support.google.com/youtube/answer/2801964>> accessed 17 January 2016.

²⁴⁸ Twitter, 'The Twitter Rules' <<https://support.twitter.com/articles/18311>> accessed 17 January 2016.

²⁴⁹ 'Policies for Google+, Hangouts & Photos: User Content and Conduct Policy' <<https://www.google.com/intl/en-US/+policy/content.html>> accessed 17 January 2016.

²⁵⁰ UN Office on Drugs and Crime (n 194) 12; Ines Von Behr and others, 'Radicalisation in the Digital Era: The Use of the Internet in 15 Cases of Terrorism and Extremism' (2013) Rand Corporation 17; Maura Conway, 'From Al-Zarqawi to Al-Awlaki: The Emergence of the Internet as a New Form of Violent Radical Milieu' (2012) <http://www.isodarco.it/courses/andalo12/doc/Zarqawi%20to%20Awlaki_V2.pdf> accessed 17 January 2016, 6.

²⁵¹ Para 6 of the facts.

²⁵² Maeve Duggan, 'The Demographics of Social Media Users' (19 August 2015) <<http://www.pewinternet.org/2015/08/19/the-demographics-of-social-media-users/>> accessed 17 January 2016; Ezekiel Rediker, 'The Incitement of Terrorism on the Internet: Legal Standards, Enforcement, and the Role of the European Union' (2015) 36 Michigan Journal of International Law 2, 321, 325; BBC, 'Anzac Day Terror Plot: Blackburn Boy Sentenced to Life' (n 218).

²⁵³ Saul Levmore and Martha Nussbaum, *The Offensive Internet: Speech, Privacy, and Reputation* (Harvard University Press 2010) 155–73; Tarlach McGonagle, 'The Council of Europe against Online Hate Speech: Conundrums and Challenges' (2013) Council of Europe 29–30.

2. The prosecution was proportionate as it was in line with the punishments imposed by other states and it was necessary for deterrence

69. Both the US\$ 70,000 fine for refusing to disclose Umani's identity, and US\$ 5 million fine were proportionate.

70. The US\$ 70,000 fine for Chatter's refusal to disclose Umani's user information was proportionate as other states impose similar fines. States such as Brazil, Italy, and the US impose fines of US\$ 10,000–250,000 for failure to disclose user information.²⁵⁵

71. Furthermore, the US\$ 5 million fine²⁵⁶ was proportionate. This is because a large fine is necessary to ensure the effectiveness of the punishment given Chatter's size.²⁵⁷ Additionally, other states have imposed harsher punishments for reckless content monitoring. These include criminal liability for executives and revocation of business licenses.²⁵⁸ As extremist speech threatens

²⁵⁴ The Organisation for Economic Co-operation and Development (n 122) 154; Center for Democracy and Technology, 'Chile's Notice-and-Takedown System or Copyright Protection: An Alternative Approach' (n 121); International Intellectual Property Alliance (n 121). See also Faith Karimi, Jason Hanna and Yousuf Basil, 'San Bernardino Shooters 'Supporters' of ISIS, Terror Group Says' *CNN* (6 December 2015) <<http://edition.cnn.com/2015/12/05/us/san-bernardino-shooting/>> accessed 17 January 2016.

²⁵⁵ Law Regarding the Protection of Personal Data Statutory Order no 196/2003 (Italy) art 164; Barretto Ferreira Brancher Sociedade de Advogados, 'Brazilian Superior Court of Justice Decision and the Disclosure of Gmail Data for Investigation' (29 April 2013) <<http://www.lexology.com/library/detail.aspx?g=793d848f-5877-4675-9336-aa28eec3d971>> accessed 17 January 2016. See also Fox News Latino, 'Google Fined in Brazil for Refusing to Intercept Emails Needed in Petrobras Probe' *Fox News* (15 December 2015) <<http://latino.foxnews.com/latino/money/2014/12/15/google-fined-in-brazil-for-refusing-to-intercept-emails-needed-in-petrobras/>> accessed 17 January 2016.

²⁵⁶ Para 20 of the facts.

²⁵⁷ European Commission, 'Fines for Breaking EU Competition Law' (n 136) 1; *Microsoft Corp* (n 136) paras 1344, 1352, 1360–61, 1363.

²⁵⁸ Computer Crime Act 2007 (Thailand) s 15; Giovanni Sartor and Mario Viola de Azevedo Cunha, 'The Italian Google-Case: Privacy, Freedom of Speech and Responsibility of Providers for User-Generated Contents' (2010) 18(4) *International Journal of Law and Information Technology* 356, 358; Measures for Managing Internet Information Services 25 September 2000 (China) article 20; OpenNet Initiative, 'Access Contested' (2011) <<http://access.opennet.net/wp-content/uploads/2011/12/accesscontested-china.pdf>> accessed 17 January 2016, 280; Glyn Moody, 'China's Internet Giant Sina.com Loses Publication License for Publishing Pornography – 20 Articles and Four Videos' (30 April 2014) <www.techdirt.com/articles/20140425/09451027029/chinas-internet-giant-sinacom-loses-publication-license-publishing-pornography-20-articles-four-videos.shtml> accessed 17 January 2016.

national security, a large fine is necessary to encourage intermediaries to be more proactive in regulating user content.²⁵⁹ Such thoroughness is necessary in Omeria given the escalating acts of terrorism.²⁶⁰

²⁵⁹ Center for Democracy & Technology, 'Intermediary Liability: Protecting for Expression and Innovation' (2010) <[https://www.cdt.org/files/pdfs/CDT-Intermediary%20Liability_\(2010\).pdf](https://www.cdt.org/files/pdfs/CDT-Intermediary%20Liability_(2010).pdf)> accessed 17 January 2016, 3; UNESCO, 'Fostering Freedom Online' (2014) UNESCO Division for Freedom of Expression and Media Development 30.

²⁶⁰ Para 4 of the facts.

PRAYERS FOR RELIEF

For the foregoing reasons, the Respondent respectfully requests this Honourable Court to adjudge and declare that:

- 1 Omeria did not violate Umani's rights to freedom of expression and privacy by prosecuting him for posts #1–3 under the NHA.
- 2 Omeria did not violate Chatter's rights to freedom of expression and privacy by prosecuting it for posts #1 and #3 under the NHA.
- 3 Omeria did not violate Umani's rights to freedom of expression and privacy by prosecuting him for posts #4–6 under the ATEL.
- 4 Omeria did not violate Chatter's rights to freedom of expression and privacy by prosecuting it for posts #4–6 under the ATEL.

Respectfully submitted 18 January 2016,

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Agent for the Respondent