
2016-2017
Price Media Law Moot Court Competition

Ballaya and SeeSey

Applicants

v.

Amostra

Respondent

MEMORIAL FOR APPLICANTS

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACmHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court of Human and Peoples' Rights
ACHR	American Convention on Human Rights
ArCHR	Arab Charter on Human Rights
CEU	Council of the European Union
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
COE	Council of Europe
ECJ	European Court of Justice
EECD	European Electronic Commerce Directive
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ESA	(Amostra's) Election Safety Act of 2016
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ISP	Internet Service Provider
OAS	Organisation of American States
OSCE	Organisation for Security and Co-operation in Europe
SIA	(Amostra's) Stability and Integrity Act of 2014
SCtI	Supreme Court of India
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNDHRD	United Nations Declaration on Human Rights Defenders
UNHRC	United Nations Human Rights Committee
UNHCHR	(Office of the) United Nations High Commissioner for Human Rights
UNGA	United Nations General Assembly

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STATEMENT OF RELEVANT FACTS

History of Amostra

Amostra is a small country with a history of political instability.¹ Over the past five years, there has been increased social unrest between members of two major religious groups, the Yona (30%) and the Zasa (70%).² The Amostran government is primarily led by members of the Zasa sect,³ and members of the Yona group maintain that the government systematically subjects the Yona people to political and economic discrimination.⁴ As a result, frequent non-violent protests have occurred between the Yona protestors and Zasa counter-protestors.⁵ These protests have resulted in a disproportionate amount of arrests of the Yona protestors, as compared to their Zasa counterparts.⁶

Stability and Integrity Act of 2014

In 2014, the Amostran government enacted the Stability and Integrity Act of 2014 ('SIA') in response to a protest outside of Parliament, which led to property damage and threats against Amostran leaders.⁷ The SIA makes it a crime to publish any 'extremist' or 'anti-patriotic' statements.⁸ The government can punish any 'person' distributing such statements with indefinite

¹ Compromis, ¶ 1.

² Compromis, ¶ 1.

³ Compromis, ¶ 1.

⁴ Compromis, ¶ 1.

⁵ Compromis, ¶ 1.

⁶ Compromis, ¶ 1.

⁷ Compromis, ¶ 10.

⁸ Compromis, ¶ 10.

fines or imprisonment,⁹ or compel any ‘person’ by a civil court order to remove the content and post an apology.¹⁰ Further, the SIA requires all media organisations that provide content to Amostran citizens to both register with the Ministry of Defence and consult with the Ministry on a quarterly basis.¹¹ Failure to consult may result in the government’s withdrawal of a media organisation’s operating license.¹²

SeeSey

SeeSey is a free, popular social media platform that allows users to post content, share content, and comment on posts.¹³ The platform is accessible worldwide, and SeeSey’s content is visible to anyone logged into a SeeSey account.¹⁴ SeeSey’s content is based on two factors.¹⁵ First, users see content based on their self-selected ‘Home Location’; SeeSey displays geographically-relevant content based on the posts that are most recent and most popular.¹⁶ Second, users see content from accounts they added to their ‘SeeMore’ list.¹⁷

SeeSey maintains both its headquarters and its servers in Sarranto, a large affluent and politically-stable country located more than 1,000 miles from Amostra.¹⁸ Sarranto is comprised of

⁹ Compromis, ¶ 10(b).

¹⁰ Compromis, ¶ 10(c).

¹¹ Compromis, ¶ 11.

¹² Compromis, ¶ 11.

¹³ Compromis, ¶ 6.

¹⁴ Compromis, ¶ 6.

¹⁵ Compromis, ¶ 6.

¹⁶ Compromis, ¶ 6.

¹⁷ Compromis, ¶ 6.

¹⁸ Compromis, ¶ 8.

a large immigrant population from a number of countries, including Amostra.¹⁹

SeeSey and Its Presence in Amostra

Amostran citizens actively utilize the internet, and social media is particularly popular.²⁰ Recently, Amostrans have experienced the occasional disruption of local news distribution due to media censorship and political instability.²¹ In response, many Amostrans turned to SeeSey as a source of news and discourse.²² In fact, SeeSey ranks as the most popular source of news and political discussion among 18-35 year-old Amostran citizens.²³ Although many Amostrans use SeeSey, they constitute only a small fraction of SeeSey's total users worldwide.²⁴

Both SeeSey and the Amostran government are capable of restricting Amostran user's access to SeeSey's content, but neither has ever initiated a restriction.²⁵ The Amostran government cannot block specific posts from a specific social media service; it must block the entire service.²⁶ SeeSey, however, is able to block an individual post in one country, while keeping it visible to the rest of the world.²⁷ In addition, SeeSey's Operating Policies allow SeeSey to remove posts from its platform 'where required by law or necessary for a person's safety'.²⁸

¹⁹ Compromis, ¶ 8.

²⁰ Compromis, ¶ 5.

²¹ Compromis, ¶ 12.

²² Compromis, ¶ 12.

²³ Compromis, ¶ 12.

²⁴ Compromis, ¶ 6.

²⁵ Compromis, ¶¶ 5, 7.

²⁶ Compromis, ¶ 5.

²⁷ Compromis, ¶ 7.

²⁸ Compromis, ¶ 14.

SeeSey has never registered for an operating license with the Ministry of Defence, and Amostra has never asked SeeSey to do so.²⁹

SeeSALES is a subsidiary of SeeSey that is headquartered and maintains its sole office in Amostra.³⁰ As one of SeeSey’s many subsidiaries throughout the world, SeeSALES operates independently to promote the use of SeeSey by Amostran businesses.³¹ SeeSey does not provide data stored on its servers to any of its subsidiaries, including SeeSALES.³²

Election Safety Act of 2016

On 15 February 2016, a protest outside Parliament caused the death of a Yona protestor by a blow to the head—either by police forces or by a small group of Zasa counter-protestors.³³ Amidst persistent protests and increasing political pressure from the international community, the Prime Minister of Amostra announced, on 6 June 2016, that the country would hold general elections in 60 days, on 5 August 2016.³⁴ This announcement introduced a period of relative calm in Amostra.³⁵

Also on 6 June 2016, a group of government-appointed regulators announced restrictions on elections-related speech and assembly entitled the Election Safety Act of 2016 (‘ESA’).³⁶ To

²⁹ Compromis, ¶ 13.

³⁰ Compromis, ¶ 9.

³¹ Compromis, ¶ 9.

³² Compromis, ¶ 9.

³³ Compromis, ¶ 1.

³⁴ Compromis, ¶ 2.

³⁵ Compromis, ¶ 2.

³⁶ Compromis, ¶ 3.

‘prevent public disorder’, the ESA prohibits both political assembly and the call for assembly.³⁷ First, it criminalizes the public assembly of more than ten people who ‘disrupt the democratic process’ or ‘spread an extremist or seditious message’ within 30 days of a general election.³⁸ Mere attendance may result in a \$10,000 fine.³⁹ Second, it sanctions those who ‘incite’ such a demonstration with a potential two-year prison sentence or a \$500,000 fine.⁴⁰

Blenna Ballaya’s Column

Blenna Ballaya (‘Ballaya’) is an Amostran citizen and celebrated blogger who resides in Sarranto.⁴¹ Ballaya became unpopular with the Zasa sect⁴² for posting breaking stories concerning Amostran political rumors and bold sympathetic writings about the Yona dissent.⁴³ The Ex-Amostra Times (‘The Times’), a Sarranto-based newspaper popular with the Amostran immigrant population based in Sarranto,⁴⁴ offered to pay Ballaya to write a one-time opinion column.⁴⁵

On 7 July 2016, the Times published Ballaya’s column entitled ‘An Open Letter to the Oppressors’.⁴⁶ The opinion column accused the Amostran Prime Minister and other Zasa officials of corruption and human rights violations against the Yona people.⁴⁷ Her publication also

³⁷ Compromis, ¶ 4.

³⁸ Compromis, ¶ 4(a)(b).

³⁹ Compromis, ¶ 4(b).

⁴⁰ Compromis, ¶ 4(c).

⁴¹ Compromis, ¶ 15.

⁴² Compromis, ¶ 15.

⁴³ Compromis, ¶ 15.

⁴⁴ Compromis, ¶ 8.

⁴⁵ Compromis, ¶ 16.

⁴⁶ Compromis, ¶ 15.

⁴⁷ Compromis, ¶ 18.

denounced the upcoming election as a facade for Zasa political benefit.⁴⁸ The column concluded by echoing calls by other advocates for an active—but peaceful—Day of Resistance three weeks in the future.⁴⁹

Notwithstanding the fact that the print edition of The Times is not distributed outside of Sarranto,⁵⁰ Ballaya’s column could also be accessed through The Times’s website and its SeeSey account.⁵¹ Most Amostran citizens who read the column, accessed it on SeeSey either because it was popular in their area or they had previously added The Times’s SeeSey account to their “SeeMore” list.⁵²

Many Yona users posted comments underneath Ballaya’s opinion column on SeeSey.⁵³ Out of fear of persecution by Amostran law enforcement and government officials on the peaceful Day of Resistance, some commented they planned to bring weapons in order to defend themselves.⁵⁴

Peaceful Day of Resistance

On 1 August 2016, Ballaya attended the peaceful Day of Resistance in Amostra.⁵⁵ During the largely peaceful assembly, a minority of protestors tainted the nonviolent disposition, chanted hardline political messages, set fire to a Zasa religious building, and subsequently attacked law

⁴⁸ Compromis, ¶ 18.

⁴⁹ Compromis, ¶ 17.

⁵⁰ Compromis, ¶ 17.

⁵¹ Compromis, ¶ 19.

⁵² Compromis, ¶ 19.

⁵³ Compromis, ¶ 20.

⁵⁴ Compromis, ¶ 20.

⁵⁵ Compromis, ¶ 21.

enforcement who tried to stop the arson.⁵⁶ During these acts, the faction chanted the words of a famous Yona unity song: *'We trust that our faith will carry us home. We are not afraid to fight, not afraid to die'*. While Ballaya had mentioned the unity song's words in her opinion column three weeks earlier, no evidence indicated that any of the attackers previously read the column.⁵⁷

Prosecution and Court Order

Following the riots, police forces arrested Ballaya and marked her as an organizer of the protest merely due to her opinion column.⁵⁸ Thereafter, Amostra charged and convicted Ballaya under Sections A and B of the SIA, sentencing her to three years' imprisonment.⁵⁹ Amostra also prosecuted Ballaya under Section 3 of the ESA and, upon conviction, fined the journalist \$300,000.⁶⁰ In addition to punishing Ballaya, Amostra applied for a civil order, pursuant to Section C of the SIA, to force SeeSey to remove the material worldwide and to post an apology.⁶¹ An Amostran court granted the order against SeeSey, requiring SeeSey to remove 'all offensive content replicating or relating to Ballaya's column, including comments made by users of SeeSey, so that such content is no longer accessible anywhere on SeeSey from any location worldwide, including in Amostra and Sarranto'.⁶²

Amostra's Supreme Court upheld both Ballaya's conviction and the court order against

⁵⁶ Compromis, ¶ 21.

⁵⁷ Compromis, ¶ 21.

⁵⁸ Compromis, ¶ 22.

⁵⁹ Compromis, ¶ 23.

⁶⁰ Compromis, ¶ 23.

⁶¹ Compromis, ¶¶ 10(c), 24.

⁶² Compromis, ¶ 24.

SeeSey.⁶³ Both Ballaya and SeeSey now seek to challenge these verdicts in the Universal Freedom of Expression Court.⁶⁴

⁶³ Compromis, ¶ 25.

⁶⁴ Compromis, ¶ 26.

STATEMENT OF JURISDICTION

The Universal Court of Human Rights has jurisdiction to hear cases arising under the International Covenant on Civil and Political Rights ('ICCPR'), and the citizens of Amostra enjoy the rights guaranteed by the ICCPR.⁶⁵ The parties have submitted their differences under Article 19 and Article 21 of the ICCPR and Article 19 of the Universal Declaration of Human Rights ('UDHR') to the Universal Freedom of Expression Court.⁶⁶ No domestic or international law restricts Applicants' standing to bring these challenges.⁶⁷ The Amostran courts have decided Applicants' claims in favor of the Government of Amostra,⁶⁸ and all domestic remedies within the Amostran legal system have been exhausted.⁶⁹ This Court has jurisdiction over Ballaya and SeeSey, as Applicants, and the Government of Amostra, as Respondent.⁷⁰

Ballaya and SeeSey request this Honourable Court to issue a judgment in accordance with relevant international law, including the UDHR, the ICCPR, conventions, jurisprudence of relevant courts, and principles of international law.

⁶⁵ Price Media Law Moot Court Competition Rules, 2016-2017, § 5.4.

⁶⁶ Compromis, ¶ 26.

⁶⁷ Price Media Law Moot Court Competition Rules, 2016-2017, § 5.4.

⁶⁸ Compromis, ¶¶ 23, 24.

⁶⁹ Compromis, ¶ 25.

⁷⁰ Price Media Law Moot Court Competition Rules, 2016-2017, § 5.4.

QUESTIONS PRESENTED

- I. Does Amostra's prosecution of Ballaya under the SIA violate international principles, including Article 19 of the UDHR and Article 19 of the ICCPR?
- II. Does Amostra's prosecution of Ballaya under the ESA violate international principles, including Article 19 and 20 of the UDHR and Articles 19 and 21 of the ICCPR?
- III. Does Amostra have jurisdiction to obtain and enforce a civil order against SeeSey in Amostra and Sarranto?
- IV. Does Amostra's civil order against SeeSey violate international principles, including Article 19 of UDHR and Article 19 of the ICCPR?

SUMMARY OF ARGUMENT

I. Amostra's prosecution of Ballaya under the SIA violates principles of international law. Freedom of expression is a fundamental and universal human right. Restriction on this freedom must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society. Further, the restriction must be the least restrictive means possible and must carry a punishment proportionate to the protected interest. Attempts to restrict political speech and matters of public interest elicit an even stricter analysis, and the limits of permissible criticism are wider regarding government officials than in relation to private citizens. As drafted, the SIA poses a real threat to freedom of expression given the breadth of words and acts that may be criminalized under its excessively broad definitions and imprecise language. Further, the threat of limitless fines and imprisonment, paired with uncertainty about which speech is or is not legal, will lead to a chilling effect in which citizens avoid controversial topics for fear of arrest. As applied to Ballaya, Amostra was required to use the least-restrictive means towards its aim of national security, rather than imposing a three-year jail sentence on Ballaya for an opinion column that merely criticized government officials. The SIA is neither prescribed by law nor necessary in a democratic society to achieve a legitimate aim. Both on its face and as applied to Ballaya, the SIA is an impermissible restriction on Amostrans' freedom of expression.

II. Amostra's prosecution of Ballaya under the ESA violates her rights to freedom of expression and freedom of assembly. The guaranteed right to freedom of assembly serves as a vehicle for the exercise of many other civil, cultural, economic, political, and social rights, and freedom of expression is one such fundamental right. States have an obligation to respect and protect the rights of individuals to assemble peacefully, which includes protecting the right to political assembly, even for persons espousing minority or dissenting views. Like freedom of expression, only certain restrictions may be applied. As written, the ESA is not provided by law

nor necessary in a democratic society. The terms ‘extremist’ or ‘seditious messages’ are not defined within the ESA, which allow the government to arbitrarily define what constitutes an offence on a case-by-case basis. This inherent ambiguity does not help to calm social unrest. Rather, it stifles dissenting dialogue. Further, no adequate safeguards are in place—if someone interrupts an otherwise peaceful assembly with a violent action, the government could imprison the organizer for two years or levy a fine of \$500,000. Absent narrower boundaries, the ESA will lead to a chilling effect on expression through the heckler’s veto. In addition, the ESA is not the least restrictive means. Neither Ballaya’s column, nor her conduct on the Day of Peaceful Resistance, conveyed any intent to incite violence. Therefore, the disproportionate and unforeseeable sanction is contrary to principles of international law and will lead to a chilling effect for citizens wishing to exercise their rights. The ESA enables Amostra to unjustly punish its citizens for merely attending or publicizing a political demonstration. Consequently, the ESA is neither prescribed by law nor necessary in a democratic society to achieve a legitimate aim. It is an impermissible restriction under international law.

III. Amostra does not have adjudicative or enforcement jurisdiction over SeeSey. A forum manifests adjudicative jurisdiction based on domicile or if there is a close connection between the court and the action. In defamation cases, there is a close connection wherever the content is accessible. Since this is not a defamation case, it would only be appropriate for Amostra to assert jurisdiction if SeeSey purposefully targeted Ballaya’s column towards its Amostran users. Since SeeSey is domiciled in Sarranto and did not post the content on its site, SeeSey did not purposefully direct content towards Amostran citizens. In enforcing judgments, states may not exert their power or exercise their laws in the territory of another state. Enforcement of the civil order is improper because it would impose Amostran law throughout the world. Since a defect in

jurisdiction negates the very authority of a forum to pass a decree, and enforcement of the order would violate established principles of international law, Amostra does not have jurisdiction to obtain and enforce the civil order against SeeSey in Amostra or Sarranto.

IV. The civil order against SeeSey under the SIA violates both the UDHR and ICCPR. Freedom of expression is universally recognized and is an essential component of a democratic society. Amostra has a history of religious tension within its borders. While states may impose some restrictions on speech, the restriction must be precise, serve a legitimate government interest, and be necessary and proportionate to achieving this interest. Here, the restriction was not proportionate to the legitimate aims pursued. The take down order within the SIA allowed the Amostran government to force private actors to censor Amostran citizens' political speech without notice, and it is an impermissible restriction on freedom of expression to require any 'person' to post an apology. The civil order is also a violation as applied to SeeSey because the civil order imposed on SeeSey was broader than the language of the SIA, and restricting all content related to Ballaya's column would severely hamper Amostran citizens' rights to receive media output and engage in political discourse.

ARGUMENT

I. AMOSTRA'S PROSECUTION OF BALLAYA UNDER THE SIA VIOLATES HER RIGHT TO FREEDOM OF EXPRESSION.

Freedom of expression is a basic condition for the progress of democratic societies and for the development of each individual.⁷¹ It is a fundamental and universal human right⁷² that applies equally to speech communicated on the internet and speech communicated through traditional means.⁷³ While not unlimited, this freedom is subject to restrictions only if they are 'construed strictly' and 'established convincingly'.⁷⁴ Any interference with freedom of expression must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society, meaning the restriction and punishment associated with violating the restriction must be proportionate to the protected interest.⁷⁵

The Amostran Parliament enacted the SIA to prohibit government criticism and anti-

⁷¹ *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49].

⁷² Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 19; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19; European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 (ECHR) art 10; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR) art 13; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (ACHPR) art 9; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) (ArCHR) art 32. See also ACmHPR 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa' (2002) ACHPR/Res 62(XXXII)02 Principle II; ACmHPR 'Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe' (2009) AHRLR 268 Comm no 294/04 [80]; *Handyside* (n 71) [49]; *Interights v Mauritania* Comm no 242/2001 (ACmHPR, 2004) [78]–[79].

⁷³ IACHR 'Freedom of expression and the Internet' (31 December 2013) OEA/Ser.L/V/II [148]. See also ICCPR art 19(2); ECHR art 10(1); ACHR art 13; ACHPR art 9; UNGA 'The promotion, protection and enjoyment of human rights on the Internet' (29 June 2012) UN Doc. A/HRC/20/L.13; UNHRC 'General Comment No 34, Article 19, Freedoms of Opinion and Expression' (12 September 2011) UN Doc CCPR/C/GC/34 [12]; Nicola Wenzel, 'Opinion and Expression, Freedom of, International Protection' *Max Planck Encyclopedia Of Public International Law* (2009) [14]–[15]; Peter Malanczuk, 'Information and Communication, Freedom of' *Max Planck Encyclopedia Of Public International Law* (April 2011) [97]; *Fatullayev v Azerbaijan* App no 40984/07 (ECtHR, 22 April 2010) [95].

⁷⁴ *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997). See also *Handyside* (n 71); *Jersild v Denmark* App no 15890/89 (ECtHR, 22 August 1994).

⁷⁵ ICCPR art 19; UDHR art 19.

patriotic statements.⁷⁶ Since the SIA enables unjust punishment, it is an impermissible restriction. As written, it is neither prescribed by law nor necessary in a democratic society to achieve a legitimate aim. Further, Ballaya's prosecution under the law is contrary to established principles of international law, since her conduct did not fall within the SIA's scope.⁷⁷

A. As written, the SIA is not provided by law nor necessary in a democratic society.

The SIA fails the three-part test in ICCPR Article 19.⁷⁸ First, the SIA is not prescribed by law, since its overly-broad and impermissibly vague language fails to clarify the prohibited conduct. Second, assuming *arguendo* the SIA pursues a legitimate aim, it is not necessary; there are lesser means available to achieve the purported aim, and it imposes disproportionate penalties.⁷⁹

1. The SIA fails to meet the standards of clarity and precision that enable citizens to foresee the consequences of their conduct.

For a restriction to be prescribed by law, a statute must be sufficiently precise⁸⁰ as to the rule's constraints, limitations, and penalties.⁸¹ This foreseeability allows citizens to know when their actions will constitute an offence and enables them 'to regulate [their] conduct'.⁸² Further, vague and overly-broad laws are often found to be impermissible since they provide officials

⁷⁶ Compromis, ¶ 10(a).

⁷⁷ ICCPR art 19. See also 'EU Human Rights Guidelines on Freedom of Expression Online and Offline' (CEU, 12 May 2014) <http://eeas.europa.eu/delegations/documents/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf> accessed 3 December 2016.

⁷⁸ ICCPR art 19.

⁷⁹ General Comment No 34 (n 73) [24]-[34].

⁸⁰ Article 19, 'Johannesburg Principles on National Security, Freedom of Expression and Access to Information' (1 October 1995) [1.1]. See also General Comment No 34 (n 73) [25].

⁸¹ *Leonardus Johannes Maria de Groot v The Netherlands* Comm no 578/1994 UN Doc CCPR/C/54/D/578/1994 (UNHRC, 1995); General Comment No 34 (n 73) [25].

⁸² *The Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) [49].

with discretionary power to make arbitrary decisions.⁸³ The UNHRC expressed ‘repeated concerns’ about Russia’s extremism laws⁸⁴ lacking ‘violence or hatred’ in their vague classification of ‘extremism’. This omission resulted in its ‘increasing[] use[] to curtail freedom of expression, including political dissent’.⁸⁵ Further, the Kyrgyz Law on Extremism Activity⁸⁶ was criticized for using ‘extremism’ as an umbrella term to describe a list of activities,⁸⁷ which could lead to abuse against ‘religious minorities, civil society, human rights defenders, peaceful separatists . . . and political opposition parties’.⁸⁸

While Amostra attempts to delineate the definitions of ‘extremism’ and ‘unpatriotic’ acts through a non-exhaustive list of punishable acts in Section A, it fails to define the terms.⁸⁹ In addition, Section A of the SIA is imprecise because it does not include an exhaustive list of

⁸³ UNGA ‘Communications report of Special Procedures’ (30 November 2015) A/HRC/31/79, case no CHN 7/2015; ‘Limitations’ (*Article 19*) <www.article19.org/pages/en/limitations.html> accessed 25 November 2016.

⁸⁴ Russian Model Law 2009 No 32-9; Yarovaya Law 2016.

⁸⁵ UNHRC ‘Concluding observations on the seventh periodic report of the Russian Federation’ (28 April 2015) UN Doc CCPR/C/RUS/CO/7 [19]-[20]. See also Tanya Lokshina, ‘Draconian Law Rammed Through Russian Parliament’ (*Human Rights Watch*, 7 July 2016) <www.hrw.org/news/2016/06/23/draconian-law-rammed-through-russian-parliament> accessed 1 December 2016; Evgeniya Melnikova, ‘Yarovaya Law. The Death of the Russian Constitution’ (*Huffington Post* (11 July 2016) <www.huffingtonpost.com/evgeniya-melnikova/yarovaya-law-the-death-of_b_10864882.html> accessed 1 December 2016.

⁸⁶ Kyrgyz Law on Extremism Activity 2005 No 150 (amended 2016).

⁸⁷ Article 19, ‘Kyrgyzstan: Law on Countering Extremist Activity’ (2015) <www.article19.org/data/files/medialibrary/38221/Kyrgyzstan-Extremism-LA-Final.pdf> accessed 27 November 2016. See also Paul Daudin Clavaud and others, ‘Freedom of Expression and Public Order Training Manual’ (*UN Educational, Scientific and Cultural Organisation*, 2015) <<http://unesdoc.unesco.org/images/0023/002313/231305e.pdf>> accessed 25 November 2016.

⁸⁸ See UNHRC ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism’ (22 February 2016) A/HRC/16/53/Add.1 [99-106]. See also UNHRC ‘Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin’ (4 February 2009) A/HRC/10/3 [35]; ‘Russia: amendments to extremist legislation further restricts freedom of expression’ *Article 19* (19 July 2007) <www.article19.org/data/files/pdfs/press/russia-foe-violations-pr.pdf> accessed 4 December 2016.

⁸⁹ Compromis, ¶ 10(a).

circumstances in which the SIA will apply.⁹⁰ The SIA also fails to require a necessary element of violence before punishing political expression⁹¹ and affords broad discretion for the government to criminalize ‘critical commentary, investigative journalism, or protest’.⁹²

Textually, the ‘and’ at the end of Section A’s list of acts creates uncertainty as to whether a person must satisfy *any* of the acts, or *any* of the acts *plus* ‘publicly inciting hatred against religious groups’.⁹³ Under either reading, criticism of the government could be mistakenly inferred as attacking the Zasa religious group instead of the Zasa-led government, as Amostra is primarily led by one religious group.⁹⁴ As drafted, the SIA is not prescribed by law since it fails to adequately warn its citizens of what conduct might be punished due to imprecise language and unclear definitions.⁹⁵

2. The SIA’s unnecessary and overly-restrictive language threatens unfettered criminal sanctions and creates a chilling effect that inhibits public debate and stifles dissent.

To be necessary in a democratic society, a restriction on expression must further a legitimate government aim and be proportionate to the intended aim.⁹⁶ Because a government

⁹⁰ Compromis, ¶ 10(a); Clavaud (n 87).

⁹¹ Compromis, ¶ 10(a). See also UK Joint Committee on Human Rights, ‘Counter-Extremism’ (2016-17, HL 39, HC 105) <www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/105/105.pdf> accessed 1 December 2016 [108]; UN Doc CCPR/C/RUS/CO/7 (n 85) [19]-[20].

⁹² Article 19, ‘UN HRC: Resolution on “violent extremism” undermines clarity’ (8 October 2015) <www.article19.org/resources.php/resource/38133/en/un-hrc:-resolution-on-%E2%80%9Cviolent-extremism%E2%80%9D-undermines-clarity> accessed 2 December 2016.

⁹³ Compromis, ¶ 10(a).

⁹⁴ Compromis, ¶ 1.

⁹⁵ Compromis, ¶ 10(a).

⁹⁶ ICCPR art 19; UDHR art 19; General Comment No 34 (n 73) [24]-[34]; ‘Limitations’ (n 83).

already sits in a position of power, it must show restraint and use the least-restrictive means⁹⁷— not just those that are desirable.⁹⁸ The SIA criminalizes ‘undermining authority’, ‘sedition’, and ‘insulting’ speech or conduct.⁹⁹ These terms are imprecise, undefined, and disproportionate to Amostra’s proposed aim of national security¹⁰⁰ and emulate widely criticized defamation laws (eg Azerbaijan,¹⁰¹ Cameroon,¹⁰² Denmark,¹⁰³ India,¹⁰⁴ Norway,¹⁰⁵ United Kingdom¹⁰⁶) and draconian sedition laws (eg India,¹⁰⁷ Malaysia,¹⁰⁸ Thailand¹⁰⁹).

Further, while a judging body is afforded discretion to assess criminal, rather than civil

⁹⁷ *Shelton v Tucker* 364 US 479 (1960); *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992); *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* Comm no 102/93 (ACmHPR, 1998) [55, 58]; *Amnesty International and Others v Sudan* Comm no 48/90, 50/91, 52/91, 89/93 (ACmHPR, 1999) [80]; *Cumpănă and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004).

⁹⁸ *Castells* (n 97); *Herrera-Ulloa v Costa Rica*, IACtHR Series C no 107 (2 July 2004).

⁹⁹ *Compromis*, ¶ 10(a).

¹⁰⁰ Open Society Foundation, ‘The Global Principles on National Security and the Right to Information (Tshwane Principles)’ (2013) [principle 3].

¹⁰¹ Criminal Code of the Republic of Azerbaijan 2000, s 147 and 148.

¹⁰² Cameroon Penal Code 1993, s 205.

¹⁰³ The Danish Criminal Code 2009 Consolidated Act 1034, s 266(b).

¹⁰⁴ Indian Penal Code 1860, s 499 and 500; See *Subramanian Swamy v Union of India* (SCtI, 13 May 2016) Writ no 184 of 2014.

¹⁰⁵ Bahrain Penal Code 1976, s 354 and 356.

¹⁰⁶ UK Public Order Act 1986, s 4 and 5.

¹⁰⁷ Indian Penal Code 1860, s 124A.

¹⁰⁸ Malaysian Sedition Act 1948, s 4.

¹⁰⁹ Thai Criminal Code 2003 (B.E. 2547), s 113 and 116 and 118.

penalties, statutes should not grant ‘unfettered discretion’ to restrict speech,¹¹⁰ and courts should hesitate before upholding criminalisation of speech.¹¹¹ If not, threat of criminal sanctions paired with uncertainty about what expression is illegal, produces a chilling effect where citizens avoid controversial topics for fear of arrest.¹¹² The UN, OSCE, and others have declared that freedom of expression offences should never be criminalised.¹¹³ Relatedly, the ECtHR overturned nearly all national courts’ sentences of imprisonment under defamation law.¹¹⁴

Amostra not only threatens criminal sanctions, but it imposes limitless fines and imprisonment terms for engaging in any expression the government deems unlawful.¹¹⁵ The SIA is not proportionate to the aims pursued because there are less-restrictive means to accomplish

¹¹⁰ General Comment No 34 (n 73) [25]. See also UNGA ‘Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred’ (7 January 2013) UN Doc A/HRC/22/17/Add.4 [21]; UN Doc CCPR/C/RUS/CO/7 (n 85) [19]-[20]; *Cumpănă and Mazăre* (n 97) [111]; *Morice v France* Appellate no 29369/10 (ECtHR, 23 April 2015) [127]; Article 19, ‘The Camden Principles on Freedom of Expression and Equality’ (2009) <www.article19.org/data/files/pdfs/standards/the-camdenprinciples-on-freedom-of-expression-and-equality.pdf> accessed 24 November 2016 [12.1].

¹¹¹ UNGA ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’ (16 May 2011) UN Doc A/HRC/17/27 [25]. See also *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998) [57]; *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006) [82]; *Perincek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) [272]-[273].

¹¹² UN Doc A/HRC/17/27 (n 111) [26, 28]; UNGA ‘Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed’ (14 March 2013) UN Doc A/HRC/23/34 [89]. See also *Lamont v Postmaster General* 381 US 301 (1965); *Herrera-Ulloa* (n 98); *Ricardo Canese v Paraguay*, IACtHR Series C no 111 (31 August 2004); *Mosley v the United Kingdom* App no 48009/08 (ECtHR, 15 September 2011) [129]; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012).

¹¹³ Ambeyi Ligabo, Freimut Duve, Eduardo Bertoni ‘International Mechanisms for Promoting Freedom of Expression’ *UN, OSCE, OAS* (2002) <www.oas.org/en/iachr/expression/showarticle.asp?artID=87> accessed 1 December 2016. See also UNHCHR ‘Expert Seminar on the Links Between Articles 19 and 20 of the ICCPR: Freedom of Expression and Advocacy of Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence’ (2-3 October 2008) Conference Room Paper #6; ‘ConCourt says criminal defamation law is dead and invalid, cannot be used to arrest journalists’ *The New Zimbabwe* (2 March 2016) <www.newzimbabwe.com/news-27501-Criminal+defamation+law+dead+ConCourt/news.aspx> accessed 30 December 2016.

¹¹⁴ *Barford v Denmark* App no 11508/85 (ECtHR, 22 February 1989); *Thorgeir Thorgeirson v Iceland* App no 13778/88 (ECtHR, 25 June 1992); *De Haes and Gijssels v Belgium* App no 19983/92 (ECtHR, 24 February 1997); *Dalban v Romania* App no 28114/95 (ECtHR, 28 September 1999); *Nilsen and Johnsen v Norway* App no 23118/93 (ECtHR, 25 November 1999); *Colombani and Others v France* App no 51279/99 (ECtHR, 25 June 2002); *Castells; Scharsach and News Verlagsgesellschaft v Austria* App no 39394/98 (ECtHR, 13 November 2003).

¹¹⁵ Compromis, ¶ 10(b).

the goals of the SIA such as utilizing media to respond to criticism¹¹⁶ or limiting fines to ‘less-chilling’ amounts.¹¹⁷

B. The SIA is invalid as applied to Ballaya’s conduct.

1. Ballaya’s speech constitutes highly-protected political speech and warrants leniency.

There is little latitude for restrictions on ‘political speech’ or ‘matters of public interest’.¹¹⁸ Free political discourse between citizens, candidates, and elected representatives is essential, as is journalists’ ability to comment on public issues without restraint to inform public opinion.¹¹⁹ Likewise, the public has a right to receive media output¹²⁰ and decide what is relevant or harmful.¹²¹ Words alone are not enough to constitute a threat to national security or public order.¹²² Here, however, the SIA’s expansive reach unlawfully impedes both Ballaya’s rights, as well as the rights of her audience.

¹¹⁶ IACtHR ‘Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)’ (13 November 1985) Advisory Opinion OC-5/85, Series A No 5 [46].

¹¹⁷ ‘Civil defamation’ (*Article 19*) <www.article19.org/pages/en/civil-defamation.html> accessed 1 December 2016.

¹¹⁸ ECHR art 10; See also *Sürek v Turkey* App no 26682/95 (ECtHR, 8 July 1999) [61].

¹¹⁹ UNHRC ‘CCPR General Comment No 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service’ (12 July 1996) UN Doc CCPR/C/21/Rev1/Add7 [26].

¹²⁰ *Mavlonov and Sa’di v Uzbekistan* Comm no 1334/2004 UN Doc CCPR/C/95/D/1334/2004 (UNHRC, 2009).

¹²¹ *Red Lion Broadcasting Co v FCC* 395 US 367 (1969).

¹²² *Brandenburg v Ohio* 395 US 444, 447-49 (1969); *Tae-Hoon Park v Republic of Korea* Comm no 628/1995 UN Doc CCPR/C/57/D/628/1995 (UNHRC, 1998) [10.3]. See also *Media Rights Agenda v Nigeria* Comm no 224/1998 (ACmHPR, 2000) [69]-[71].

The ECtHR explained, ‘Limits of permissible criticism are wider [regarding] the government than . . . a private citizen or even a politician’.¹²³ Laws are not to grant officials special protection or ‘hamper the press in performing its task as purveyor of information’.¹²⁴ In particular, a State must not deter journalists ‘from contributing to public discussion of issues affecting the life of the community’,¹²⁵ as political reporting warrants elevated protection.¹²⁶ In *Şener v Turkey*, Şener was convicted of disseminating separatist propaganda after publishing an article endorsing a negative opinion of the government.¹²⁷ The ECtHR held that the public’s right to be informed of Şener’s opinion, ‘irrespective of how unpalatable that perspective may be’,¹²⁸ offset the State’s national security claim.

Similarly, Amostra’s interference with Ballaya’s freedom of expressions was disproportionate. Under the SIA’s broad ambit, Amostra was able to claim Ballaya’s column called for illegal action, incited others to rebel, or insulted the government.¹²⁹ However, her call was for peaceful protest,¹³⁰ despite some actors turning violent.¹³¹ Her writing intended to

¹²³ *Karatas v Turkey* App no 23168/94 (ECtHR, 8 July 1999) [50-52]. See also *New York Times v Sullivan* 376 US 254 (1964); *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [45]; *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999); *Sürek* (n 118); *Mahmudov and Agazade v Azerbaijan* App no 35877/04 (ECtHR, 18 December 2008) [39].

¹²⁴ *Lingens* (n 123) [44].

¹²⁵ *Lingens* (n 123) [44].

¹²⁶ ECHR art 10.

¹²⁷ *Şener v Turkey* App no 26680/95 (ECtHR, 18 July 2000).

¹²⁸ ECHR art 10; *Şener* (n 127).

¹²⁹ Compromis, ¶ 10(a).

¹³⁰ Compromis, ¶ 18.

¹³¹ Compromis, ¶ 21.

inform, not to incite.¹³² Her content, while possibly ‘unpalatable’, was legal under international standards and, like Şener’s, contributed to the existing political debate.¹³³

2. Amostra imparted an unforeseeable and disproportionately harsh punishment on Ballaya.

‘If there are various options to protect the legitimate interest, that which least restricts the right must be selected’.¹³⁴ In other words, a government cannot ‘use a sledge-hammer to crack a nut’.¹³⁵ Similarly, measures adopted must ‘not be arbitrary, unfair, or based on irrational considerations . . . [and] must be rationally connected to the objective’.¹³⁶

Two criminal defamation suits filed against journalists by the Chilean president and a Peruvian governor have been widely condemned, fearing criminal sanctions could have a chilling effect on press in both South American countries.¹³⁷ Damages sought in those cases were found to be ‘utterly disproportionate . . . [and] typical of the way powerful . . . public officials use the justice system to censor and retaliate against journalists’.¹³⁸

¹³² Compromis, ¶ 18.

¹³³ Compromis, ¶¶ 18, 19.

¹³⁴ Toby Mendel, ‘Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression’ *Centre for Law and Democracy* (March 2010) <www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf> accessed 28 November 2016.

¹³⁵ Mendel (n 134).

¹³⁶ *R v Oakes* (1986) 1 SCR 103 [138]-[139].

¹³⁷ OAS, ‘Office of the Special Rapporteur Expresses Concern over a New Criminal Conviction for Defamation against a Journalist in Peru’ (6 May 2016) <www.oas.org/en/iachr/expression/showarticle.asp?artID=1024&IID=1.asp> accessed 5 December 2016; ‘Criminal defamation suits in Peru and Chile could have chilling effect’ *Committee to Protect Journalists* (3 June 2016) <<http://cpj.org/reports/2016/03/critics-are-not-criminals.php>> accessed 5 December 2016; ‘Peru: RSF condemns disproportionate penalties in defamation cases’ *Reporters Without Borders* (5 October 2016) <<http://rsf.org/en/news/peru-rsf-condemns-disproportionate-penalties-defamation-cases>> accessed 5 December 2016; ‘Freedom of the Press 2015: Peru’ *Freedom House* <<http://freedomhouse.org/report/freedom-press/2015/peru>> accessed 5 December 2016.

¹³⁸ ‘Peru: RSF condemns disproportionate penalties in defamation cases’ (n 137).

In *Lohé Issa Konaté v Burkina Faso*,¹³⁹ a journalist who wrote two articles accusing a government official of corruption was sentenced to one-year imprisonment and \$12,000 in monetary penalties.¹⁴⁰ The ACtHPR held that Burkina Faso must amend its law to disallow criminal penalties for defamation and reasoned that the punishment represented a disproportionate interference for criticizing a public figure.¹⁴¹ Similarly, Ballaya wrote one column accusing the government of corruption. Yet, the SIA empowered Amostra to label Ballaya's criticism 'anti-patriotic' and issue a harsh three-year imprisonment.

II. AMOSTRA'S PROSECUTION OF BALLAYA UNDER THE ESA VIOLATES HER RIGHTS TO FREEDOM OF EXPRESSION AND FREEDOM OF PEACEFUL ASSEMBLY

The guaranteed right to freedom of assembly¹⁴² serves as a 'vehicle for the exercise of many other civil, cultural, economic, political and social rights'¹⁴³—including freedom of expression.¹⁴⁴ ICCPR Article 21 recognizes that the right to freedom of peaceful assembly should be enjoyed by everyone.¹⁴⁵ States have an obligation to respect and protect the right of peaceful assembly, online as well as offline, including political assembly and persons espousing

¹³⁹ *Lohé Issa Konaté v The Republic of Burkina Faso* Comm no 004/2013 (ACmHPR, 2014).

¹⁴⁰ *Lohé Issa Konaté* (n 139).

¹⁴¹ *Lohé Issa Konaté* (n 139).

¹⁴² UDHR art 20; ICCPR art 21; United Nations Declaration on Human Rights Defenders (adopted 8 March 1999) UNGA Res 53/144 (UNDHRD) art 5; ECHR art 11; ACHR art 15; ACHPR art 11; ArCHR art 24. See also IACHR 'Report on the Situation of Human Rights Defenders in the Americas' OEA/Ser.L/V/II.124 Doc. 5 rev.1 (6 March 2006); IACHR 'Report on Citizen Security and Human Rights' OEA/Ser.L/V/II. Doc. 57 (31 December 2009).

¹⁴³ UNGA 'Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai' (14 April 2014) UN Doc A/HRC/26/29 [12].

¹⁴⁴ UDHR art 19; ICCPR art 19; ECHR art 10; ACHR art 13; ACHPR art 9. See also *Handyside* (n 71) [49].

¹⁴⁵ ICCPR art 21.

minority or dissenting views.¹⁴⁶ Like freedom of expression, only ‘certain’ restrictions may be applied; ‘freedom is the rule and its restriction the exception’.¹⁴⁷

In contrast, the ESA enables Amostra to convey unjust punishments upon citizens for merely attending or publicizing a political demonstration.¹⁴⁸ Consequently, it is an impermissible restriction, neither prescribed by law nor necessary in a democratic society. Further, if the Court were to conclude the ESA is a valid restriction under Amostra’s public order aim, as applied to Ballaya, it is invalid because her conduct did not fall within the ESA’s scope.¹⁴⁹

A. As written, the ESA is not provided by law nor necessary in a democratic society.

1. The ESA fails to define key terms resulting in a vague law that can be arbitrarily interpreted to suit Amostra’s needs.

The ESA reads as a catchall, encompassing anything perceived as ‘extremist or seditious’, ‘inciting hatred or violence’, or ‘disrupting the democratic process’.¹⁵⁰ Such an expansive definition does not help to calm social unrest. It stifles dissenting dialogue¹⁵¹ and freedom of assembly.¹⁵² Since ‘extremist’, ‘seditious’, and ‘disruptive’ are undefined, Amostra—even to merely quash criticism—may arbitrarily decide what constitutes an offence on a case-by-

¹⁴⁶ UN Doc A/HRC/26/29 (n 143) [22].

¹⁴⁷ UNGA ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue’ (17 April 2003) UN Doc A/HRC/23/40 [16].

¹⁴⁸ Compromis, ¶ 4.

¹⁴⁹ ICCPR art 19.

¹⁵⁰ Compromis, ¶ 4(a).

¹⁵¹ ‘Global: 140 Countries Pass Counterterrorism Laws since 9/11’ *Human Rights Watch* (29 June 2012) <www.hrw.org/news/2012/06/29/global-140-countries-pass-counterterrorism-laws-9/11> accessed 25 November 2016.

¹⁵² ‘10 Absurd Violations of Freedom of Association’ (*Freedom House*, 12 July 2012) <<http://freedomhouse.org/blog/10-absurd-violations-freedom-association>> accessed 4 December 2016.

case basis. The law is vague, similar to the ‘unlawful society’ pretext that allowed Uganda to arrest citizens walking to work to protest rising fuel prices¹⁵³; the ‘intent to incite hostility toward government’ law that Zimbabwe used to punish activists gathering to watch Arab Spring uprising videos¹⁵⁴; the ‘descato’ law that led to arrests of Cuban wives and mothers of political prisoners for wearing white¹⁵⁵; the ‘unauthorized assembly’ law that punished peaceful Burmese protestors obstructing a sidewalk¹⁵⁶; the ‘illicit mingling’ law that resulted in body cavity searches of Christians in Saudi Arabia for praying together at a private home¹⁵⁷; and the ‘joint mass presence’ law that led to punishment of Belarusians for standing together doing nothing.¹⁵⁸

2. Amostra’s aim of protecting public order does not justify the ESA’s overly-intrusive restrictions.

Amostra enacted the ESA under the guise of protecting public order in response to the socio-political climate between the Zasa and Yona groups.¹⁵⁹ Even if the government acted out of a perceived need, ‘more than ten people’ in ‘public streets’ unnecessarily impairs free

¹⁵³ ‘Uganda: “Walk to Work” Group Declared Illegal’ *Human Rights Watch* (4 April 2012) <www.hrw.org/news/2012/04/04/uganda-walk-work-group-declared-illegal> accessed 4 December 2016.

¹⁵⁴ Lydia Polgreen, ‘Zimbabwe Convicts 6 Who Viewed Revolt News’ *New York Times* (19 March 2012) <www.nytimes.com/2012/03/20/world/africa/6-convicted-for-watching-arab-spring-news-in-zimbabwe.html> accessed 4 December 2016.

¹⁵⁵ ‘Dissidents say as many as 200 arrested in Cuba’ *Associated Press* (23 February 2015) <www.foxnews.com/world/2015/02/23/dissidents-say-as-many-as-200-arrested-in-cuba.html> accessed 4 December 2016.

¹⁵⁶ ‘Burma: “Peaceful Assembly Law” Fails to End Repression’ *Human Rights Watch* (26 January 2015) <www.hrw.org/news/2015/01/26/burma-peaceful-assembly-law-fails-end-repression> accessed 4 December 2016.

¹⁵⁷ ‘Saudi Arabia: Christians Arrested at Private Prayer’ *Human Rights Watch* (30 January 2012) <www.hrw.org/news/2012/01/30/saudi-arabia-christians-arrested-private-prayer> accessed 4 December 2016.

¹⁵⁸ Ilya Mouzykantskii, ‘In Belarus, Just Being Can Prompt an Arrest’ *New York Times* (29 July 2011) <www.nytimes.com/2011/07/30/world/europe/30belarus.html> accessed 4 December 2016.

¹⁵⁹ Compromis, ¶¶ 1, 10.

expression.¹⁶⁰ Without narrower boundaries, the ESA generates a chilling effect on expression via a heckler’s veto: the ability of Amostra to silence opposition through fear that one will be punished by the irrational violent acts of another in response to his words.¹⁶¹ Amostra can exercise less-restrictive means to address election disruption by increasing ten attendees to 100, narrowing the location, or limiting the duration to fewer than thirty days. Further, Amostra’s law applies with equal force to all Amostra—like Ethiopia’s declaring a state of emergency for the entire country rather than just addressing the two (of its nine) regions in need.¹⁶² Instead, Amostra could geographically limit ESA restrictions to only the Parliament, the city, or regions with a known history of violent protests.

B. The ESA is invalid as applied to Ballaya’s conduct.

1. Ballaya conveyed no intention to incite violence, nor was her column likely to incite violence.

When a government invokes a freedom of expression restriction, it must demonstrate the expression is intended to incite imminent violence, the expression is likely to incite violence, and a direct connection exists between the expression and likelihood or occurrence of the violence.¹⁶³

The COE,¹⁶⁴ IACtHR,¹⁶⁵ and SCOTUS¹⁶⁶ also recognize intent and likeliness to incite violence

¹⁶⁰ ‘Limitations’ (n 83).

¹⁶¹ Evelyn Aswad, ‘To Ban or Not to Ban Blasphemous Videos’ (2013) 44 Geo J Intl L 1313, 1319; Ruth McGaffey, ‘The Heckler’s Veto’ 57 Marq L Rev 39, 61 (1973).

¹⁶² ‘Legal Analysis of Ethiopia’s State of Emergency’ (*Human Rights Watch*, 20 October 2016) <www.hrw.org/news/2016/10/30/legal-analysis-ethiopia-state-emergency> accessed 5 December 2016.

¹⁶³ ‘Johannesburg Principles’ (n 80) [6]; See *Karatas v Turkey* App no 23168/94 (ECtHR, 8 July 1999) [53]; See *Athukoral v AG* 5 May 1997, SD nos 1-15/97 (Supreme Court of Sri Lanka); *Secretary of State for the Home Department v Rehman* (2001) UKHL 47 (United Kingdom House of Lords).

¹⁶⁴ Council of Europe Convention on the Prevention of Terrorism (entered into force 1 June 2007) ETS no 196 art 5(1); ‘Council Framework Decision 2008/919/JHA’ (COE, 2008) <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008F0919>> accessed 2 December 2016.

¹⁶⁵ IACtHR ‘Annual Report of the Inter-American Commission on Human Rights 1994’ (17 February 1995) OEA/SerL/V/V 211 Doc 9 [40].

must be proven.

Incitement is defined as speech that advocates lawless action and is directed towards a specific person or group.¹⁶⁷ Such speech must be intended or likely to produce imminent disorder.¹⁶⁸ Additionally, speech is not incitement unless it is ‘gratuitously offensive’.¹⁶⁹ Courts consider the scope of distribution of the speech,¹⁷⁰ whether the speech was a vehement attack on a religion or religious beliefs,¹⁷¹ and whether the speech was a call to hostility, discrimination, or violence.¹⁷² ‘The expression should be intrinsically dangerous . . . [and] inseparably locked up with the action . . . the equivalent of a “spark in a powder keg”’.¹⁷³

While Ballaya’s opinion may have shocked, offended, or disturbed, her speech is still protected.¹⁷⁴ Ballaya’s column never mentioned violence and explicitly called for a ‘peaceful’ protest¹⁷⁵—lacking even a scintilla of a spark of incitement. Had Amostra believed her post

¹⁶⁶ *Brandenburg* (n 122) [447]; *Hess v Indiana* 414 US 105, 108 (1973); *NAACP v Claiborne Hardware Co* 458 US 886, 928 (1982); Michael Curtis, *Free Speech, ‘The People’s Darling Privilege’* (2000) 394-397; James Weinstein, *Extreme Speech and Democracy* (OUP 2010) [41]; Susan Gilles, ‘Brandenburg v State of Ohio: An “Accidental”, “Too Easy”, and “Incomplete” Landmark Case’ (2010) 38 *Capital University Law Review* 517, 522-525; Lucas Powe, ‘Brandenburg: Then and Now’ (2011) 44 *Texas Tech Law Review* 69, 75-7.

¹⁶⁷ *Brandenburg* (n 122) [447].

¹⁶⁸ *Hess* (n 166) [109].

¹⁶⁹ *Otto-Preminger-Institut v Austria* App no 13470/87 (ECtHR, 20 September 1994) [49]; *Giniewski v France* App no 64016/00 (ECtHR, 31 January 2006) [43, 52].

¹⁷⁰ *Norwood v DPP* (2003) EWHC 1564 (Admin).

¹⁷¹ *Norwood* (n 170).

¹⁷² *Alves Da Silva v Portugal* App no 41665/07 (ECtHR, 20 October 2009) [28]; *Perincek* (n 111) [66]; Anne Weber, ‘Manual on Hate Speech’ (COE, September 2009) [51]; Iginio Gagliardone and others, ‘Countering Online Hate Speech’ (UNESCO, 2015) [12].

¹⁷³ *S Rangarajan v P Jagjivan Ram* (SCTI, 30 March 1989) (2) SCR 204 [226].

¹⁷⁴ ICCPR art 19; UDHR art 19; ECHR art 10; *Handyside* (n 71); *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003).

¹⁷⁵ *Compromis*, ¶ 18.

would incite imminent violence, it would have reacted immediately. Rather, Amostra waited 25 days to respond—after the protest turned violent. This delay shows a more-likely correlation to suppression of anti-governmental speech than an attempt to stop imminent violence. Like Gandhi, Dr. Martin Luther King, Jr., and the Dalai Lama,¹⁷⁶ Ballaya called for peaceful resistance to bring awareness to human rights violations¹⁷⁷; she, too, was punished by a fearful government for challenging the political status quo.¹⁷⁸

Further, there was no evidence that the demonstrators chanting the Yona unity song had read Ballaya's column. Even if so, the song cannot be considered incitement; unifying through song is common during peaceful and non-peaceful uprisings.¹⁷⁹ Consequently, many national anthems rejoice in the unity of sacrifice and bloodshed, such as Hungary (*No freedom's flowers return from the spilt blood of the dead*), France (*The bloody flag is raised*), and Vietnam (*The path to glory is built by the bodies of our foes*).¹⁸⁰ Holding Ballaya responsible for incitement based on widely-revered lyrics would be akin to holding Ethiopian Olympian Feyisa Lilesa liable

¹⁷⁶ 'Gandhi Leads Civil Disobedience' (*History*) <www.history.com/this-day-in-history/gandhi-leads-civil-disobedience> accessed 25 November 2016; 'About Dr. King' (*The King Center*) <www.thekingcenter.org/about-dr-king> accessed 25 November 2016 'Profile: The Dalai Lama' *BBC News* (10 March 2011) <www.bbc.com/news/world-asia-pacific-12700331> accessed 25 November 2016; Compromis, ¶ 18.

¹⁷⁷ Compromis, ¶ 18.

¹⁷⁸ Compromis, ¶¶ 22, 23.

¹⁷⁹ Andrew Gilbert, 'Singing It Right Out Loud: How Protest Songs Have Propelled Progressive Politics' *California Magazine* <<http://alumni.berkeley.edu/california-magazine/just-in/2014-11-09/singing-it-right-out-loud-how-protest-songs-have-propelled>> accessed 4 December 2016.

¹⁸⁰ 'National Anthems of the World' (*Flagdom*) <www.flagdom.com/flag-resources/national-anthems> accessed 26 November 2016. See also 'Il Canto degli Italiani: The Italian National Anthem' <www.understandingitaly.com/profile-content/anthem.html> accessed 28 November 2016; Italy; 'Hino Nacional Brasileiro: The Brazilian National Anthem' <www.southamerica.cl/Brazil/National_Anthem.htm> accessed 28 November 2016.

for inciting his native Oromo people through a mere gesture at the finish line—9,575 kilometers away.¹⁸¹ Similarly, Ballaya’s actions were too remote from the response that followed.

2. Amostra imparted a disproportionate and unforeseeable \$300,000 fine, creating a chilling effect for citizens wishing to exercise their rights to free speech and assembly.

‘Political ideas which challenge the existing order and whose realisation is advocated by peaceful means must be afforded a proper opportunity of expression through the exercise of the right of assembly’.¹⁸² Yet, disproportionate monetary and criminal punishments can cause a chilling effect for bloggers and modest-income journalists. For example, in Oman, two journalists who alleged corruption in the Omani judiciary were convicted of ‘undermining the prestige of the state’ for publishing material that would ‘disturb public order’.¹⁸³ Each face three year’s imprisonment and were initially held on \$130,000 bail. The UN Special Rapporteur condemned Oman’s actions as part of a pattern of ‘silencing voices of dissent’.¹⁸⁴

In *Taranenko v Russia*, Taranenko was one of approximately forty protestors who forced her way into a government building, occupied the building, and distributed anti-government leaflets through the windows.¹⁸⁵ While the ECtHR found that Taranenko’s actions disturbed the

¹⁸¹ Thom Patterson, Ralph Ellis and Briana Duggan, ‘Ethiopia: Marathoner Has Nothing to Fear After Olympic Protest’ *CNN* (22 August 2016) <<http://edition.cnn.com/2016/08/22/sport/rio-olympics-ethiopian-marathon-protest>> accessed 26 November 2016.

¹⁸² *United Macedonian Organisation Ilinden and Ivanov v Bulgaria* App no 44079/98 (ECtHR, 20 October 2005) [97].

¹⁸³ ‘Urgent Action: Journalists’ Trial Postponed To 12 December’ *Amnesty International* (18 November 2016) <www.amnestyusa.org/sites/default/files/uaa20616_4.pdf> accessed 26 November 2016.

¹⁸⁴ ‘Oman: ‘Journalists Sentenced Over Articles Alleging Corruption’ *Human Rights Watch* (3 October 2016) <www.hrw.org/news/2016/10/03/oman-journalists-sentenced-over-articles-alleging-corruption> accessed 26 November 2016; ‘Oman: End crackdown on peaceful dissent’ *Amnesty International* (18 November 2016) <www.refworld.org/docid/583844964.html> accessed 27 November 2016.

¹⁸⁵ *Taranenko v Russia* App no 19554/05 (ECtHR, 15 May 2014).

public order, they unanimously held that her punishment of one-year pre-trial detention and three-year suspended prison sentence was disproportionate and would deter future activists.¹⁸⁶

Comparably, Ballaya's \$300,000 fine under the ESA was neither foreseeable nor proportionate to Amostra's perceived aim and will only serve to stifle dissent. The disproportionate punishment, Ballaya's lack of intent or likeliness to incite violence, and the ESA's vague language and overly-intrusive restrictions violate international law.

III. AMOSTRA DOES NOT HAVE JURISDICTION TO OBTAIN AND ENFORCE THE CIVIL ORDER AGAINST SEESY

A defect in jurisdiction negates the very authority of a forum to pass a decree.¹⁸⁷ A forum manifests adjudicative jurisdiction over defendants based on domicile or, in the alternative, if there is a close connection between the court and the action.¹⁸⁸ In enforcing judgments, States 'may not exercise [their] power in any form in the territory of another state'.¹⁸⁹ Here, Amostra did not have adjudicative jurisdiction over SeeSey since SeeSey was domiciled in Sarranto, and SeeSey did not have a sufficiently close connection with Amostra. Further, enforcement of the civil order would be improper and contrary to established principles of international law, since enforcement of the civil order would require Amostran law to be enforced throughout the world.

A. Amostra does not have adjudicative jurisdiction over SeeSey.

Amostra does not have adjudicative jurisdiction over SeeSey. A forum automatically manifests adjudicative jurisdiction over a defendant if the defendant is domiciled in that

¹⁸⁶ 'Oman: 'Journalists Sentenced Over Articles Alleging Corruption' (n 184); 'Oman: End crackdown on peaceful dissent' (n 184).

¹⁸⁷ *Kiran Singh and Others v Chaman Paswan and Others*, 1954 AIR 340 (Supreme Court of India).

¹⁸⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (2012) OJ L351/3 [15] [16].

¹⁸⁹ *Case of the SS Lotus (France v Turkey)* (1927) PCIJ Rep Series A no 19.

jurisdiction.¹⁹⁰ Alternatively, a forum may exercise adjudicative jurisdiction if there is ‘a close connection between the court and the action’.¹⁹¹ When legal persons are domiciled abroad, a subsidiary domiciled in the forum can function as a sufficiently close connection, but only if the claim concerns the subsidiary’s business.¹⁹²

In internet activity cases, courts utilize different approaches to determine whether there is a ‘close connection’.¹⁹³ Under the Accessibility Approach, a ‘destination’ State is able to assert control over a foreign site based solely on the site’s local accessibility.¹⁹⁴ The Targeting Approach restricts the territorial applicability of jurisdiction to forums where a website directs or targets its content¹⁹⁵ to prevent the chilling effect of imposing jurisdiction over websites simply because they are accessible.¹⁹⁶ The EU’s Electronic Commerce Directive advocates for the Origin Approach where jurisdiction of internet intermediaries is proper only in the state where the content originated.¹⁹⁷

¹⁹⁰ Regulation (EU) No 1215/2012 (n 188) [15].

¹⁹¹ Regulation (EU) No 1215/2012 (n 188) [16]. See also Frank LaRue and others ‘Joint Declaration on Freedom of Expression and the Internet’ (2005); ‘Freedom of expression and ICTs: Overview of international standards’ *Article 19* (2013) <www.article19.org/data/files/medialibrary/37380/FoE-and-ICTs.pdf> accessed 19 November 2016.

¹⁹² Belgian Code of Private International Law of 16 July 2004, 57344-57374 [Sec. 4 Article 5(2)].

¹⁹³ Regulation (EU) No 1215/2012 (n 188) [16].

¹⁹⁴ *LICRA & UEJF v Yahoo! Inc. & Yahoo France* (2000) Tribunal de Grande Instance de Paris; *R v Töben* BGH (12 December 2000) 1 StR 184/00; *Deutscher Apothekerverband eV v 0800 Docmorris NV, Jacques Waterval* C-322/01 (2003) ECJ I-14887; *Arzneimittelwerbung im Internet* BGH (30 March 2006) I ZR 24/03 [27]-[30].

¹⁹⁵ *Hotel Alpenhof GesmbH v Oliver Heller* (Case C-144/09) (7 December 2010) ECJ I-12527; *Pammer v Reederei Karl Schlüter GmbH & Co KG* Case C-585/08 (7 December 2010) ECJ I-12527; *L’Oreal SA and Others v eBay International AG and Others* C-324/09 (2011) ECJ I-6011; *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AED)* C-131/12 CJEU (Grand Chamber) (13 May 2014).

¹⁹⁶ *L’Oreal SA* (n 195) [64].

¹⁹⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (2000) OJ L178/1 art 2(c).

SeeSey's headquarters and servers hosting all worldwide data are located in Sarranto, a country located more than 1,000 miles away from Amostra.¹⁹⁸ Accordingly, Amostra cannot assert jurisdiction based on domicile.

Although SeeSey owns SeeSALES, an independent advertising subsidiary,¹⁹⁹ the content at issue is wholly unrelated to the business of the subsidiary. This case is distinguishable from *Google Spain SL, Google Inc. v Agencia Espanola de Proteccion de Datos*.²⁰⁰ Google Spain SL was a subsidiary of Google that promoted and sold keyword advertising space on Google in Spain.²⁰¹ The CJEU's Grand Chamber determined that Google Spain SL provided a close connection for Google, Inc. because Google Spain SL's business was the sole reason the search engine could remain a free information tool in Spain, and the harm at issue concerned the use of the search engine.²⁰²

Contrastingly, SeeSALES is far removed from the claims in suit. First, there is no evidence to suggest that without SeeSALES, SeeSey would not be able to remain a free social media platform in Amostra. Second, The Times published the article without SeeSey's prior knowledge and SeeSey did not actively promote the content.²⁰³ Without prior knowledge, it is improper to assert liability.²⁰⁴ Further, The Times is a Sarranto-based company, and SeeSALES operates exclusively within Amostra to promote the use of SeeSey by Amostran businesses.

¹⁹⁸ Regulation (EU) No 1215/2012 (n 188) [16].

¹⁹⁹ Compromis, ¶ 9.

²⁰⁰ *Google Spain SL* (n 195).

²⁰¹ *Google Spain SL* (n 195).

²⁰² *Google Spain SL* (n 195).

²⁰³ Compromis, ¶ 18.

²⁰⁴ Regulation (EU) No 1215/2012 (n 188) [14]; *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015); *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016).

Thus, there is no connection between SeeSALES and the Times. The mere existence of the subsidiary should not be sufficient to grant jurisdiction if the activity of the subsidiary is not implicated.²⁰⁵

Under the Origin Approach,²⁰⁶ Sarranto maintains exclusive jurisdiction over SeeSey. Should this Court utilize a different approach, jurisdiction would remain improper.

Jurisdiction should not be imposed under the Accessibility Approach. Courts utilize this approach in cases involving hate speech²⁰⁷ and defamation.²⁰⁸ The Accessibility Approach, however, is a broad rule that allows a country to assert jurisdiction over an entity based solely on the accessibility of information within a forum.²⁰⁹ It would be inappropriate to employ such a broad jurisdictional rule to assert jurisdiction over SeeSey since this is not a hate speech²¹⁰ or defamation case. Rather, it concerns the right to engage in political discourse.²¹¹ Punishing SeeSey for media content published on its site hinders Amostran citizens' right to receive media output.²¹² Accordingly, this court should employ a more limited approach to determine whether Amostra has jurisdiction over SeeSey.

Although narrower in scope, this court should not impose jurisdiction under the Targeting Approach because SeeSey did not purposefully direct content to Amostran citizens. The Times, a

²⁰⁵ Belgian Code of Private International Law (n 192) [Sec. 4 Article 5(2)].

²⁰⁶ Regulation (EU) No 1215/2012 (n 188) Recital 21 and Art 2(h)(ii).

²⁰⁷ *Töben* (n 194); *LICRA* (n 194).

²⁰⁸ *Dow Jones & Co Inc v Gutnick* (2002) HCA 56.

²⁰⁹ *LICRA* (n 194); *Töben* (n 194); *Deutscher Apothekerverband eV* (n 194); *Arzneimittelwerbung* (n 194) [27]-[30].

²¹⁰ ICCPR art 20.

²¹¹ *Mika Miha v Equatorial Guinea* Comm no 414/1990, UN Doc CCPR/C/51/D/414/1990 (UNHRC, 1994).

²¹² *Mavlonov* (n 120).

Sarranto-based newspaper, unilaterally uploaded the column in Sarranto.²¹³ Many Amostrans only saw the column because they previously added The Times to their ‘SeeMore’ list.²¹⁴ SeeSey should not be held responsible for the column because it was only an intermediary—it did not have knowledge of the content or of the content’s alleged illegality before it was posted.²¹⁵ Moreover, SeeSey does not maintain a media operating license in Amostra,²¹⁶ a necessity for all companies providing media content to Amostran users,²¹⁷ and the Ministry of Defence never asked SeeSey to register for one.²¹⁸ Finally, since Amostran users comprise only a small fraction of SeeSey’s users, there is no evidence that SeeSey deliberately directed the content toward Amostran users.²¹⁹

‘A defect of jurisdiction strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by the consent of the parties.’²²⁰ Accordingly, Amostra lacked adjudicative jurisdiction over SeeSey.

B. Amostra does not have enforcement jurisdiction over SeeSey in Amostra or Sarranto.

Courts resist enforcing judicial orders if enforcement would impose the forum state’s law throughout the world.²²¹ In addition, recognition of a judgment in a foreign court depends upon

²¹³ Compromis, ¶¶ 6, 16, 18.

²¹⁴ Compromis, ¶ 19.

²¹⁵ *Magyar* (n 204).

²¹⁶ Compromis, ¶ 13.

²¹⁷ Compromis, ¶ 11.

²¹⁸ Compromis, ¶ 13.

²¹⁹ Compromis, ¶ 6.

²²⁰ *Kiran Singh* (n 187).

²²¹ *Macquarie Bank Ltd v Berg* NSWSC 526 (Unreported, Simpson J, 2 June 1999); *Case of the SS Lotus* (n 189).

the principle of ‘comity’,²²² the recognition of another nation’s legislative, executive, or judicial acts within a competing nation’s territory.²²³

In *Macquarie Bank v Berg*, the Supreme Court of New South Wales refused to enforce an order restraining defamatory conduct that was occurring or expected to occur outside of the jurisdiction.²²⁴ The purpose of the injunction was to ensure compliance with state law.²²⁵ If enforced, however, state law would be imposed in foreign jurisdictions, thus offending the sovereignty of other nations.²²⁶ The Court noted that the injunction could be enforced if they could restrict transmission of material to a specific geographic area as opposed to a blanket ban; but absent such a limiting mechanism, enforcement was improper.²²⁷ In *Yildirim v Turkey*, the ECtHR held that wholesale blocking of ISPs of Google Sites website violated Yildirim’s right to freedom of expression.²²⁸ Though the ISPs included a third-party site that violated Turkish law, the ECtHR noted that the court below failed to consider the fact that a block would render large quantities of online information inaccessible, and would restrict the rights of internet users.²²⁹ The court held that even if the only way to block the one offending site was through a wholesale

²²² Julia Alpert Gladstone, ‘Determining Jurisdiction in Cyberspace: The “Zippo” Test or the “Effects” Test?’ (2003) *Informing Science* 154.

²²³ Paul Beaumont and Lara Walker, ‘Recognition and enforcement of judgments in civil and commercial matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project’ (2015) 11(1) *Journal of Private International Law* 37.

²²⁴ *Macquarie Bank* (n 221).

²²⁵ *Macquarie Bank* (n 221).

²²⁶ *Macquarie Bank* (n 221).

²²⁷ *Macquarie Bank* (n 221).

²²⁸ *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) [34].

²²⁹ *Yildirim* (n 228) [66].

block, such a measure was forbidden since it violated internet users' right to access information.²³⁰

Enforcement of Amostra's civil order is improper because it is overbroad and, like *Yildirim*, has the collateral effect of restricting the rights of SeeSey's users. Additionally, enforcement would be an impermissible restriction of Amostran law within a foreign nation, and as the North Wales court held in *Macquarie Bank*, a state may not exercise its power in the territory of another state.²³¹ Although SeeSey can restrict access to content within certain geographic areas,²³² the civil order should not be enforced as it infringes the rights of Amostran citizens to engage in political discourse and receive media output.²³³

IV. AMOSTRA'S CIVIL ORDER AGAINST SEESEY UNDER THE SIA VIOLATES PRINCIPLES OF INTERNATIONAL LAW.

Free expression is a 'pillar of democratic society,'²³⁴ and may only be curtailed in limited circumstances²³⁵ where restrictions are narrowly tailored and proportionate to a legitimate need.²³⁶ The civil order within the SIA violates international law since the take down order was not the least restrictive measure to achieve the objectives of the SIA and the forced apology is an impermissible restriction on freedom of expression. The civil order against SeeSey is overly

²³⁰ *Yildirim* (n 228) [67].

²³¹ *Macquarie Bank* (n 221); *Case of the SS Lotus* (n 189).

²³² *Compromis*, ¶ 7.

²³³ *See* Part IV(B).

²³⁴ Advisory Opinion OC-5/85 (n 116), Series A No 5 [70]; General Comment No 34 (n 73) [2]; *Erbakan* (n 111) [56]; Onder Bakircioglu, 'Freedom of Expression and Hate Speech' (2008) 16 *Tulsa J Comp & Intl L* 1, 2.

²³⁵ ICCPR art 19; General Comment No 34 (n 73) [13] [43]; UNGA 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (2013) UN Doc A/HRC/23/40 [26].

²³⁶ UNGA 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' (2013) UN Doc A/HRC/23/40 [42]; Corey Omer, 'Intermediary Liability for Harmful Speech: Lessons from Abroad' (2014) 28 *Harv J L & Tech* 289, 294.

broad and restricts Amostran citizens' rights to access media output and engage in political discourse.

A. Amostra's civil order under the SIA is an impermissible restriction.

Restrictions on free expression are only permissible if they are provided by law, pursue a legitimate aim, and are necessary in a democratic society.²³⁷ For the reasons stated in Part I(A), the SIA is not provided by law.²³⁸ The civil order is not necessary because a less-intrusive measure could be utilized to achieve the purpose of the SIA. Further, the forced apology within the SIA is an impermissible restriction on freedom of expression.

1. The civil order is not necessary.

i. The civil order is not the least restrictive means to achieve the aim of the SIA.

Any restriction must be proportionate to the legitimate aims pursued,²³⁹ and restrictions must be the least restrictive means of achieving such purported legitimate aims.²⁴⁰ Although states are afforded a margin of appreciation to determine what constitutes a pressing social need and how to properly respond,²⁴¹ the margin of appreciation evolves as international consensus on a particular issue changes.²⁴² In cases concerning freedom of expression, the margin of

²³⁷ ICCPR art 19.

²³⁸ See Part I(A).

²³⁹ General Comment No 34 (n 73) [33]; *The Sunday Times* (n 82) [59, 62]; *Velichkin v Belarus* Comm no 1022/2001 UN Doc CCPR/C/85/D/1022/2001 (UNHRC, 2006) [7.3].

²⁴⁰ *Velichkin* (n 239) [7.3].

²⁴¹ *Handyside* (n 71) [48].

²⁴² Daniel Moeckli and others, *International Human Rights Law* (2nd edn Oxford University Press 2014) 104.

appreciation afforded to states must be evaluated against the fundamental nature of freedom of political debate in a democratic society.²⁴³

After a single protest outside of Parliament, the Amostran government enacted the SIA, a stringent law prohibiting ‘extremist’ or ‘anti-patriotic’ statements.²⁴⁴ Under the SIA, any entity distributing material illegal under the Act can be compelled by a ‘take down order’ to remove the content and post an apology.²⁴⁵ While this approach is preferable to blocking an entire social media service,²⁴⁶ it can easily lead to internet intermediaries infringing internet users’ right to the freedom of expression by removing their content without prior notice.²⁴⁷ Further, ‘no State should use or force intermediaries to undertake censorship on its behalf’.²⁴⁸ The SIA was enacted to stop anti-patriotic speech,²⁴⁹ and the Amostran government is utilizing the civil order to force internet intermediaries to censor Amostran citizens by suppressing political discourse. Despite its legitimate aim, the civil order is not necessary since it is not the least restrictive means available.

A notice-to-notice system would be the ideal approach.²⁵⁰ Under such a system, an aggrieved party sends notice of the complaint to a host, and the alleged wrongdoer has the choice to remove the content or file a counter-notice.²⁵¹ Following the counter-notice, the complainant

²⁴³ *Erbakan* (n 111).

²⁴⁴ *Compromis*, ¶ 10.

²⁴⁵ *Compromis*, ¶ 10(c).

²⁴⁶ *Compromis*, ¶ 5.

²⁴⁷ UN Doc A/HRC/17/27 (n 111) [47].

²⁴⁸ UN Doc A/HRC/17/27 (n 111) [47].

²⁴⁹ *Compromis*, ¶ 10.

²⁵⁰ *See* An Act to amend the Copyright Act, Bill C-11 (18 June 2012) Canadian Parliament, 1st Session, 41st Parliament, 60-61 Elizabeth II, 2011-2012.

²⁵¹ *See* An Act to amend the Copyright Act, Bill C-11 (n 250).

is able to take the matter to court or to another adjudicatory body.²⁵² The notice-to-notice procedure is preferable to preserve the fundamental right to the freedom of expression in a democracy.²⁵³

- ii. The SIA's requirement that a user must post an apology after removing the content at issue is an impermissible infringement of freedom of expression.

The freedom to express one's opinion necessarily encompasses the freedom to not express an opinion.²⁵⁴ Further, a government may not attempt to coerce its citizens into holding a particular opinion.²⁵⁵ The forced apology within the SIA²⁵⁶ constitutes an attempt by the Amostran government to force its citizens to both hold a particular opinion as well as express that opinion. This requirement is an impermissible restriction on freedom of expression and is not necessary within the SIA or proportionate to the legitimate aims pursued.

- B. The civil order against SeeSey is overly broad and deprives Amostrans of their right to receive media output and engage in political discourse.

Restrictions must not be overbroad, and 'the principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law'.²⁵⁷ The breadth of the civil order issued by the Amostran

²⁵² See An Act to amend the Copyright Act, Bill C-11 (n 250).

²⁵³ 'Internet Intermediaries: Dilemma of Liability' *Article 19* (2013) <www.article19.org/data/files/Intermediaries_ENGLISH.pdf> accessed 27 November 2016 [17].

²⁵⁴ General Comment No 34 (n 73) [10]; *Kang v Republic of Korea* Comm no 878/1999 UN Doc CCPR/C/78/D/878/1999 (UNHRC, 2003).

²⁵⁵ General Comment No 34 (n 73) [10]; *Mpaka-Nsusu v Zaire* Comm no 157/1983 UN Doc Supp no 40 (A/41/40) (UNHRC, 1986) [142]; *Mika Miha* (n 211).

²⁵⁶ Compromis, ¶ 10(d).

²⁵⁷ UNHRC 'General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 [14]. See also *Marques v Angola*, Comm no 1128/2002 UN Doc CCPR/C/83/D/1128/2002 (UNHRC, 2005); *Coleman v Australia* Comm no 1157/2003 UN Doc CCPR/C/87/D/1157/2003 (UNHRC, 2006).

Court against SeeSey goes beyond the civil order prescribed in the SIA.²⁵⁸ By forcing SeeSey to remove ‘all offensive content replicating or relating to Ballaya’s column, including comments made by users of SeeSey’,²⁵⁹ the Amostran government trampled on the rights of Amostran citizens to receive media output and engage in political discourse.

Free communication of information about public and political issues is essential within a democracy.²⁶⁰ Media must be able to comment on public issues without censorship²⁶¹ since they have the ultimate responsibility of imparting information and ideas on matters of public interest and concern.²⁶² Further, the public must be able to receive such media output.²⁶³ Finally, given the importance of the internet as a tool to exercise the right to freedom of expression, access to news via the internet should not be unduly restricted.²⁶⁴

SeeSey is committed to its role as ‘the planet’s best news source’,²⁶⁵ and works to serve as a conduit for discussion about causes that are important to its users.²⁶⁶ SeeSey further serves as a vital source of news for Amostran citizens, especially because of media censorship, political instability, and occasional disruptions of local news distribution services.²⁶⁷ In fact, among 18-

²⁵⁸ Compromis, ¶¶ 10(c), 24.

²⁵⁹ Compromis, ¶ 24.

²⁶⁰ General Comment No 34 (n 73) [13].

²⁶¹ UN Doc CCPR/C/21/Rev1/Add7 [25]; Charter of Fundamental Rights of the EU (entered into force 1 December 2009) 20 2012/C 326/02 art 11.

²⁶² *Observer and Guardian v United Kingdom* App no 13585/88 (ECtHR, 26 November 1991) [59b]; *Jersild* (n 74) [31].

²⁶³ *Mavlonov* (n 120); ACHR art 13; Advisory Opinion OC-5/85 (n 116), Series A No 5 [34].

²⁶⁴ General Comment No 34 (n 73) [15]; *Times Newspapers Ltd v The United Kingdom* App no 3002/03 and 23676/03 (ECtHR, 10 June 2009) [27].

²⁶⁵ Compromis, ¶ 14.

²⁶⁶ Compromis, ¶ 14.

²⁶⁷ Compromis, ¶ 12.

to-35 year-olds in Amostra, SeeSey prevails as the most popular news source, and users engage in political discourse by sharing and commenting on the platform's media content.²⁶⁸

An internet intermediary risks violating its users' right to freedom of expression whenever it is required to take down, and thus censor, its users' content.²⁶⁹ In order to avoid infringing users' rights, intermediaries should warn their users of the possibility that their content may be removed.²⁷⁰ SeeSey adequately warned its users by including notice within its Operating Policies that content may be removed 'where required by law or necessary for a person's safety'.²⁷¹ Despite SeeSey's warning, the expansive scope of the civil order against SeeSey rendered the notice insufficient since the civil order imposed was broader than that prescribed within the SIA.²⁷² The Amostran government is trying to force SeeSey to censor Amostran citizens on its behalf²⁷³ in violation of Amostran citizens' right to freedom of expression, specifically the right to engage in political discourse.²⁷⁴

Finally, SIA's Section D states: 'to be convicted of an offence or made subject to a civil order under this Act, the offending statement must be physically distributed or published in Amostra or be addressed to Amostra residents'.²⁷⁵ Since the offending statement was not

²⁶⁸ Compromis, ¶ 12.

²⁶⁹ UN Doc A/HRC/17/27 (n 111) [47].

²⁷⁰ UN Doc A/HRC/17/27 (n 111) [47].

²⁷¹ Compromis, ¶ 14.

²⁷² Compromis, ¶¶ 10(c), 24.

²⁷³ UN Doc A/HRC/17/27 (n 111) [47].

²⁷⁴ *Mika Miha* (n 211); *Bowman v the United Kingdom* App no 24839/94 (ECtHR, 19 February 1998); *Lopes Gomes Da Silva v Portugal* App no 37698/97 (ECtHR, 28 September 2000); *Erbakan* (n 111); *Filatenko v Russia* App no 73219/01 (ECtHR, 6 December 2007); *Brosa v Germany* App no 5709/09 (ECtHR, 17 April 2014).

²⁷⁵ Compromis, ¶ 10(d).

physically distributed in Amostra or addressed to Amostran residents,²⁷⁶ SeeSey cannot be subject to the civil order under the SIA.²⁷⁷

²⁷⁶ See Part III(A).

²⁷⁷ Compromis, ¶ 10(d).

PRAYERS FOR RELIEF

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

1. Amostra's prosecution of Ballaya under the ESA violated international principles, including Article 19 of the UDHR and Article 19 of the ICCPR.
2. Amostra's prosecution of Ballaya under the ESA violated international principles, including Article 19 and 20 of the UDHR and Articles 19 and 21 of the ICCPR.
3. Amostra does not have jurisdiction to obtain and enforce a civil order against SeeSey in Amostra and Sarranto.
4. Amostra's civil order against SeeSey violated international principles, including Article 19 of UDHR and Article 19 of the ICCPR.

On behalf of Blenna Ballaya and SeeSey,

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Agents for the Applicants