

THE 2017–2018 PRICE MEDIA LAW
MOOT COURT COMPETITION

PEAPS & SCOOPS
(APPLICANTS)

v

THE FEDERAL REPUBLIC OF TURTONIA
(RESPONDENT)

MEMORIAL FOR APPLICANTS

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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
CJEU	Court of Justice of the European Union
ECHR	European Convention on 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
IA	Information Act of 2006
ODPA	Online Dignity Protection Act of 2015
OECD	Organisation for Economic Co-operation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights

UNESCO	United Nations Educational, Scientific and Cultural Organisation
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
SCOTUS	Supreme Court of the United States

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STATEMENT OF RELEVANT FACTS

Background of Turtonia

- A. Turtonia is a democratic country with a population of 17 million. In the past three years, it has seen a significant influx of immigrants from the neighbouring country, Aquaria. The Turtonian Minister of Immigration, Kola, believes that Aquarian immigrants can contribute to Turtonian society. However, some Turtonians do not support her position and claim that the immigrants have disrupted the economy and diluted the culture. In particular, a nationalist group called Turton Power has been vocal in opposing Kola's immigration policies.
- B. Turtonia is also threatened by a religious extremist terror group called True Religion, which has been recognised as a terrorist organization in both Turtonia and Aquaria. True Religion's leader is an Aquarian named Parkta.

The IA and the ODPa

- C. In 2006, the Turtonian government enacted the IA, which criminalises the communication of false information that damages the reputation of another or disrupts public order. The IA exempts Online Service Providers from liability for storing content that is prohibited under the IA if they are able to "expeditiously" remove such content.
- D. In 2015, the Turtonian government enacted the ODPa, which criminalises the distribution of images that expose an individual's intimate parts without his or her consent. The ODPa exempts liability for any intimate images distributed in the "public

interest”. The ODPa also provides examples of matters that are of “public interest”, although such matters are “not limited to” the examples listed.

The publication of Peaps’ post on Scoops

- E. Scoops is the most popular social media platform in Turtonia. It does not generate its own content, but instead stores content uploaded by its users. Scoops’ users have the option of improving the visibility of their posts by paying a fee to have their posts “boosted”.
- F. Peaps is a Turton Power member who, on May 1, created a Scoops account with the name “XYZ News12”.
- G. At noon on May 2, Peaps published a post on his Scoops account claiming that Kola may have been in a relationship with Parkta and had approved visas for True Religion members. The post also included an image depicting Kola in the nude. On May 3, TurtonTimes, a major newspaper affiliated to the political party that opposes Kola’s party, published an opinion article citing dissatisfaction with Kola and calling for her resignation. On May 4 and 5, protesters gathered outside Kola’s office calling for her resignation. Most of the protests signs held were unrelated to Peaps’ post. Kola resigned on May 10 without making any public statement.
- H. At 7:00p.m. on May 2, Kola’s staff submitted an online reporting form indicating that Peaps’ post contained a nude image of Kola shared without her consent. However, Kola’s staff did not verify the person depicted. At 11:00a.m. on May 3, Kola’s legal counsel submitted a letter to Scoops, threatening a civil action for defamation and violation of

privacy. Scoops removed the post and all shares of the post at 1:00pm on May 5.

The prosecution of Peaps and Scoops

- I. Peaps was identified through a Turtonian criminal search warrant served upon Scoops' corporate offices in Turtonia. He was tried and convicted under the ODPA and the IA due to his single act of distributing Kola's image. He was sentenced to two years' imprisonment for the former offence, and a fine of US\$100,000 for the latter.

- J. Scoops was concurrently tried and convicted under the ODPA and the IA due to its single act of distributing Kola's image. It was sentenced to a fine of US\$200,000 for the former offence, and a fine of US\$100,000 for the latter.

STATEMENT OF JURISDICTION

Peaps, Scoops, and the Federal Republic of Turtonia, which is a member of the UN, have submitted their differences to the Universal Freedom of Expression Court ('this Court'), and hereby submit to this Court their dispute concerning Article 19 of the UDHR and 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 Turtonia violated Peaps' right to freedom of expression by prosecuting him under the ODPa and sentencing him to two years' imprisonment.
2. Whether Turtonia violated Scoops' right to freedom of expression by prosecuting it under the ODPa and imposing a US\$200,000 fine.
3. Whether Turtonia violated Peaps' right to freedom of expression by prosecuting him under the IA and imposing a US\$100,000 fine.
4. Whether Turtonia violated Scoops' right to freedom of expression by prosecuting it under the IA and imposing a US\$100,000 fine.

SUMMARY OF ARGUMENTS

Turtonia violated Peaps' right to freedom of expression by prosecuting him under the ODP

- A. Turtonia, in prosecuting Peaps under the ODP, interfered with Peaps' right to freedom of expression. This is because interferences with the right to freedom of expression are broadly defined and include prosecutions. This interference was unjustified as it was neither prescribed by law nor necessary in a democratic society.
- B. The prosecution under the ODP was not prescribed by law because sections 1 and 3(b) were insufficiently precise. Section 1 was imprecise because the phrase "whose intimate parts" was vague. Peaps could not have reasonably foreseen that section 1 would apply to fabricated intimate images. Further, section 3(b) was imprecise because the term "public interest" that exempts him from liability was vague. Given that information concerning the possible infiltration of terrorists are quintessential examples of matters of public interest, Peaps could not have reasonably foreseen that this exception would not apply.
- C. There was also no pressing social need to prosecute Peaps because his post did not unlawfully interfere with Kola's rights to privacy and reputation. First, the limits of acceptable publications are substantially wider where applied to public officials like Kola, who knowingly exposed herself to public scrutiny. Secondly, Peaps' post raised the possibility of Kola's involvement with True Religion, which could contribute to a matter of public debate as Kola oversaw Turtonia's immigration policy. Thirdly, Peaps'

post did not depict Kola's actual intimate body parts and thus did not result in severe consequences to Kola's privacy. Further, there was an insufficient link between Peaps' post and any subsequent harm to Kola's reputation. Finally, there was a lesser need to prosecute Peaps as he did not intend to inflict harm on Kola.

- D. The two-year imprisonment term was disproportionate because the nature of the punishment was excessive. Imprisonment is an undue punishment where the impugned publication does not amount to an incitement to discrimination, hostility or violence. Even then, imprisonment is only resorted to in exceptional circumstances. The prosecution of Peaps under the ODPa concerned the effect of his post on Kola's privacy and reputation, and did not relate to any such incitement.
- E. Turtonia cannot rely on the margin of appreciation doctrine because this doctrine undermines the protection of human rights according to common standards. Even if Turtonia is afforded a margin of appreciation, it must be narrow because Peaps' post contributed to a debate of public interest.

Turtonia violated Scoops' right to freedom of expression by prosecuting it under the ODPa

- F. Turtonia's prosecution of Scoops under the ODPa was unjustified as it was neither prescribed by law nor necessary in a democratic society.
- G. The prosecution under the ODPa was not prescribed by law because section 1 was insufficiently precise. Section 1 was imprecise because the terms "knowingly" and

“knows or consciously disregards” were vague. Scoops could not have reasonably foreseen that knowledge would be imputed, particularly since Kola’s staff did not send a completed online reporting form.

- H. There was also no pressing social need to prosecute Scoops because the obligation to determine the legality of Peaps’ post was unduly onerous. First, Scoops was a neutral intermediary that did not exercise substantial control over content published on its platform. Secondly, given that Kola’s staff did not complete the online reporting form, Scoops did not have sufficient knowledge of the illegality of Peaps’ post. Thirdly, Scoops cannot be expected to proactively remove Peaps’ post especially when Peaps’ post was not clearly illegal. Finally, requiring Scoops to take down posts at the mere request of a private party would pave the way for over-broad private censorship. This would inhibit political debate and democratic development in Turtonia.
- I. The US\$200,000 fine was disproportionate. First, as an intermediary, Scoops should not be subjected to the same liability provisions as content creators and should have had recourse to a safe harbour regime. Secondly, the US\$200,000 fine was excessive in comparison to penalties imposed on intermediaries in other states.

Turtonia violated Peaps’ right to freedom of expression by prosecuting him under the IA

- J. Turtonia’s prosecution of Peaps under the IA was unjustified as it was neither prescribed by law nor necessary in a democratic society.
- K. The prosecution under the IA was not prescribed by law because section 1(b) was

insufficiently precise. Section 1(b) was imprecise because the phrase “incite civil unrest, hatred, or damage the national unity” was vague. The Turtonian authorities had undue discretion to find Peaps liable, without even clearly identifying the specific ground of liability.

- L. There was also no pressing social need to prosecute Peaps because his post did not amount to an incitement to hostility. First, considering the high threshold for finding an intention to incite hostility, Peaps was principally motivated to maximise his popularity on Scoops and did not have the requisite intention. Secondly, Peaps’ post did not contain content that incited hostility against Aquarians. This is because the post contributed to a debate of public interest and only mentioned the True Religion terrorist group, instead of the Aquarian immigrant community. Thirdly, Peaps’ post was unlikely to be interpreted as a call to hostility as there was no such express call against Aquarians and the publication’s tone was not hostile. Finally, the self-correcting mechanisms of social media militates against the need to prosecute Peaps because not all users of social media will be swayed by the effects of false information.
- M. The US\$100,000 fine was disproportionate. States have generally issued warnings to individual who publish statements that incite hatred or issued judicial order for the prompt removal of such orders. Even if a fine was appropriate, a fine of US\$100,000 was excessive in comparison to what was imposed in other states.

Turtonia violated Scoops’ right to freedom of expression by prosecuting it under the IA

- N. Turtonia’s prosecution of Scoops under the IA was unjustified as it was neither prescribed by law nor necessary in a democratic society.

- O. The prosecution under the IA was not prescribed by law because section 3(c) was insufficiently precise. Section 3(c) was imprecise because the term “expeditiously” was vague. The usage of this term without a specific definition has generated much uncertainty as it is unclear how fast intermediaries must act to qualify for immunity. As such, Scoops could not have reasonably foreseen liability even though it had successfully removed all 21,000 shares of Peaps’ post within 50 hours.
- P. There was also no pressing social need to prosecute Scoops. First, Scoops was a neutral intermediary and should not be held responsible for the dissemination of Peaps’ post. Secondly, Scoops had difficulties in determining whether Peaps’ post was illegal. This difficulty was compounded by the fact that the original fabricated image was removed before Scoops could conduct any checks. Thirdly, Scoops took sufficient steps by removing Peaps’ post within 50 hours of receiving the letter from Kola’s legal counsel. Finally, it is impractical to impose an obligation to remove posts at the mere behest of a private party, as that would require Scoops to trawl through an immense amount of content.
- Q. The US\$100,000 fine was disproportionate. The imposition of criminal liability was excessive, as Kola could have directly pursued a civil action against Scoops. Further, a fine was not the least restrictive measure that could have been adopted because states have often implemented co-monitoring regimes with intermediaries instead. Even if a fine was appropriate, the sum of US\$100,000 was excessive in comparison to penalties imposed on intermediaries in other states.

ARGUMENTS

I. TURTONIA VIOLATED PEAPS' FREEDOM OF EXPRESSION BY PROSECUTING HIM UNDER THE ODPA

1. The freedom of expression, enshrined in the UDHR,¹ ICCPR,² ECHR,³ ACHR⁴ and ACHPR,⁵ is the bedrock of a free and democratic society⁶ like Turtonia.⁷ This freedom provides an avenue for public discourse,⁸ and allows for the self-fulfilment of each individual.⁹
2. While this freedom is not absolute,¹⁰ its significance for society's progress mandates that any interferences with this freedom should only be imposed in exceptional

¹ UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 19.

² ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 17 art 19(2).

³ ECHR (adopted 4 November 1950, entered into force 3 September 1953) art 10.

⁴ ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13.

⁵ ACHPR (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 art 9(2).

⁶ *Bowman v UK* App no 24839/94 (ECtHR, 19 February 1998) para 42; *Claude-Reyes v Chile*, Merits, Reparations and Costs Judgment (IACtHR, 19 September 2006) para 85; HRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 ('General Comment 34') para 2.

⁷ Para 1.1 of the Facts.

⁸ General Comment 34 (n 6) para 2; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (17 April 2013) UN Doc A/HRC/23/40 ('UNHRC April 2013 Report') para 30.

⁹ *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) ('*Lingens*') paras 41–42; 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 22.

¹⁰ UDHR art 19(3); ECHR art 10(2); ACHR art 13(2); ACHPR art 10(2).

circumstances.¹¹ Consequently, an interference may only be justified if it is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society.¹² These three requirements have been applied by the UNHRC,¹³ IACtHR,¹⁴ ECtHR,¹⁵ and ACommHPR.¹⁶

3. In response to Peaps' attempt to provide coverage of information that he believed to be from a reputable source,¹⁷ Turtonia prosecuted Peaps under the ODPa and sentenced him to two years' imprisonment.¹⁸ As interferences with the right to freedom of

¹¹ 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 49; General Comment 34 (n 6) para 21.

¹² ECHR art 10(2); ICCPR art 19(3); *Vörður Ólafsson v Iceland* App no 20161/06 (ECtHR, 27 April 2010) ('*Vörður*') para 51; UNHRC April 2013 Report (n 8) paras 28–29.

¹³ *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, 26 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 9) para 24; 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 15; General Comment 34 (n 6) para 35; UNHRC April 2013 Report (n 8) para 29.

¹⁴ *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, 'Inter-American Legal Framework Regarding the Right to Freedom of Expression' OEA/SER L/V/II CIDH/RELE/INF 2/09 ('Inter-American Legal Framework') 24; IACHR, 'Freedom of Expression and the Internet' (31 December 2013) OEA/SER L/II CIDH/RELE/INF 11/13 ('IACHR December 2013 Report') 26–29.

¹⁵ *Handyside v UK* App no 5393/72 (ECtHR, 7 December 1976) ('*Handyside*') 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) para 59; *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) ('*Perinçek*') para 124.

¹⁶ 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 wAfrica v Zimbabwe* AHRLR 268 Comm no 294/04 (ACommHPR, 2009) para 80.

¹⁷ Para 12.2 of the Facts.

¹⁸ Para 12.1.1 of the Facts.

expression are broadly defined and include prosecutions,¹⁹ Turtonia’s measure was an interference with Peaps’ right.

4. Although Turtonia may have acted in pursuance of the legitimate aim of protecting Kola’s rights to privacy and reputation,²⁰ the prosecution of Peaps under the ODPa was unjustified as it was: (A) not prescribed by law; and (B) not necessary in a democratic society.

A. THE PROSECUTION WAS NOT PRESCRIBED BY LAW BECAUSE SECTION 3(B) OF THE ODPa WAS NOT SUFFICIENTLY PRECISE

5. A prosecution under a statute is prescribed by law if the relevant statute is sufficiently precise.²¹ Laws drafted in imprecise terms are vulnerable to arbitrary application by state authorities,²² thereby impeding individuals from being able to reasonably foresee

¹⁹ *Perinçek* (n 15) para 117; *Malcolm Ross* (n 13) para 11.1; 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.

²⁰ ICCPR art 17(2); ECHR art 8.

²¹ *Sunday Times* (n 15) para 49; *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; *Wingrove v UK* App no 17419/90 (ECtHR, 25 November 1996) (*‘Wingrove’*) para 40; *Lindon, Otchakovsky-Laurens and July v France* App no 21275/02 (ECtHR, 22 October 2007) (*‘Lindon’*) para 41; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) (*‘Editorial Board’*) para 52; 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) UN Doc E/CN.4/1984/4 (*‘Siracusa Principles’*) principle 17; HRC, ‘General Comment 16’ (19 May 1989) UN Doc CCPR/C/21/Rev.1 (*‘General Comment 16’*) para 3; General Comment 34 (n 6) paras 24–25.

²² UNHRC, ‘Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence’ (11 January 2013) UN Doc A/HRC/22/17/Add.4 (*‘UNHRC Rabat Plan’*) para 15; UNHRC, ‘Report of the Special Rapporteur on Freedom of Religion or Belief’ (23 December 2014) UN Doc A/HRC/28/66/Add.1 para 49; UNHRC, ‘Report on Best Practices and Lessons Learned on How Protecting and Promoting Human Rights Contribute to Preventing and Countering Violent Extremism’ (21 July 2016) UN Doc A/HRC/33/29 para 21; UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (6 September 2016) UN Doc A/71/373 (*‘UNHRC September 2016 Report’*) para 13.

liability.²³ The prosecution was not prescribed by law because sections 1 and 3(b) of the ODPAs were insufficiently precise.

6. Section 1 was insufficiently precise because the phrase “whose intimate parts” was vague. Peaps had been prosecuted under the ODPAs for distributing a photoshopped image of Kola.²⁴ However, the ODPAs only identified “[i]ntimate parts” as “the naked genitals, pubic area... of a person”, and did not specify whether this extended to fabricated images.²⁵ Further, the ODPAs were passed in response to the dissemination of actual nude photos²⁶ and Peaps could not have reasonably foreseen that a photoshopped image would attract liability. Additionally, legislations similar to the ODPAs in the US²⁷ and the UK²⁸ are designed only to protect truthful private information and not fabricated images.
7. Section 3(b) was also insufficiently precise because the term “public interest” that exempts liability for distributing intimate images was vague. Peaps was denied the

²³ *Altuğ Taner Akçam v Turkey* App no 27520/07 (ECtHR, 25 October 2011) para 95; European Commission for Democracy Through Law of the Council of Europe, ‘Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation’ (*Council of Europe*, 20 June 2012) <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)016-e)> accessed 21 January 2018, paras 70, 74; UNHRC, ‘Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism’ (19 December 2014) UN Doc A/HRC/28/28 para 48; UNHRC September 2016 Report (n 22) para 13.

²⁴ Para 12.1.1 of the Facts.

²⁵ Para 10.2 of the Facts.

²⁶ Para 10.1 of the Facts.

²⁷ Tracy Clark-Flory, ‘A Naked Body & An Ex’s Face: The Disturbing World Of “Fake” Porn’ (*Vocativ*, 29 September 2016) <<http://www.vocativ.com/363198/photoshopped-porn/index.html>> accessed 21 January 2018; Catherine Skipp, ‘Miami Law in the News Week of 7 October 2016’ (*University of Miami School of Law*, 7 October 2016) <<http://www.law.miami.edu/press/2016/october/miami-law-news-week-7-october-2016>> accessed 21 January 2018.

²⁸ Kate Parker, ““Revenge Porn” Laws: A Year of Reflection’ (*5PB*, 7 June 2016) <http://www.5pb.co.uk/blog/2016/06/17/revenge_porn_law_a_years_reflection/> accessed 21 January 2018.

exception by the Turtonian courts,²⁹ even though his post concerned the possible infiltration of True Religion terrorists into Turtonia.³⁰ He could not have reasonably foreseen that section 3(b) would not apply to his post because terrorist activities are quintessential examples of matters of public interest.³¹ Additionally, although section 3(b) provides examples of “public interest”, these examples are non-exhaustive as the matters of “public interest” are “not limited to” the categories listed.³² Such vague wording affords an overly broad discretion for authorities, resulting in excessive censorship.³³ Hence, the usage of this term in legislations prohibiting the distribution of false information or intimate images has also been cautioned for lacking a firm definition.³⁴

8. Accordingly, the prosecution was not prescribed by law.

²⁹ Para 12.3.7 of the Facts.

³⁰ Para 8.3 of the Facts.

³¹ Teruo Komori, *Public Interest Rules of International Law: Towards Effective Implementation* (Routledge, 2016) (‘Public Interest Rules’) 150; House of Lords Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* (HL 75-I, 2005) (‘House of Lords Bill’) 3–4.

³² Para 10.2 of the Facts.

³³ UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (11 May 2016) UN Doc A/HRC/32/38 para 39.

³⁴ *R v Zundel* (1992) 2 SCR 731, 769–770; Randolph J May, ‘The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?’ (2001) 53 *Federal Communications Law Journal* 427, 444; David E Morrison and Michael Svennevig, ‘The Defence of Public Interest and The Intrusion of Privacy’ (2007) 8 *Journalism* 44, 48–49; David E Morrison and Michael Svennevig, ‘The Public Interest, the Media and Privacy’ (*BBC*, March 2002) <<http://downloads.bbc.co.uk/guidelines/editorialguidelines/research/privacy.pdf>> accessed 21 January 2018, 1, 17–19; Tracy Clark-Flory, ‘Bill That Would Make Revenge Porn Federal Crime To Be Introduced’ (*Vocativ*, 14 July 2016) <<http://www.vocativ.com/339362/federal-revenge-porn-bill/index.html>> accessed 21 January 2018.

B. THE PROSECUTION WAS NOT NECESSARY IN A DEMOCRATIC SOCIETY

9. An interference with the right to freedom of expression is necessary in a democratic society if it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aim pursued.³⁵
 1. *There was no pressing social need to prosecute Peaps because his post did not unlawfully interfere with Kola's right to private life*
10. The rights to privacy and reputation must not be unduly protected at the expense of undermining the right to freedom of expression, as these competing rights are of equal value.³⁶ To determine whether a fair balance has been struck between these rights, the pertinent factors to consider include:³⁷ the status of the affected individual; whether the publication contributed to a debate of public interest; and the content and consequences of the publication.
11. Applying these factors, there was no pressing social need to prosecute Peaps. First, the limits of acceptable publications are substantially wider where politicians are concerned,

³⁵ *Handyside* (n 15) para 48; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) ('*Delfi June 2015*') para 131; *Mac TV SRO v Slovakia* App no 13466/12 (ECtHR, 28 November 2017) ('*Mac TV SRO*') para 39; General Comment 34 (n 6) paras 22, 33–34; UNHRC April 2013 Report (n 8) para 29;

³⁶ *Timciuc v Romania* App no 28999/03 (ECtHR, 12 October 2010) para 144; *Mosley v UK* App no 48009/98 (ECtHR, 10 May 2011) ('*Mosley*') para 111; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) ('*Axel Springer*') para 87.

³⁷ *Axel Springer* (n 36) paras 90–95; *Von Hannover v Germany (No 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012) paras 109–113; *Putistin v Ukraine* App no 16882/03 (ECtHR, 21 February 2014) ('*Putistin*') para 40; *Haldimann v Switzerland* App no 21830/09 (ECtHR, 24 May 2015) ('*Haldimann*') para 50; *Couderc and Hachette Filipacchi Associes v France* App no 40454/47 (ECtHR, 10 November 2015) ('*Couderc*') para 93; *Bestry v Poland* App no 57675/10 (ECtHR, 3 February 2016) paras 59, 67; *Ólafsson v Iceland* App no 58493/13 (ECtHR, 16 June 2017) para 48; *Egill Einarsson v Iceland* App no 24703/15 (ECtHR, 7 November 2017) ('*Egill Einarsson*') paras 40, 42.

since they knowingly expose themselves to public scrutiny by virtue of their positions.³⁸ Kola was still the Minister of Immigration at the time of Peaps' post.³⁹ In particular, she had used this position to champion for the entry of Aquarian immigrants, which was a controversial stance that generated much debate.⁴⁰

12. Secondly, the scope for interferences with the freedom of expression is narrower where the impugned publication can contribute to a debate of public interest.⁴¹ Peaps' post raised the possibility of Kola having an improper relationship with True Religion's leader, and as a result, the granting of visas to True Religion members.⁴² Although Peaps' post was eventually found to be untrue by the Turtonian courts,⁴³ it still contributed to a debate of public interest at the time of publication. This is because publications that are not factually accurate can nevertheless arouse the interest of the public with regard to matters of social significance.⁴⁴ Given that Kola oversaw Turtonia's immigration policy and there were large immigrant inflows into Turtonia, the possibility of any involvement

³⁸ *Lingens* (n 9) para 42; *Standard Verlags GmbH and Krawagna-Pfeifer v Austria (No 2)* App no 21277/05 (ECtHR, 04 September 2009) para 47; *Vörður* (n 12) para 51; *Erla Hlynsdóttir v Iceland* App no 43380/10 (ECtHR, 10 July 2012) para 65; *Instytut Ekonomichnykh Reform, TOV v Ukraine* App no 61561/08 (ECtHR, 17 October 2016) para 44; General Comment 34 (n 6) para 38; IACHR, 'Report of the Special Rapporteur for Freedom of Expression' (30 December 2009) OEA Ser L V/II/ Doc 51 ('IACHR December 2009 Report') 223.

³⁹ Para 4.1 of the Facts.

⁴⁰ Para 4.1 of the Facts.

⁴¹ *Editions Plon v France* App no 58148/00 (ECtHR, 18 August 2004) para 44; *Braun v Poland* App no 30162/10 (ECtHR, 4 February 2015) paras 47, 50; *Couderc* (n 37) para 96; *Kurski v Poland* App no 26115/10 (ECtHR, 5 October 2016) para 53; IACHR December 2009 Report (n 38) 221–223.

⁴² Para 8.3 of the Facts.

⁴³ Para 12.3.2 of the Facts.

⁴⁴ *Mosley* (n 36) para 127; *Morice v France* App no 29369/10 (ECtHR, 23 April 2015) paras 125–126; *Steel and Morris v UK* App no 68416/01 (ECtHR, 15 May 2015) para 89; *Couderc* (n 37) para 111; *Egill Einarsson* (n 37) para 45.

between Kola and True Religion remained a matter of social concern.⁴⁵

13. Thirdly, there is a lesser need to prosecute where the consequences resulting from the impugned publication have not reached a level of seriousness as to cause prejudice to the rights to privacy and reputation.⁴⁶ While true private information, once disclosed, leads to an irreversible intrusion upon privacy,⁴⁷ false private information can be corrected and thus does not “forever deprive [individuals] of their autonomy”.⁴⁸ Although Peaps’ post contained an image purporting to depict Kola naked, Kola’s actual intimate parts were not displayed.⁴⁹ Kola was also able to publicly declare that the image was untrue,⁵⁰ demonstrating that her public image could be restored.

14. Additionally, a prosecution is less justified in the absence of a sufficient connection between the impugned publication and any resulting harm to reputation.⁵¹ The threats and protests against Kola had occurred prior to the publication of Peaps’ post due to her

⁴⁵ Para 4.1 of the Facts.

⁴⁶ *Axel Springer* (n 36) para 83; *Putistin* (n 37) para 40; *A v Norway* App no 28070/06 (ECtHR, 12 November 2009) (‘A’) para 64; *Egill Einarsson* (n 37) para 52; ECtHR, *Guide on Article 8 of the European Convention on Human Rights* (1st edn, Council of Europe, 2016) (‘Guide on Article 8’) para 112; Andrew Kenyon, *Comparative Defamation and Privacy Law* (Cambridge University Press, 2016) (‘Comparative Defamation and Privacy Law’) 286–288.

⁴⁷ David Eady, ‘Injunctions and the Protection of Privacy’ (2010) 29 *Civil Justice Quarterly* 411, 413; Keith Schilling, ‘One’s Private Life is Rather Like an Ice Cube: Once Melted, it is Gone for Ever’ *The Times* (2 April 2009) <<https://www.thetimes.co.uk/article/ones-private-life-is-like-an-ice-cube-once-melted-it-is-gone-5wb8d8x7pw5>> accessed 21 January 2018.

⁴⁸ John Hartshone, ‘An Appropriate Remedy for the Publication of False Private Information’ (2012) 4 *Journal of Media Law* 93, 109.

⁴⁹ Para 12.3 of the Facts.

⁵⁰ Para 9.1 of the Facts.

⁵¹ *Axel Springer* (n 36) para 83; *Putistin* (n 37) para 40; *A* (n 46) para 64; *Egill Einarsson* (n 37) para 52; *Guide on Article 8* (n 46) para 112; *Comparative Defamation and Privacy Law* (n 46) 286–288.

controversial pro-Aquarian immigration stance.⁵² Although the May 4 and 5 protests had the largest turnout, they were mainly directed towards Kola’s immigration policies.⁵³ In contrast, Peaps’ post had not directly targeted Kola’s immigration policies but instead focused on an alleged sexual relationship with Parkta.⁵⁴ It was the publication by the TurtonTimes, a major newspaper affiliated with the political party opposing Kola’s, that had directly criticised Kola’s immigration policies and called for her resignation.⁵⁵

15. Finally, criminalising the publication of intimate images is excessive where harm was not intended.⁵⁶ The freedom of expression protects even publications that “offend, shock or disturb”,⁵⁷ and a blanket prohibition on such publications denies individuals the right to “decide for [themselves] ... ideas and beliefs deserving of expression, consideration, and adherence.”⁵⁸ Many anti-revenge porn legislations thus require a finding of intent to

⁵² Para 4.1 of the Facts.

⁵³ Para 9.4 of the Facts.

⁵⁴ Para 8.3 of the Facts.

⁵⁵ Para 9.3 of the Facts.

⁵⁶ IACHR December 2009 Report (n 38) 220–221; IACHR, ‘Report of the Special Rapporteur for Freedom of Expression’ (31 December 2015) OEA/SER L/V/II Doc 48/15, 364; Casey Martinez, ‘An Argument for States to Outlaw Revenge Porn and for Congress to Amend 47 USC Section 230: How Our Current Laws Do Little to Protect Victims’ (2014) 14 Pittsburgh Journal of Technology and Policy 236, 249–250; John Humbach, ‘The Constitution and Revenge Porn’ (2014) 35 Pace Law Review 215, 217–218; Joseph Pangaro, ‘Hell Hath No Fury: Why First Amendment Scrutiny Has Led to Ineffective Revenge Porn Laws, and How to Change the Analytical Argument to Overcome This Issue’ (2015) 88 Temple Law Review 185, 217–218; Sarah Driscoll, ‘Revenge Porn: Chivalry Prevails as Legislation Protects Damsels in Distress over Freedom of Speech’ (2016) Roger Williams University Law Review 75, 109–110; Theresa Upperton, ‘Criminalising “Revenge Porn”: Did the Harmful Digital Communications Act Get It Right?’ (2015) Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No 4/2016 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773197> accessed 21 January 2018, 27.

⁵⁷ *Haldimann* (n 37) para 44.

⁵⁸ *Turner Broadcasting System v Federal Communications Commission* (1994) 512 US 622, 641.

cause harm before liability is imposed.⁵⁹ Here, Peaps’ principal goal was to “maximise his influence score on Scoops”,⁶⁰ and use Kola’s image to better “illustrate” his story.⁶¹ Given the high threshold for inferring intention,⁶² it is likely that Peaps did not concurrently intend to cause harm to Kola.

16. Accordingly, there was no pressing social need to prosecute Peaps.

2. *The prosecution was disproportionate because imprisonment was an inappropriate punishment*

17. Proportionality requires that states adopt the least restrictive measure to achieve the legitimate aim.⁶³ In assessing the proportionality of Turtonia’s actions, the nature and severity of the interference are relevant.⁶⁴

18. The imprisonment sentence imposed on Peaps was disproportionate. Where individuals

⁵⁹ Harmful Digital Communications Act 2015 (New Zealand) s 22(a); Criminal Justice and Courts Act 2015 (UK) s 33; Justice Act 2016 (Northern Ireland) s 51; Ariz Rev Stat §13-1425 (Arizona) s A(3); Or Rev Stat §161.005 (Oregon) s 1(a); Utah Code §76-5b-203 (Utah) s 2.

⁶⁰ Para 12.2 of the Facts.

⁶¹ Para 12.2 of the Facts.

⁶² Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Publishing, 2012), 39–40; Giuseppe Palmisano, ‘Fault’ (2007) Max Planck Encyclopaedia of Public International Law 1955, paras 41–42.

⁶³ *Malcolm Ross* (n 13) para 11.6; 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 (‘UNHRC December 2009 Report’) para 17.

⁶⁴ *Ceylan* (n 15) para 37; *Tammer v Estonia* App no 41205/98 (ECtHR, 4 April 2001) (‘*Tammer*’) para 69; *Skalka v Poland* App no 43425/98 (ECtHR, 27 May 2003) (‘*Skalka*’) paras 41–42; *Cumpănă and Mazare v Romania* App no 33348/96 (ECtHR, 17 December 2004) (‘*Cumpănă*’) para 111.

have made allegations about public officials, the UNHRC,⁶⁵ ECtHR⁶⁶ and ACommHPR⁶⁷ have found imprisonment sentences inappropriate unless such allegations amount to an incitement to discrimination, hostility, or violence. Even then, criminal imprisonment is still only reserved for the most severe cases of incitement.⁶⁸ This is because imposing imprisonment sentences beyond these specific categories would create a “chilling effect” where citizens are discouraged from discussing the conduct of officials in fear of punishment.⁶⁹ Here, the prosecution of Peaps under the ODPa concerned the effect of his post on Kola’s privacy and reputation, and did not relate to any such incitement.⁷⁰

19. Turtonia cannot argue that it should enjoy a margin of appreciation in determining the severity of Peaps’ penalty. The margin of appreciation doctrine undermines the protection of human rights according to common standards, and thus betrays the

⁶⁵ *Marques de Morais v Angola* UN Doc CCPR/C/83/D/1128/2002 (HRC, 18 April 2005) para 6.8; *Adonis v Philippines* UN Doc CCPR/C/103/D/1815/2008/Rev 1 (HRC, 26 April 2012) para 7.7; UNESCO, *World Trends in Freedom of Expression and Media Development: Special Digital Focus* (UNESCO Publishing, 2015) 164; David Kaye, ‘Jailing Teen Blogger in Singapore Sends Wrong Message on Free Expression’ *UN News Centre* (4 October 2016) <www.un.org/apps/news/story.asp?NewsID=55207#.WF1KaVN97IU> accessed 21 January 2018.

⁶⁶ *Cumpănă* (n 64) para 115; *Otegi Mondragon v Spain* App no 2034/07 (ECtHR, 15 September 2011) paras 58–60; *Belpietro v Italy* App no 43612/10 (ECtHR, 24 September 2013) paras 61–62.

⁶⁷ *Lohé Issa Konaté v The Republic of Burkina Faso* App no 004/2013 (ACommHPR, 5 December 2014) para 167.

⁶⁸ *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998) (‘*Lehideux*’) para 57; *Perinçek* (n 15) para 272; UNHRC May 2011 Report (n 9) para 36; Law Commission of Canada, *What is a Crime? Defining Criminal Conduct in Contemporary Society* (UBC Press, 2014) 9.

⁶⁹ UNHRC May 2011 Report (n 9) paras 26, 28; UNHRC, ‘Report of the Special Rapporteur in the Field of Cultural Rights’ (14 March 2013) UN Doc A/HRC/23/34 (‘UNHRC March 2013 Report’) para 89; Article 19, ‘Defining Defamation: Principles on Freedom of Expression and Protection of Reputation’ (*Article 19*, 2017) <[https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-\(online\)-.pdf](https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf)> accessed 21 January 2018, 11.

⁷⁰ Para 8.3 of the Facts.

universality of human rights.⁷¹ Even if a margin of appreciation could be accorded to Turtonia, it must be narrow where the impugned publication contributes to a debate of public interest.⁷² As argued above,⁷³ given that Peaps' post raised the possibility of Kola's involvement with True Religion, Turtonia exceeded its margin in sentencing Peaps to two years' imprisonment.

20. Accordingly, the prosecution was disproportionate to the aim pursued.

⁷¹ *Ilmari Lämsman v Finland* UN Doc CCPR/C/52/D/511/1992 (HRC, 14 October 1993) para 9.4; Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012) 1; Cora Feingold, 'The Doctrine of Margin of Appreciation and the European Convention on Human Rights' (1977) 53 *Notre Dame Law Review* 90, 95; Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 843, 844; Trevor Allan, 'Human Rights and Judicial Review: A Critique of "Due Defence"' (2006) 65 *Cambridge Law Journal* 671, 675.

⁷² *Wingrove* (n 21) para 58; *Ceylan* (n 15) para 34; *Animal Defenders International v UK* App no 48876/08 (ECtHR, 22 April 2013) para 102; *Perinçek* (n 15) para 197.

⁷³ See para 12 of this Memorial.

II. TURTONIA VIOLATED SCOOPS' FREEDOM OF EXPRESSION BY PROSECUTING IT UNDER THE ODP

21. The right to freedom of expression protects information regardless of the medium employed for dissemination.⁷⁴ This includes internet-based modes of expression that serve as “one of the most powerful instruments of the 21st century for ... facilitating active citizen participation in building democratic societies.”⁷⁵ As such, attempts to “distort the workings of the internet and limit its democratizing potential ... constitutes ... a violation of [the] freedom of expression”.⁷⁶
22. Scoops, the social media platform that had stored Peaps' post, was prosecuted under the ODP and fined US\$200,000.⁷⁷ This was done despite Scoops successfully removing all 21,000 shares of Peaps' post after being informed by Kola's legal counsel.⁷⁸
23. Although Turtonia may have acted in pursuance of the legitimate aim of protecting Kola's rights to privacy and reputation,⁷⁹ Turtonia's prosecution of Scoops under the ODP was unjustified because it was: (A) not prescribed by law; and (B) not necessary in a democratic society.

⁷⁴ General Comment 34 (n 6) paras 11–12; Frank LaRue *et al*, ‘Joint Declaration on Freedom of Expression and the Internet’ (2011) <<http://www.osce.org/fom/78309?download=true>> (‘Joint Declaration’) accessed 21 January 2018, principle 1(a); IACHR, ‘Report of the Special Rapporteur for Freedom of Expression’ (15 March 2017) OEA/SER L/V/II Doc 22/1, 417.

⁷⁵ UNHRC May 2011 Report (n 9) para 2.

⁷⁶ IACHR December 2013 Report (n 14) 503.

⁷⁷ Para 12.1 of the Facts.

⁷⁸ Para 9.2 of the Facts.

⁷⁹ ICCPR art 17(2); ECHR art 8.

A. THE PROSECUTION WAS NOT PRESCRIBED BY LAW BECAUSE SECTION 1(A) OF THE ODPa WAS NOT SUFFICIENTLY PRECISE

24. As stated above,⁸⁰ a prosecution under a statute is prescribed by law if the statute is sufficiently precise such that liability can be reasonably foreseen.⁸¹ The prosecution of Scoops was not prescribed by law because section 1 of the ODPa was insufficiently precise.
25. Section 1 was insufficiently precise because the terms “knowingly” and “knows or consciously disregards” were vague. Scoops was prosecuted for knowingly distributing an intimate image without Kola’s consent,⁸² despite the ODPa failing to define the knowledge requirement. The usage of the knowledge requirement has generated uncertainty for intermediaries as it is unclear when knowledge can be imputed on to them.⁸³ For example, in the context of the EU E-Commerce Directive,⁸⁴ this requirement

⁸⁰ See para 5 of this Memorial.

⁸¹ *Sunday Times* (n 15) para 49; *Müller* (n 21) para 29; *Kokkinakis* (n 21) para 40; *Wingrove* (n 21) para 40; *Lindon* (n 21) para 41; *Editorial Board* (n 21) para 52; Siracusa Principles (n 21) principle 17; General Comment 16 (n 21) para 3; UNHRC May 2011 Report (n 9) paras 31–32; General Comment 34 (n 6) paras 24–25.

⁸² Para 13.1 of the Facts.

⁸³ European Commission, ‘Commission Staff Working Document: Online Services, Including E-Commerce, in the Single Market’ (2012) <http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf> (‘Commission Staff Working Document’) accessed 21 January 2018, 33; UNESCO, ‘Fostering Freedom Online: The Role of Internet Intermediaries’ (2014) <<http://unesdoc.unesco.org/images/0023/002311/231162e.pdf>> (‘UNESCO 2014 Report’) accessed 21 January 2018, 52; Pablo Baistrocchi, ‘Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce’ (2002) 19 *Santa Clara Computer & High Tech Law Journal* 111, 123–125; Thibault Verbiest *et al*, ‘Study on the Liability of Internet Intermediaries’ (12 November, 2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575069> (‘Study on Internet Intermediaries’) accessed 21 January 2018, 14–15; Nicolo Zingales, ‘Internet Intermediary Liability: Identifying Best Practices for Africa’ (*APC*, 2013) <https://www.apc.org/sites/default/files/APCInternetIntermediaryLiability_BestPracticesAfrica_20131125.pdf> (‘Internet Intermediary Liability’) accessed 21 January 2018, 10.

⁸⁴ European Commission, Council Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market [2000] OJ L 178/1.

has been interpreted by member states as being established in a myriad of ways, including by way of court order,⁸⁵ user notice⁸⁶ or general awareness of the illegality of a post by self-monitoring.⁸⁷ Without a clear definition on this element of liability, intermediaries are left uncertain as to the preventive measures that can be undertaken. This results in over-censorship and a chilling effect on these intermediaries.⁸⁸ Despite Kola's staff failing to confirm the identity of the person depicted,⁸⁹ knowledge had been imputed on to Scoops. This demonstrates an arbitrary application of a vague statute in a manner that Scoops could not reasonably have foreseen.

26. Accordingly, the prosecution was not prescribed by law.

B. THE PROSECUTION WAS NOT NECESSARY IN A DEMOCRATIC SOCIETY

27. As stated above,⁹⁰ an interference with the right to freedom of expression is necessary in a democratic society if it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aim pursued.⁹¹

⁸⁵ Legislative Decree No 70 (Italy), art 16; Decree No 7/2004 of 7 January 2004 (Portugal), art 18; Law 34/2002 on Information Society Services and Electronic Commerce (Spain), art 16.1.II.

⁸⁶ Aleksandra Kuczerawy, 'Intermediary Liability & Freedom of Expression: Recent Developments in the EU Notice & Action Initiative' (2015) CiTiP Working Paper 21/2015 ('Recent Developments') 6; Patrick van Eecke and Maarten Truyens, *Legal Analysis of a Single Market for the Information Society: New Rules for a New Age?* (DLA Piper, 2009) ('New Rules') ch 6 pp 18–19; Commission Staff Working Document (n 83) 33.

⁸⁷ Commission Staff Working Document (n 83) 34–37; Study on Internet Intermediaries (n 83) 37–40.

⁸⁸ Internet Intermediary Liability (n 83) 10; Rishabh Dara, 'Intermediary Liability in India: Chilling Effects on Free Expression on the Internet' (*SSRN*, 11 April 2012) <<http://ssrn.com/abstract=2038214>> accessed 21 January 2018.

⁸⁹ Para 9.2 of the Facts.

⁹⁰ See para 9 of this Memorial.

⁹¹ *Handyside* (n 15) para 48; *Delfi June 2015* (n 35) para 131; *Mac TV SRO* (n 35) para 39; General Comment 34 (n 6) paras 22, 33–34; UNHRC April 2013 Report (n 8) para 29.

1. *There was no pressing social need to prosecute Scoops because the obligation to determine the legality of Peaps' post was unduly onerous*

28. The excessive regulation of intermediaries should be avoided as it severely impairs their ability to facilitate a country's democratic development.⁹² The ECtHR⁹³ and the CJEU⁹⁴ have thus provided a framework to determine whether there is a pressing social need to impose liability on intermediaries. The pertinent factors to consider under this framework include: the nature of the intermediary; knowledge of the illegality of its user content; and the steps taken by the intermediary to regulate its user content.

29. Applying these factors, there was no pressing social need to prosecute Scoops. First, in comparison to active intermediaries, neutral intermediaries act as mere "technical service providers"⁹⁵ and should not be held to the same standard as an active intermediary.⁹⁶ The distinction between active and neutral intermediaries lies in the degree of control the intermediary has over its user content.⁹⁷ In particular, active intermediaries exercise

⁹² UNHRC May 2011 Report (n 9) para 37; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (7 September 2012) UN Doc A/67/357 ('UNHRC September 2012 Report') para 51.

⁹³ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) ('*Delfi October 2013*') para 85; *Delfi June 2015* (n 35) paras 142–143.

⁹⁴ *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) ('*L'Oreal SA*') paras 111–113;

⁹⁵ *Delfi June 2015* (n 35) para 146.

⁹⁶ *Delfi June 2015* (n 35) paras 145–146; *Google France* (n 94) para 114; Eleonora Rabinovich, 'Challenges Facing Freedom of Expression: Intermediary Liability in Argentine Case-Law' (*Association for Civil Rights*, 31 March 2012) <<http://adc.org.ar/download.php?fileId=669>> accessed 21 January 2018, 9.

⁹⁷ *Delfi June 2015* (n 35) paras 144–146; *Google France* (n 94) para 114; Jaani Riordan, *The Liability of Internet Intermediaries* (1st edn, Oxford University Publishing, 2016) ('*Liability of Internet Intermediaries*') paras 12.120, 12.123.

editorial control over the content stored on their platforms⁹⁸ or restrict users from modifying stored content.⁹⁹ Here, Scoops’ users have full discretion to create and upload content that immediately reaches their friends upon hitting the “send” button,¹⁰⁰ save for limited categories of prohibited content.¹⁰¹ Further, while Scoops can increase the visibility of certain posts by way of a boosting mechanism,¹⁰² this mechanism was not involved in the dissemination of Peaps’ post.¹⁰³

30. Secondly, social media intermediaries generally lack the capacity to determine whether material stored on their platforms is illegal¹⁰⁴ because the determination of illegality is “contextual and subjective”.¹⁰⁵ As this task properly falls within the expertise of judicial or executive authorities, intermediaries should only be taken to know about the illegality

⁹⁸ *Delfi June 2015* (n 35) paras 115–116; *Papasavvas v O Fileleftheros Dimosia Etaireia Ltd* C-291/13 (CJEU, 27 March 2013) para 45; *Liability of Internet Intermediaries* (n 97) paras 8.105, 11.47, 12.126, 12.129.

⁹⁹ *Delfi June 2015* (n 35) paras 115–116, 145; Lisl Brunner, ‘The Liability of an Online Intermediary for Third Party Content, The Watchdog Becomes the Monitor: Intermediary Liability after *Delfi v Estonia*’ (2016) 16 *Human Rights Review* 163, 166–167; Robert Spano, ‘Intermediary Liability for Online User Comments Under the European Convention on Human Rights’ (2017) 17 *Human Rights Law Review* 665, 671–672.

¹⁰⁰ Para 5.3 of the Facts.

¹⁰¹ Para 9.2 of the Facts.

¹⁰² Para 5.3 of the Facts.

¹⁰³ Para 7 of the Clarifications.

¹⁰⁴ UNHRC May 2011 Report (n 9) para 42; Yaman Akdeniz, ‘Governing Racist Content on the Internet: National and International Responses’ (2007) 56 *University New Brunswick Law Journal* 103 (‘Governing Racist Content’) paras 143–144; Article 19, ‘Internet Intermediaries: Dilemma of Liability’ (*Article 19*, 2013) <www.article19.org/data/files/Intermediaries_ENGLISH.pdf> (‘Dilemma of Liability’) accessed 21 January 2018, 14; *Recent Developments* (n 86) 6.

¹⁰⁵ *Scarlet Extended SA v SABAM* C–70/10 (CJEU, 24 November 2011) paras 49–53; *SABAM v Netlog NV* C–360/10 (CJEU, 16 February 2012) paras 47–51.

of their user content upon receiving notices from these authorities.¹⁰⁶ As Turtonia had not sent any notice, Scoops should not have been taken to know about the illegality of Peaps' post. Even if the illegality of user content can be determined from notices sent by private entities, these notices should provide details of the sender and the party harmed by the content to avoid abuses of the notice system and assist in the determination of illegality.¹⁰⁷ The notice sent by Kola's office was incomplete and did not confirm Kola's identity in Peaps' post.¹⁰⁸

31. Thirdly, intermediaries should only be required to proactively remove their user content in exceptional situations, where the content is "on [its] face" manifestly illegal, amounting to incitement to hostility or direct threats to the physical integrity of individuals.¹⁰⁹ This recognises the pluralistic and self-regulating nature of social media,¹¹⁰ and it is thus sufficient for intermediaries to implement a notice-and-takedown

¹⁰⁶ Ley No 20435, Modifica La Ley No 17.336 Sobre Propiedad Intelectual, chap III (Chile), arts 85-L–85-U; Legislative Decree No 70 (Italy), art 16; Decree No 7/2004 of 7 January 2004 (Portugal), art 18; Law 34/2002 on Information Society Services and Electronic Commerce (Spain), art 16.1.II; New Rules (n 86) ch 6 19–20; UNHRC May 2011 Report (n 9) para 43; Christina Angelopoulos and Stijn Smet, 'Notice-and-fair-balance: How to Reach a Compromise Between Fundamental Rights in European Intermediary Liability' (2016) 8 Journal of Media Law 266 ('Notice-and-Fair-Balance') 299–300.

¹⁰⁷ European Commission, 'Public Consultation on Procedures for Notifying and Acting on Illegal Content Hosted by Online Intermediaries Summary of Responses' (2012) <http://ec.europa.eu/internal_market/consultations/2012/clean-and-open-internet/summary-of-responses_en.pdf> ('Public Consultation') accessed 21 January 2018, 4–5; European Commission, 'Tackling Illegal Content Online: Towards An Enhanced Responsibility of Online Platforms' (Communication) COM (2017) 555 final, 10; Council of Europe, 'Draft Recommendation CM/Rec(2017)xxx of the Committee of Ministers to Member States on the Roles and Responsibilities of Internet Intermediaries' (2017) <<https://rm.coe.int/draft-recommendation-cm-rec-2017-xxx-of-the-committee-of-ministers-to-/168075d869>> accessed 21 January 2018, 7; New Rules (n 86) ch 6, 19; Electronic Frontier Foundation, 'The Manila Principles on Intermediary Liability Background Paper' (EFF, 22 March 2015) <<https://www.eff.org/sites/default/files/manila-principles-background-paper-0.99.pdf>> ('Manila Principles Background Paper') accessed 21 January 2018, 30–31.

¹⁰⁸ Para 9.2 of the Facts.

¹⁰⁹ *Delfi June 2015* (n 35) para 114; *Magyar Tartalomszolgáltatók Egyesülete v Hungary App no 22947/13* (ECtHR, 2 February 2016) ('MTE') para 63.

¹¹⁰ General Comment 34 (n 6) para 15; UNHRC, 'Report of the Special Rapporteur on Minority Issues' (5 January 2015) UN Doc A/HRC/28/64 ('UNHRC January 2015 Report') paras 60, 65, 94–100.

mechanism.¹¹¹ Scoops had an online reporting system in place for users to provide notice to remove a post.¹¹² Further, as Peaps' post was not written in a hostile manner and did not contain any threats,¹¹³ there were no exceptional situations justifying the immediate removal of Peaps' post.

32. Finally, intermediaries wishing to avoid potential liability would be incentivized to automatically take down content upon receiving notices from private entities, as evaluating the merits of each case would be expensive and time-consuming.¹¹⁴ This paves the way for excessive self-censorship that is particularly damaging because of a lack of due process, such as the opportunity to appeal a request for removal.¹¹⁵ This severely undermines the ability of social media intermediaries to spur debate on

¹¹¹ *Delfi June 2015* (n 35) para 159; *MTE* (n 109) para 91.

¹¹² Para 9.2 of the Facts.

¹¹³ Para 8.3 of the Facts.

¹¹⁴ UNESCO 2014 Report (n 83) 52; Manila Principles Background Paper (n 107) 17; Recent Developments (n 86) 53–54; Rosa-Julia Barcelo and Kamiel Koelman, 'Intermediary Liability In The E-Commerce Directive: So Far So Good, But It Is Not Enough' (2000) 16 *Computer Law & Security Review* 231, 231; Daithí Mac Síthigh, 'The Fragmentation of Intermediary Liability in the UK' (2013) 8 *Journal of Intellectual Property Law & Practice* 521 ('Fragmentation of Intermediary Liability') 525–526; Aleksandra Kuczerawy, 'The Power of Positive Thinking: Intermediary Liability and the Effective Enjoyment of the Right to Freedom of Expression' (2017) 8 *Journal of Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 226, para 6; Ashley Hurst, 'ISPs and Defamation Law: Hold Fire, Robert Jay' *The Guardian* (25 January 2013) <www.theguardian.com/law/2013/jan/25/defamation-law-robert-jay> accessed 21 January 2018.

¹¹⁵ UNESCO 2014 Report (n 83) 86; Alex Comminos, 'The Liability of Internet Intermediaries in Nigeria, Kenya, South Africa and Uganda: An Uncertain Terrain' (2012) *Intermediary Liability in Africa Research Papers* No 1, 7; Manila Principles Background Paper (n 107) 3, 11.

contentious issues, ultimately damaging the flow of free speech.¹¹⁶ The imposition of liability on Scoops, Turtonia’s largest social media platform,¹¹⁷ would inhibit political debate and democratic development in Turtonia.

33. Accordingly, there was no pressing social need to prosecute Scoops.

2. *The prosecution was disproportionate because it was excessive pursuant to international standards*

34. As stated above,¹¹⁸ proportionality requires that states adopt the least restrictive measure to achieve the legitimate aim.¹¹⁹ In assessing the proportionality of Turtonia’s actions, the nature and severity of the interference are relevant.¹²⁰

35. The imposition of direct liability on Scoops was disproportionate. Given that intermediaries often lack control over the voluminous amount of user content on their

¹¹⁶ *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012) para 48; *Delfi June 2015* (n 35) para 110; UNHRC May 2011 Report (n 9) para 2; OECD, ‘The Economic and Social Role of Internet Intermediaries’ (OECD, April 2010) <<https://www.oecd.org/internet/ieconomy/44949023.pdf>> accessed 21 January 2018, 43–44; Jerome Antony, ‘Refugee Crisis: Growing Social Media Outrage as Gulf Nations Fail to Embrace Syrian Migrants’ *International Business Times* (11 September 2015) <<http://www.ibtimes.co.uk/refugee-crisis-questions-raised-over-rich-gulf-nations-not-embracing-syrian-migrants-1519241>> accessed 21 January 2018; Steve Almasy, ‘Twitter Offers Ahmed Mohamed Inspiration, Invitations and Internships’ *CNN* (17 September 2015) <<http://edition.cnn.com/2015/09/16/us/ahmed-mohamed-social-media-reactions/index.html>> accessed 21 January 2018; Bijian Stephen, ‘Social Media Helps Black Lives Matter Fight the Power’ (*Wired*, 2015) <<http://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/>> accessed 21 January 2018; Joint Declaration (n 74) para 2.

¹¹⁷ Para 5.1 of the Facts.

¹¹⁸ See para 17 of this Memorial.

¹¹⁹ *Malcolm Ross* (n 13) para 11.6; UNHRC December 2009 Report (n 63) para 17.

¹²⁰ *Ceylan* (n 15) para 47; *Tammer* (n 64) para 69; *Skalka* (n 64) paras 41–42; *Cumpănă* (n 64) para 111.

platforms,¹²¹ they should not be subjected to the same standards as content creators to prevent over-exposure to liability.¹²² Instead, such intermediaries are often afforded recourse to a safe harbour regime that exempts liability upon compliance with certain requirements.¹²³ However, the ODPa did not provide for such a regime that distinguished between intermediaries and content creators.¹²⁴ Scoops, the social media intermediary,¹²⁵ had been fined under the statute and was therefore exposed to excessive liability.

36. In any event, the US\$200,000 fine imposed on Scoops was excessive. Less severe fines have been imposed on intermediaries where the publication interfered with an individual's reputation. For instance, Google was fined US\$65,000 by France for failing to remove a defamatory publication from its search links.¹²⁶ Less severe fines have also been imposed on intermediaries where the publication concerned large social groups and thus had greater adverse effects. In *Delfi AS v Estonia*, a fine of US\$400 was imposed on Delfi AS, Estonia's largest internet news portal, for failing to remove speech that incited

¹²¹ Corey Omer, 'Intermediary Liability for Harmful Speech: Lessons from Abroad' (2014) 28 *Harvard Journal of Law & Technology* 289 ('Liability for Harmful Speech') 294–295; Michal Lavi, 'Content Providers' Secondary Liability: A Social Network Perspective' (2016) 26 *Fordham Intellectual Property, Media & Entertainment Law Journal* 855, 866–867; Lilian Edwards, 'The Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights' (*WIPO*, 2010) <http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf> ('Role and Responsibility') accessed 21 January 2018, 5.

¹²² UNHRC May 2011 Report (n 9) para 40; Manila Principles Background Paper (n 107) 14–15.

¹²³ Miquel Peguera, 'The DMCA Safe Harbors and their European Counterparts: A Comparative Analysis of some Common Problems' (2009) 32 *Columbia Journal of Law & the Arts* 481, 481; Notice-and-Fair-Balance (n 106) 268; Dilemma of Liability (n 104) 7.

¹²⁴ Para 10.2 of the Facts.

¹²⁵ Para 5.1 of the Facts.

¹²⁶ Kashmir Hill, 'French Court Forces Google To Change "Crook" Company's Autocomplete Suggestion' *Forbes* (5 January 2012) <<https://www.forbes.com/sites/kashmirhill/2012/01/05/french-court-forces-google-to-change-crook-companys-autocomplete-suggestion/#4622582d2ce4>> accessed 21 January 2018.

violence.¹²⁷ Similarly, Twitter was fined US\$51,000 by Turkey for refusing to remove ‘terrorist propaganda’ despite being asked to do so.¹²⁸

37. Accordingly, the prosecution was disproportionate to the aim pursued.

¹²⁷ *Delfi June 2015* (n 35) paras 27–31.

¹²⁸ Ercan Gurses, ‘Turkey Fines Twitter for Failure to Remove “Terrorist Propaganda”’: Official’ *Reuters* (11 December 2015) <<http://www.reuters.com/article/us-turkey-twitter-fine-idUSKBN0TU0NK20151211>> accessed 21 January 2018.

III. TURTONIA VIOLATED PEAPS' FREEDOM OF EXPRESSION BY PROSECUTING HIM UNDER THE IA

38. Although states have a duty to curtail any “advocacy of national, racial or religious hatred that constitutes incitement to hostility, discrimination or violence”,¹²⁹ the development of a tolerant, pluralist, and democratic society also requires states to refrain from excessively criminalising legitimate expression.¹³⁰
39. In response to Peaps’ attempt to publish information concerning a possible terrorist infiltration by True Religion members, who were distinct from the Aquarian immigrant community, Turtonia prosecuted Peaps under the IA and imposed a US\$100,000 fine.¹³¹
40. Although Turtonia may have acted in pursuance of the legitimate aim of protecting public order, Turtonia’s prosecution of Peaps under the IA was unjustified because it was: (A) not prescribed by law; and (B) not necessary in a democratic society.

¹²⁹ ICCPR art 20(2).

¹³⁰ UNHRC May 2011 Report (n 9) paras 26, 28, 34; UNHRC January 2015 Report (n 110) para 59.

¹³¹ Para 12.1 of the Facts.

A. THE PROSECUTION WAS NOT PRESCRIBED BY LAW BECAUSE SECTION 1(B) OF THE IA WAS NOT SUFFICIENTLY PRECISE

41. As stated above,¹³² a prosecution under a statute is prescribed by law if the statute is sufficiently precise such that liability can reasonably be foreseen.¹³³ The prosecution of Peaps was not prescribed by law because section 1(b) of the IA was insufficiently precise.
42. Section 1(b) of the IA was insufficiently precise because the phrase “civil unrest, hatred, or damage the national unity” was vague. Peaps was prosecuted under the IA¹³⁴ even though these key terms were not defined. Legislations prohibiting incitement frequently prescribe heavy penalties¹³⁵ and are susceptible to abuse for the purpose of suppressing dissenting voices if not clearly defined.¹³⁶ Thus, states ought to define key terms such as “hatred”, “incitement”, “unrest”, and “national unity” in their legislations governing incitement.¹³⁷ This has been noted by the United Nations, which has criticised

¹³² See para 5 of this Memorial.

¹³³ *Sunday Times* (n 15) para 49; *Müller* (n 21) para 29; *Kokkinakis* (n 21) para 40; *Wingrove* (n 21) para 40; *Lindon* (n 21) para 41; *Editorial Board* (n 21) para 52; Siracusa Principles (n 21) principle 17; General Comment 16 (n 21) para 3; UNHRC May 2011 Report (n 9) paras 31–32; General Comment 34 (n 6) paras 24–25.

¹³⁴ Para 12.1.2 of the Facts.

¹³⁵ UNHRC September 2012 Report (n 92) para 51.

¹³⁶ UN Economic and Social Council, ‘Report of the Special Rapporteur on Freedom of Expression’ (11 February 1997) UN Doc E/CN.4/1997/31/Add.1 (‘UN Economic and Social Council February 1997 Report’) para 32; UNHRC August 2011 Report (n 13) para 29-30; UNHRC September 2012 Report (n 92) paras 51–52; Toby Mendel, ‘Study on International Standards Relating to Incitement to Genocide or Racial Hatred’ (*Concerned Historians*, April 2006) <<http://www.concernedhistorians.org/to/239.pdf>> (‘Study on International Standards’) accessed 21 January 2018, 39; Simon Joel, ‘Of Hate and Genocide: In Africa, Exploiting the Past’ (2009) 44 *Columbia Journalism Review* 9; UNHRC Rabat Plan (n 22) para 15.

¹³⁷ UNHRC August 2011 Report (n 13) para 29-30; UNHRC September 2012 Report (n 92) paras 51–52; OHCHR, ‘Mandates of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (12 February 2013) UN Doc EGY/4/2013, 3–4; UNHRC Rabat Plan (n 22) para 19; Article 19, ‘The Camden Principles of Freedom of Expression and Equality’ (*Article 19*, April 2009) <<http://www.refworld.org/docid/4b5826fd2.html>> accessed 21 January 2018, principle 12.

prohibitions against speech “inciting religious unrest” in Turkmenistan, “damaging the indivisible unity of the State” in Turkey, and “threaten[ing] the national unity” in Egypt for lacking firm definitions.¹³⁸ Here, not only did the IA impose up to a one-year jail term and a US\$300,000 fine,¹³⁹ the Turtonian authorities also had the undue discretion to find Peaps liable without clearly identifying the specific ground of liability.¹⁴⁰

43. Accordingly, the prosecution was not prescribed by law.

B. THE PROSECUTION WAS NOT NECESSARY IN A DEMOCRATIC SOCIETY

44. As stated above,¹⁴¹ an interference with the right to freedom of expression is necessary in a democratic society if it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aim pursued.¹⁴²

¹³⁸ UN Economic and Social Council February 1997 Report (n 136) para 32; UNHRC August 2011 Report (n 13) para 29-30; UNHRC September 2012 Report (n 92) paras 51–52.

¹³⁹ Para 11.2 of the Facts.

¹⁴⁰ Para 3 of the Clarifications.

¹⁴¹ See para 9 of this Memorial.

¹⁴² *Handyside* (n 15) para 48; *Delfi June 2015* (n 35) para 131; *Mac TV SRO* (n 35) para 39; General Comment 34 (n 6) paras 22, 33–34; UNHRC April 2013 Report (n 8) para 29.

1. *There was no pressing social need to prosecute Peaps because Peaps' post did not amount to an incitement to hostility*

45. The UN Rabat Plan provides a framework to determine whether publications amount to an incitement to hostility.¹⁴³ The factors to consider include: the intention of the publisher; the context; the content of the publication; the likelihood of hostility, discrimination, or violence occurring; and the medium used.
46. Applying these factors, there was no pressing social need to prosecute Peaps. First, for an individual to be liable for incitement, there must be an intention for the publication to incite hostility.¹⁴⁴ Such intention is objectively discerned from the publication's content, read in light of its surrounding circumstances.¹⁴⁵ Although Peaps deliberately chose to discuss the controversial topic of terrorist infiltration in Turtonia,¹⁴⁶ this was done to boost his account's viewership.¹⁴⁷ Peaps' lack of intent to incite hostility is further

¹⁴³ UNHRC Rabat Plan (n 22) para 29; UNHRC March 2013 Report (n 69) para 28; UNHRC January 2015 Report (n 110) para 48; UN Committee on the Elimination of Racial Discrimination, 'General Recommendation No 35 Combating Racist Hate Speech' (26 September 2013) UN Doc CERD/C/GC/35 para 15; UNHRC, 'Report of the Special Rapporteur on Freedom of Religion or Belief' (26 December 2013) UN Doc A/HRC/25/58 para 58; International Justice Resource Centre, 'UN Launches the Rabat Plan of Action' *IRJC* (25 February 2013) <<http://www.ijrcenter.org/2013/02/25/un-launches-the-rabat-plan-of-action/>> accessed 21 January 2018.

¹⁴⁴ *Robert Faurisson v France* UN Doc CCPR/C/58/D/550/1993 (HRC, 8 November 1996) para 9; Amnesty International, 'Written Contribution to the Thematic Discussion on Racist Hate Speech and Freedom of Opinion and Expression Organized by the UN Committee on Elimination of Racial Discrimination' (*OHCHR*, 28 August 2012) <<http://www.ohchr.org/Documents/HRBodies/CERD/Discussions/RacistHateSpeech/AmnestyInternational.pdf>> accessed 21 January 2018, 3; Article 19, 'Prohibiting Incitement to Discrimination, Hostility or Violence' (*Article 19*, December 2012) <<https://www.article19.org/data/files/medialibrary/3548/ARTICLE-19-policy-on-prohibition-to-incitement.pdf>> ('Prohibiting Incitement') accessed 21 January 2018, 22.

¹⁴⁵ *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) ('*Jersild*') para 31; *Arslan v Turkey* App no 23462/94 (ECtHR, 8 July 1999) ('*Arslan*') para 48; *Karatas v Turkey* App no 23168/94 (ECtHR, 8 July 1999) paras 48–49; Prohibiting Incitement (n 144) 31–33.

¹⁴⁶ Para 4.1 of the Facts.

¹⁴⁷ Paras 12.2 of the Facts.

demonstrated by his online search, which was an attempt to ensure that he was the first to break the story.¹⁴⁸ Further, the threshold for finding intention to incite hostility is high.¹⁴⁹ Despite the fact that Peaps was a Turton Power member, his potential dissatisfaction with Kola's immigration policies is insufficient to meet the requisite intention.

47. Secondly, publications that contribute to a debate of public interest are less likely to be interpreted as incitement.¹⁵⁰ Peaps' post concerned an allegation of a possible terrorist infiltration in the context of a spike in Turtonia's immigrant inflow.¹⁵¹ Such a subject matter is a quintessential example of public interest.¹⁵² Further, for a publication to qualify as incitement, it must contain an attack against an identifiable group.¹⁵³ However, Peaps' post related to the True Religion group and did not target the general Aquarian community.¹⁵⁴ Members of True Religion, widely regarded as terrorists by several states,¹⁵⁵ were different from the general Aquarian immigrant community and

¹⁴⁸ Para 12.2 of the Facts.

¹⁴⁹ *R v Keegstra* (1990) 3 SCR 697, 774–775; UNHRC Rabat Plan (n 22) paras 18, 22; Inter-American Legal Framework (n 14) 20–21; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights Cases Materials and Commentary* (3rd edn, Oxford University Publishing, 2013) 463.

¹⁵⁰ *Jersild* (n 145) paras 33–34; *Incal v Turkey* App no 22678/93 (ECtHR, 9 June 1998) paras 46, 50; *Lehideux* (n 68) paras 48, 55; *Gunduz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) ('*Gunduz*') paras 43, 44, 49; *Coleman v Australia* UN Doc CCPR/C/87/D/1157/2003 (HRC, 10 August 2006) para 7.3; Study on International Standards (n 136) 42.

¹⁵¹ Para 2.1 of the Facts.

¹⁵² Public Interest Rules (n 31) 150; House of Lords Bill (n 31) 3–4.

¹⁵³ *Norwood v UK* App no 23131/03 (ECtHR, 16 November 2004) para 4; *Ivanov v Russia* App no 35222/04 (ECtHR, 20 February 2007) para 4; *Dmitriyevskiy v Russia* App no 42168/06 (ECtHR, 3 October 2017) para 100; *Malcolm Ross* (n 13) para 11.5; UNHRC Rabat Plan (n 22) para 22.

¹⁵⁴ Para 8.3 of the Facts.

¹⁵⁵ Para 3.2 of the Facts.

unwelcomed in both Turtonia and Aquaria alike.¹⁵⁶

48. Thirdly, the likelihood of hostility arising from a publication depends on whether the audience would interpret it as a call to hostility.¹⁵⁷ Such an interpretation would be less likely in the absence of an express call to hostility and where the publication's tone is not hostile.¹⁵⁸ Peaps' post was limited to an allegation of Kola's sexual relationship with Parkta¹⁵⁹ and made no express reference to violence against the Aquarian immigrant community. Further, Peaps' post included a revealing photoshopped image and an eye-catching title,¹⁶⁰ in a highly sensationalised manner. Peaps' audience was thus likely to regard his post as an exposé about Kola, and not a call for violence against the Aquarian immigrant community.

49. Finally, users of social media are known for their tendency to fact-check rumours as they appear online.¹⁶¹ Peaps' publication was posted on Scoops,¹⁶² which operated as a two-way social media platform where users interacted by creating content, boosting and

¹⁵⁶ Paras 3.1–3.2 of the Facts.

¹⁵⁷ *Alves Da Silva v Portugal* App no 41665/07 (ECtHR, 20 October 2009) para 28; Susan Benesch, 'Dangerous Speech: A Proposal to Prevent Group Violence' (*World Policy*, 12 January 2012) <<http://www.worldpolicy.org/sites/default/files/Dangerous%20Speech%20Guidelines%20Benesch%20January%202012.pdf>> ('Dangerous Speech') accessed 21 January 2018, 4; Prohibiting Incitement (n 144) 39.

¹⁵⁸ *Arslan* (n 145) para 45; *Ergin v Turkey (No 6)* App no 47533/99 (ECtHR, 4 May 2006) paras 32, 34; *Gunduz* (n 150) para 51; *Ceylan* (n 15) para 36; Tarlach McGonagle, 'The Council of Europe against Online Hate Speech: Conundrums and Challenges' (2013) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c170f>> ('Conundrums and Challenges') accessed 21 January 2018, 3, 13–14; *Dangerous Speech* (n 157) 2.

¹⁵⁹ Para 8.3 of the Facts.

¹⁶⁰ Para 8.3 of the Facts.

¹⁶¹ Wouter Jong, 'Self-Correcting Mechanisms and Echo-Effects in Social Media: An Analysis of the "Gunman in the Newsroom" Crisis' (2016) 59 *Computers in Human Behaviour* 334; Hunt Allcott and Matthew Gentzkow, 'Social Media and Fake News in the 2016 Election' (2017) 31 *Journal of Economic Perspectives* 2, 223–231.

¹⁶² Para 8.1 of the Facts.

forwarding posts to others.¹⁶³ These response mechanisms stirred public discussion that would have facilitated the verification of Peaps' post.¹⁶⁴ Further, even though Peaps' post garnered over 145,000 views on Scoops,¹⁶⁵ few references were made to its content during the protests,¹⁶⁶ underscoring a lack of belief in its accuracy.

50. Accordingly, there was no pressing social need to prosecute Peaps.

2. *The prosecution was disproportionate because it was excessive pursuant to international standards*

51. As stated above,¹⁶⁷ proportionality requires that states adopt the least restrictive measure to achieve the legitimate aim.¹⁶⁸ In assessing the proportionality of Turtonia's actions, the nature and severity of the punishment are relevant.¹⁶⁹

52. The US\$100,000 fine imposed on Peaps was excessive. Where individuals have

¹⁶³ Para 5.2 of the Facts.

¹⁶⁴ Paras 8.4, 9.3 of the Facts.

¹⁶⁵ Para 9.2 of the Facts.

¹⁶⁶ Para 9.3 of the Facts.

¹⁶⁷ See para 17 of this Memorial.

¹⁶⁸ *Malcolm Ross* (n 13) para 11.6; UNHRC December 2009 Report (n 63) para 17.

¹⁶⁹ *Ceylan* (n 15) para 47; *Tammer* (n 64) para 69; *Skalka* (n 64) paras 41–42; *Cumpănă* (n 64) para 111.

published statements likely to incite hostility, states have generally issued warnings¹⁷⁰ or court orders for the prompt removal of such publications,¹⁷¹ without imposing penalties. Even where a penalty was imposed, states such as Denmark,¹⁷² Germany,¹⁷³ the Netherlands,¹⁷⁴ Malta,¹⁷⁵ Russia,¹⁷⁶ and South Africa¹⁷⁷ have only issued fines ranging from US\$750–12,500 for the publication of speech that incite hostility on social media.

53. Accordingly, the prosecution was disproportionate to the aim pursued.

¹⁷⁰ Panapress, ‘Kenyan Politicians Warned Against Hate Speeches’ (*Panapress*, 20 September 2005) <<http://www.panapress.com/Kenyan-politicians-warned-against-hate-speeches-13-573805-18-lang4-index.html>> accessed 21 January 2018; Raymond Tham, ‘Calvin Cheng’s “Killing Children” Remarks “Insensitive and Inappropriate”’: MLC Chairman’ *CNA* (28 November 2015) <<http://www.channelnewsasia.com/news/singapore/calvin-cheng-s-killing/2299992.html>> accessed 21 January 2018; IFEX Staff, ‘Peruvian Journalist Gets Death Threat After Politician Incites Violence Against Him’ *IFEX* (1 December 2015) <https://www.ifex.org/peru/2015/12/01/tuanama_danger/> accessed 21 January 2018; Jamaica Observer, ‘Dwayne Vaz’ *Jamaica Observer* (16 December 2015) <http://www.jamaicaobserver.com/news/Dwayne-Vaz-apologises_45847> accessed 21 January 2018.

¹⁷¹ *Delfi October 2013* (n 93) para 29; *Conundrums and Challenges* (n 158) 29–30; *Dilemma of Liability* (n 104) 16.

¹⁷² Paul Joseph Watson, ‘Danish Man Convicted, Fined for Facebook Post Comparing Islam with Nazism’ (*The Legal Project*, 11 February 2016) <www.legal-project.org/4482/danish-man-convicted-fined-for-facebook-post> accessed 21 January 2018.

¹⁷³ Philip Oltermann, ‘German Founder of Pegida Fined €9,600 for Facebook Posts’ *The Guardian* (3 May 2016) <www.theguardian.com/world/2016/may/03/german-founder-of-pegida-fined-9600-for-facebook-posts> accessed 21 January 2018; DW Staff, ‘Facebook User Fined Thousands of Euros for Hate Speech Against German Politician’ *DW* (11 April 2017) <<http://www.dw.com/en/facebook-user-fined-thousands-of-euros-for-hate-speech-against-german-politician/a-38390379>> accessed 21 January 2018.

¹⁷⁴ Rebecca Flood, ‘Dutch Populist Leader Geert Wilders Faces 5,000 Euro Fine if Convicted of Hate Speech’ *Express* (17 November 2016) <<https://www.express.co.uk/news/world/733609/Geert-Wilders-racist-hate-speech-fine-Dutch-politician-populist-leader-right-wing>> accessed 21 January 2018.

¹⁷⁵ Bertrand Borg, ‘Fined €3,000 Each for Racist Facebook Posts’ *Times of Malta* (29 November 2016) <www.timesofmalta.com/articles/view/20161129/local/fined-3000-each-for-racist-facebook-posts.632410> accessed 21 January 2018.

¹⁷⁶ Vitaly Shevchenko, ‘Russian Blogger Anton Nosik Convicted of Extremism’ *BBC* (3 October 2016) <www.bbc.com/news/technology-37541039> accessed 21 January 2018.

¹⁷⁷ Daily Mail Staff, ‘South African Woman Fined for Racist Post on Facebook’ *Daily Mail* (10 June 2016) <www.dailymail.co.uk/wires/afp/article-3635816/South-African-woman-fined-10-000-racist-Facebook-rant.html> accessed 21 January 2018.

IV. TURTONIA VIOLATED SCOOPS' FREEDOM OF EXPRESSION BY PROSECUTING IT UNDER THE IA

54. The universal nature of the right to freedom of expression means that “all forms of speech are protected ... independently of their content.”¹⁷⁸ Publications that may not be true are also entitled to protection¹⁷⁹ because “the best test of truth is the power of the thought to get itself accepted in the competition of the market [of ideas]”.¹⁸⁰
55. The first direct suggestion that Peaps' post was false only resulted from the letter from Kola's legal counsel.¹⁸¹ Yet, Scoops was prosecuted under the IA and fined US\$100,000 for communicating false information.¹⁸²
56. Although Turtonia might have acted in pursuance of the legitimate aim of protecting Kola's right to reputation,¹⁸³ Turtonia's prosecution of Scoops under the IA was unjustified because it was: (A) not prescribed by law; and (B) not necessary in a democratic society.

¹⁷⁸ IACHR December 2009 Report (n 38) 220.

¹⁷⁹ *Handyside* (n 15) para 49; Joint Declaration (n 74) para 2(a).

¹⁸⁰ *Abrams v United States* (1919) 250 US 616, 630; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge University Publishing, 2015) 17.

¹⁸¹ Para 9.2 of the Facts.

¹⁸² Para 13.2 of the Facts.

¹⁸³ ICCPR art 17(2); ECHR art 8.

A. THE PROSECUTION WAS NOT PRESCRIBED BY LAW BECAUSE SECTION 3(C) OF THE IA WAS NOT SUFFICIENTLY PRECISE

57. As stated above,¹⁸⁴ a prosecution under a statute is prescribed by law if the relevant statute is sufficiently precise such that liability can reasonably be foreseen.¹⁸⁵ The prosecution was not prescribed by law because section 3(c) of the IA was insufficiently precise.

58. Section 3(c) was insufficiently precise because the term “expeditiously” was vague. Scoops was denied recourse to this defence of expeditious removal,¹⁸⁶ despite the IA failing to define “expeditiously”.¹⁸⁷ The usage of the term “expeditiously” without a specific definition has generated much uncertainty because it is unclear how fast intermediaries must act to qualify for immunity.¹⁸⁸ For example, in the context of the EU E-Commerce Directive, this requirement has been interpreted by member states in a multiplicity of ways, ranging from 12 to 72 hours.¹⁸⁹ Despite successfully removing all 21,000 shares of Peaps’ post within 50 hours,¹⁹⁰ Scoops was nevertheless found liable in

¹⁸⁴ See para 5 of this Memorial.

¹⁸⁵ *Sunday Times* (n 15) para 49; *Müller* (n 21) para 29; *Kokkinakis* (n 21) para 40; *Wingrove* (n 21) para 40; *Lindon* (n 21) para 41; *Editorial Board* (n 21) para 52; Siracusa Principles (n 21) principle 17; General Comment 16 (n 21) para 3; UNHRC May 2011 Report (n 9) paras 31–32; General Comment 34 (n 6) paras 24–25.

¹⁸⁶ Para 13.2 of the Facts.

¹⁸⁷ Para 11.2 of the Facts.

¹⁸⁸ UNESCO 2014 Report (n 83) 411; Commission Staff Working Paper (n 83) 37–39; Public Consultation (n 107) 3; Role and Responsibility (n 121) 10; Emily Laidlaw and Hilary Young, ‘Internet Intermediary Liability in Defamation: Proposals for Statutory Reform’ (*SSRN*, 1 February 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044772> accessed 21 January 2018, 56–57.

¹⁸⁹ Commission Staff Working Paper (n 83) 44.

¹⁹⁰ Para 9.2 of the Facts.

a manner that it could not have reasonably foreseen.

59. Accordingly, the prosecution was not prescribed by law.

B. THE PROSECUTION WAS NOT NECESSARY IN A DEMOCRATIC SOCIETY

60. As stated above,¹⁹¹ an interference with the right to freedom of expression is necessary in a democratic society if it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aim pursued.¹⁹²

1. *There was no pressing social need to prosecute Scoops because the obligation to determine the legality of Peaps' post was overly onerous*

61. As stated above,¹⁹³ the following factors are to be considered in determining whether there is a pressing social need to impose liability on intermediaries:¹⁹⁴ the nature of the intermediary; knowledge of the illegality of its user content; and the steps taken by the intermediary to regulate its user content.

62. Applying these factors, there was no pressing social need to prosecute Scoops. First, as argued above,¹⁹⁵ Scoops was a neutral intermediary and should not be held responsible

¹⁹¹ See para 9 of this Memorial.

¹⁹² *Handyside* (n 15) para 48; *Delfi June 2015* (n 35) para 131; *Mac TV SRO* (n 35) para 39; General Comment 34 (n 6) paras 22, 33–34; UNHRC April 2013 Report (n 8) para 29.

¹⁹³ See para 28 of this Memorial.

¹⁹⁴ *Delfi October 2013* (n 93) para 85; *Delfi June 2015* (n 35) paras 142–143; *Google France* (n 94) para 114; *L'Oreal SA* (n 94) paras 111–113.

¹⁹⁵ See para 29 of this Memorial.

for the dissemination of Peaps' post.

63. Secondly, as stated above,¹⁹⁶ social media intermediaries generally lack the capacity to determine the illegality of material on the internet.¹⁹⁷ Here, Scoops could have had knowledge of the existence of Peaps' post due to the widespread attention that the post had garnered and Scoops' human review system.¹⁹⁸ However, liability under the IA was premised on the falsity of the information published,¹⁹⁹ which Scoops would have faced difficulty in determining. This is because the falsity of Peaps' post would only have been apparent if Scoops came across the discussion thread on the True Religion website. This difficulty was compounded by the removal of the discussion thread on the same day that Scoops received notice from Kola's legal counsel.²⁰⁰

64. Thirdly, requiring intermediaries to remove illegal content immediately would be "excessive and impracticable",²⁰¹ as social media content can quickly go viral.²⁰² In addition, the obligation to remove illegal content immediately can be "oppressive" for intermediaries who wish to ascertain the legality of such content.²⁰³ Thus, states

¹⁹⁶ See para 30 of this Memorial.

¹⁹⁷ UNHRC May 2011 Report (n 9) para 42; Governing Racist Content (n 104) paras 143–144; Recent Developments (n 86) 6; Dilemma of Liability (n 104) 14.

¹⁹⁸ Paras 9.2, 9.3 of the Facts; Paras 4, 5 of the Clarifications.

¹⁹⁹ Para 11.2 of the Facts.

²⁰⁰ Paras 9.2, 12.3.4 of the Facts.

²⁰¹ *MTE* (n 109) para 82.

²⁰² *Editorial Board* (n 21) para 63; *Delfi June 2015* (n 35) para 133; Christian Fuchs, 'Behind the News Social Media, Riots, and Revolutions' (2011) 36(3) *Capital & Class* 383, 384; Sam Gustin, 'Social Media Sparked, Accelerated Egypt's Revolutionary Fire' (*Wired*, 2 November 2011) <<http://www.wired.com/2011/02/egypts-revolutionary-fire/>> accessed 21 January 2018.

²⁰³ Role and Responsibility (n 121) 10.

generally allow intermediaries between 2 to 7 days to remove illegal publications.²⁰⁴

Scoops' successful removal of all 21,000 shares within 50 hours of receiving the letter from Kola's legal counsel²⁰⁵ should thus be deemed sufficient.

65. Finally, it is impractical to impose an obligation to remove a post at the unverified behest of a private party. Social media platforms such as Facebook,²⁰⁶ Twitter,²⁰⁷ or Snapchat²⁰⁸ host between 1 million and 4.75 billion posts per day. Scoops is also the most popular social media platform in Turtonia,²⁰⁹ where Peaps' post was shared over 10,000 times in its first hour.²¹⁰ Imposing an obligation to remove Peaps' post and 21,000 shares at the immediate request of Kola's legal counsel would require Scoops to trawl through an immense amount of content. Such an obligation may cause social media platforms to

²⁰⁴ Fragmentation of Intermediary Liability (n 114) 527; Liability for Harmful Speech (n 121) 308–311; Commission Staff Working Paper (n 83) 44; Gerald Spindler, 'Internet Intermediary Liability Reloaded – The New German Act on Responsibility of Social Networks and its (In-) Compatibility with European Law' (2017) 8 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 166, para 1.

²⁰⁵ Para 9.2 of the Facts.

²⁰⁶ Facebook Staff, 'Facebook's Growth in the Past Year' (*Facebook*, 18 May 2013) <<https://www.facebook.com/facebook/photos/a.10151908376636729.1073741825.20531316728/10151908376716729/?type=3&theater>> accessed 21 January 2018.

²⁰⁷ Salman Aslam, 'Twitter by the Numbers: Stats, Demographics & Fun Facts' (*Omnicores*, 1 January 2018) <<https://www.omnicoreagency.com/twitter-statistics/>> accessed 21 January 2018.

²⁰⁸ Salman Aslam, 'Snapchat by the Numbers: Stats, Demographics & Fun Facts' (*Omnicores*, 1 January 2018) <<https://www.omnicoreagency.com/snapchat-statistics/>> accessed 21 January 2018.

²⁰⁹ Para 5.1 of the Facts.

²¹⁰ Para 8.4 of the Facts.

become economically unsustainable²¹¹ and diminish their ability to facilitate public discussion.²¹²

66. Accordingly, there was no pressing social need to prosecute Scoops.

2. *The prosecution was disproportionate because it was excessive pursuant to international standards*

67. As stated above,²¹³ proportionality requires that states adopt the least restrictive measure to achieve the legitimate aim.²¹⁴ In assessing the proportionality of Turtonia's actions, the nature and severity of the interference are relevant.²¹⁵

68. The imposition of criminal liability on Scoops was disproportionate. States should refrain from resorting to the criminal law if civil law alternatives are readily available.²¹⁶ This is

²¹¹ Cynthia Wong, 'Mapping Digital Media: The Media and Liability for Content on the Internet' (2011) Open Society Foundations Reference Series no 12, 14; Raphael Cohen-Almagor, 'Freedom of Expression, Internet Responsibility, and Business Ethics: The Yahoo! Saga and Its Implications' (2012) 106 *Business & Professional Ethics Journal* 353, 361–362.

²¹² UNHRC February 2008 Report (n 11) para 23; UNHRC May 2011 Report (n 9) paras 2, 20; UNHRC April 2013 Report (n 8) para 13; Centre for Democracy and Technology, 'Regardless of Frontiers: The International Right to Freedom of Expression in the Digital Age' (CDT, 2011) <<https://cdt.org/insight/regardless-of-frontiers-the-international-right-to-freedom-of-expression-in-the-digital-age/>> accessed 21 January 2018, 2.

²¹³ See para 17 of this Memorial.

²¹⁴ *Malcolm Ross* (n 13) para 11.6; UNHRC December 2009 Report (n 63) para 17.

²¹⁵ *Ceylan* (n 15) para 47; *Tammer* (n 64) para 69; *Skalka* (n 64) paras 41–42; *Cumpănă* (n 64) para 111.

²¹⁶ *Amorim Giestas and Jesus Costa Bordalo v Portugal* App no 37840/10 (ECtHR, 3 April 2014) para 36; *Dilipak v Turkey* App no 29680/05 (ECtHR, 2 May 2016) para 77; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (18 January 2000) UN Doc E/CN.4/2000/63 para 52; Richard Carver, 'Freedom of Expression, Media Law and Defamation' (*Media Legal Defence Initiative and International Press Institute*, February 2015) <<http://www.mediadefence.org/sites/default/files/resources/files/MLDI.IPI%20defamation%20manual.English.pdf>> accessed 21 January 2018, 20.

because interferences with the rights to privacy and reputation are essentially private matters being played out between private actors, and neither the public prosecutor nor the public purse should be involved.²¹⁷ Considering that Kola's legal counsel has threatened to sue Scoops for defamation and invasion of privacy,²¹⁸ there was no need for Turtonia to intervene.

69. The imposition of a monetary fine on Scoops was also disproportionate. States rarely impose fines of a huge quantum on intermediaries for inadequate monitoring. Instead, they have implemented co-monitoring regimes with intermediaries.²¹⁹ Such a regime balances the intermediaries' right to freedom of expression with the individuals' rights to privacy and reputation, as opposed to solely pinning the blame on intermediaries. Scoops, as Turtonia's most popular social media platform,²²⁰ was fined under the IA even

²¹⁷ *Madanhire & another v AG* Judgment No CCZ 2/14 (ZWCC, 12 June 2014) 12; Polly Botsford, 'Word Crimes – Defamation and Freedom of Expression' (*International Bar Association*, 15 February 2016) <<https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=9e40e124-20bb-4533-a919-c7b5345f34c4>> accessed 21 January 2018.

²¹⁸ Para 9.2 of the Facts.

²¹⁹ Council Directive (EC) 95/46 On the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data [1995] OJ L 281/31, para 5; Council Directive (EC) 2007/65/EC Amending Council Directive 89/552/EEC on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities [2007] OJ L 332/27, recital 36; Christopher T Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (Cambridge University Press, 2011); Bruce E May, 'The Differences of Regulatory Models and Internet Regulation in the European Union and the United States' (2004) 13 *Information & Communications Technology Law* 259, 266; Daithí Mac Síthigh, 'The Mass Age of Internet Law' (2008) 17 *Information & Communications Technology Law* 79, 87; Dennis D Hirsch, 'In Search of the Holy Grail: Achieving Global Privacy Rules Through Sector-Based Code of Conduct' (2013) 74 *Ohio State Law Journal* 1029, 1046, 1065; Courtney Giles, 'Balancing the Breach: Data Privacy Laws in the Wake of the NSA Revelations' (2015) 37 *Houston Journal of International Law* 543, 573–574; Nicolas Suzor, 'Non-Consensual Porn and the Responsibilities of Online Intermediaries' (2017) 40 *Melbourne University Law Review* 1057, 1087; EDRI, 'EDRI Campaign on CoE Recommendation Failing to Uphold Freedom of Expression' (*EDRI*, 10 October 2007) <<https://edri.org/coerec200711/>> accessed 21 January 2018; OECD, 'The Role of Internet Intermediaries in Advancing Public Policy Objectives' (*OECD*, 16 June 2010) <<https://www.oecd.org/internet/ieconomy/45997042.pdf>> accessed 21 January 2018, 3, 12, 20, 21.

²²⁰ Para 5.1 of the Facts.

though it successfully removed Peaps' post within 50 hours of being notified.²²¹ Turtonia could have resorted to other less restrictive measures in response to Scoops' efforts.

70. Further, even if criminal liability was appropriate, the US\$100,000 fine was excessive. As stated above,²²² less severe penalties have been imposed on intermediaries for hosting illegal publications, whether in the form of incitement or defamatory content. The US\$100,000 went further than necessary to protect Kola's rights and reputations.
71. Accordingly, the prosecution was disproportionate to the aim pursued.

²²¹ Para 9.7 of the Facts.

²²² See para 36 of this Memorial.

RELIEFS SOUGHT

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

1. Turtonia violated Peaps' right to freedom of expression by prosecuting him under the ODP.
2. Turtonia violated Scoops' right to freedom of expression by prosecuting it under the ODP.
3. Turtonia violated Peaps' right to freedom of expression by prosecuting him under the IA.
4. Turtonia violated Scoops' right to freedom of expression by prosecuting it under the IA.

Respectfully submitted 22 January 2018,

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