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THE 2014–2015 MONROE E. PRICE  
INTERNATIONAL MEDIA LAW MOOT COURT COMPETITION

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DERI KUTIK & DIGITUBE

*Applicants*

v

REPUBLIC OF LYDINA

*Respondent*

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MEMORIAL FOR RESPONDENT

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## LIST OF ABBREVIATIONS

ACHPR	African Court on Human and Peoples’ Rights
ACHR	American Convention on Human Rights
African Charter	The African Charter on Human and Peoples’ Rights
The Charter	The Social Media Speech Charter
CHRT	The Canadian Human Rights Tribunal
The CIA	The Content Integrity Act
Clarifications	The 2014–2015 Price Media Law Moot Court Competition Clarifications
Compromis	The 2014–2015 Price Media Law Moot Court Competition Case
ECHR	European Court of Human Rights
European Convention	Convention for the Protection of Human Rights and Fundamental Freedoms
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ISP	Internet Service Provider
RRTA	Racial and Religious Tolerance Act
UDHR	Universal Declaration of Human Rights
UDRIP	Universal Declaration on the Rights of Indigenous Peoples
UN	United Nations
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee
US	United States of America

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## STATEMENT OF RELEVANT FACTS

### I. Statement of the Case

1. The Republic of Lydina is plagued with escalating rioting and violence between its two dominant religions, Parduism and Saduja.<sup>1</sup> Seventy-five percent of the population is Parduist, twenty percent is Sadujist, and five percent is Hindi, Muslim, or Christian.<sup>2</sup> Parduists and Sadujists historically have been, and continue to be, ‘frequently involved in violence against each other’.<sup>3</sup> Lydina ratified the ICCPR in 2000, and, in response to widespread religious violence, reserved in Articles 18–20 that ‘acts that may lead to division between religions’ are unprotected.<sup>4</sup>

2. A majority of Lydinans are ethnically Malani.<sup>5</sup> Because Parduism has been the majority religion in Lydina for centuries, Parduism has ‘a strong cultural bond for Lydinan Malanis’.<sup>6</sup> Parduism strongly influences the ‘diet, music, dress, and social values’ of the Malani culture.<sup>7</sup> Even the Lydinan Constitution incorporates Parduist religious values.<sup>8</sup> Parduism is a monotheistic religion<sup>9</sup> that adheres to Holy Scriptures called the Zofftor.<sup>10</sup> Conversely, Sadujists

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<sup>1</sup> Compromis, para 3.

<sup>2</sup> *ibid*, para 2.

<sup>3</sup> *ibid*, para 3.

<sup>4</sup> *ibid*, para 18.

<sup>5</sup> *ibid*, para 5.

<sup>6</sup> *ibid*, para 6.

<sup>7</sup> *ibid*, paras 5–6.

<sup>8</sup> *ibid*, para 6.

<sup>9</sup> *ibid*, para 3.

<sup>10</sup> *ibid*, para 9.

believe in numerous intellectual and moral principles without following religious scriptures or laws.<sup>11</sup> Saduja teaches that every human is divine.<sup>12</sup> Only a small percentage of Sadujists are ethnically Malani.<sup>13</sup>

3. Social media use is common in Lydina. Sixty-seven percent of Lydinans have internet access at home, and seventy percent have mobile access to the internet through smart technology.<sup>14</sup> Recently, violence between the two religions has ‘increased markedly’ because of increased ‘extremist’ social media use.<sup>15</sup> Recently, in March 2012, one Facebook post caricaturing the founder of Saduja ‘caused an uproar’ online and a confirmed arson attempt.<sup>16</sup>

4. In response to increased religious violence, Lydina and several other states enacted the *Social Media Speech Charter* (‘the Charter’) in 2008.<sup>17</sup> Article 1 of the Charter addresses promoting online respect for Malani culture, banning ‘hostility and harmful propaganda’ as well as religious insults; Article 1(b) of the Charter specifically requires states to ensure that social media ‘[c]omplies with the religious and ethical values of Malani culture and society’.<sup>18</sup> States additionally must ensure that social media, under Article 2(a), ‘prevents incitement of hatred based on ... religion’, and, under Article 2(b), ‘prohibits provocation’.<sup>19</sup> Provocation is defined

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<sup>11</sup> *ibid*, para 3.

<sup>12</sup> *ibid*, para 8.

<sup>13</sup> *ibid*, para 7.

<sup>14</sup> *ibid*, para 4.

<sup>15</sup> *ibid*.

<sup>16</sup> *ibid*; Clarifications, para 12.

<sup>17</sup> *Compromis*, para 15.

<sup>18</sup> *ibid*.

<sup>19</sup> *ibid*.

as ‘speech or conduct that deliberately hurts religious feelings or values of Malani culture and triggers violent protest inspired by Malani solidarity’.<sup>20</sup> To comply with these requirements, Lydina enacted the Content Integrity Act (‘the CIA’) in 2009,<sup>21</sup> which holds ISPs liable for ‘illegal conduct’ that violates international law and is disseminated by service providers.<sup>22</sup> An ISP is ‘an organization that provides services for accessing, using, or participating in the Internet’.<sup>23</sup> Under the CIA, liability for broadcasting illegal content attaches to ISPs when they distribute the content ‘to a dispersed audience via any electronic mass communications media in a one-to-many model’.<sup>24</sup> ISPs and speakers who violate the Charter or the CIA are not criminally liable for their speech, but may be required to pay civil fines for damage caused by harmful, provocative, or incendiary speech.<sup>25</sup>

5. A Sadujist named Deri Kutik filmed and published a video on 17 January 2014 via an online video sharing website called DigiTube.<sup>26</sup> In this video, Kutik asserted that ‘Saduja is superior to Parduism’ because Parduism requires ‘blind belief’ in the Zofftor.<sup>27</sup> Kutik further proclaimed that ‘all Parduists are inferior and should be converted—by any means—to believe in Saduja’.<sup>28</sup> Kutik also claimed that a passage of the Zofftor is false in light of recent scientific

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<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*, para 16.

<sup>22</sup> *ibid.*, para 17.

<sup>23</sup> Clarifications, para 9.

<sup>24</sup> *ibid.*, para 10.

<sup>25</sup> *ibid.*, para 15.

<sup>26</sup> Compromis, para 8.

<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*

discoveries.<sup>29</sup> A majority of Parduists were offended by Kutik's claims, and only one small, deviant Parduist denomination was not offended.<sup>30</sup> The highest Parduist religious leader, the Grand Parder, proclaimed that Kutik's remarks were blasphemous and insulting towards Parduism.<sup>31</sup>

6. Immediately after DigiTube published Kutik's video, the video went viral and circulated widely across Lydina.<sup>32</sup> Many Parduists were outraged over the video's insults to Parduism and subsequently rioted and attacked Sadujists.<sup>33</sup> Some Sadujists retaliated, attacking Parduists and their religious sites.<sup>34</sup> The violence continued for a week.<sup>35</sup> One hundred people were injured, and numerous homes, businesses, and a historical site were completely destroyed.<sup>36</sup>

## **II. Procedural Posture**

7. The Grand Parder sued Kutik and DigiTube in a Lydinan trial court on 21 April 2014, claiming violations of Articles 1 and 2 of the Charter.<sup>37</sup> Kutik and DigiTube counterclaimed that the Charter was invalid under the ICCPR.<sup>38</sup> The domestic trial court dismissed the counterclaim,

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<sup>29</sup> *ibid*, para 9.

<sup>30</sup> *ibid*, para 14.

<sup>31</sup> *ibid*, para 13.

<sup>32</sup> *ibid*, para 11.

<sup>33</sup> *ibid*.

<sup>34</sup> *ibid*.

<sup>35</sup> *ibid*, para 12.

<sup>36</sup> *ibid*.

<sup>37</sup> *ibid*, para 20.

<sup>38</sup> *ibid*, para 21.

finding in favour of the Grand Parder and deferring to his determination that the video offended Malani culture.<sup>39</sup>

8. Kutik and DigiTube appealed to the Lydinan Supreme Court, which dismissed the appeal.<sup>40</sup> The Supreme Court is Lydina's highest court; thus, Kutik and DigiTube exhausted all domestic remedies.<sup>41</sup> Kutik and DigiTube challenged the Supreme Court's rulings in this Court, and this Court found jurisdiction and allowed arguments.<sup>42</sup>

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<sup>39</sup> *ibid*; Clarifications, para 3.

<sup>40</sup> *Compromis*, para 22.

<sup>41</sup> *ibid*.

<sup>42</sup> *ibid*, para 24.

## **STATEMENT OF JURISDICTION**

Deri Kutik and DigiTube, the Applicants, and the Republic of Lydina, the Respondent, hereby submit this dispute before this Honourable Court, the Universal Freedom of Expression Court, a Special Chamber of the Universal Court of Human Rights. This dispute concerns the rights of freedom of expression, religion, culture, and speech in Articles 18–20 of the International Covenant on Civil and Political Rights. This Honourable Court has jurisdiction as the final adjudicator in place of all other regional courts once parties have exhausted all domestic remedies. Because the Applicants’ claims were rejected on the merits in the domestic courts of Lydina, and because all appeals and other remedies in Lydina have been exhausted, this Honourable Court has jurisdiction in this matter.

The Republic of Lydina requests this Honourable Court to issue a judgment in accordance with relevant international law, including the International Covenant on Civil and Political Rights, conventions, jurisprudence developed by relevant courts, and principles of international law.

## **QUESTIONS PRESENTED**

- I. Did Deri Kutik and DigiTube violate Article 1(b) of the Charter, which protects the religious and ethical values of Malani culture and society, when Kutik threatened to force religious conversions and proclaimed that all persons belonging to a religion are inferior human beings?
- II. Did Deri Kutik and DigiTube violate Article 2(a) of the Charter, which prohibits incitement, when Kutik uploaded a video online that sparked immediate violence, including injury to over one hundred people and the destruction of businesses, a historical site, and numerous homes?
- III. Did Deri Kutik and DigiTube violate Article 2(b) of the Charter, which prohibits triggering violent protests by deliberately hurting the religious feelings and values of Malani culture, when Kutik's online video intentionally used radical language and religious threats to elicit a strong reaction from viewers?
- IV. Under the ICCPR, is the Charter valid when it prevents violence by requiring media to respect human dignity and the rights of others while discouraging religious hatred and violent protests?

## SUMMARY OF ARGUMENTS

I. Deri Kutik's remarks violated Article 1(b) of the Charter, which forbids commentary that upsets the religious and ethical values of Malani culture and society. Religious values, traditions, and beliefs are a part of protected culture, and protections for culture vary depending on a state's historical and religious context. Kutik's remarks violated the ethical and religious values of Malani culture because Kutik mocked and criticised Parduism, a religion deeply connected with Malani culture. A majority of Lydinans are Parduists, and Parduism strongly influences Malani food, dress, and social values. As such, Kutik's insults to Parduism, including his references to all Parduists as inferior and his threats to convert Parduists by any means, offended the religious, and therefore cultural, values of a majority of Malanis. Additionally, Lydina is uniquely positioned to determine when speech offends cultural values within its borders. Lydina rationally determined that Kutik's speech caused widespread and significant offence to a majority of Malanis; this decision was entitled to great deference. Therefore, Kutik and DigiTube violated Article 1(b) of the Charter.

II. Kutik's remarks violated Article 2(a) of the Charter, which prohibits online incitement. Incitement is speech that inflicts emotional harm on listeners or promotes hatred; it need not propose or advocate violence. Kutik's speech qualified as incitement for three reasons. First, it interfered with the right of Parduists to peacefully hold their religious beliefs, as the speech threatened to force conversions and used derogatory terms to mock Parduism. These statements, in their totality, encouraged hatred and enmity. Second, Kutik's speech was highly likely, upon its utterance, to lead to a breach of the peace. Lydina experienced frequent violence between Parduists and Sadujists, including disruptions in response to social media speech. Lydina's environment of tense religious frictions, when combined with Kutik's inflammatory speech,

caused a sudden, chaotic, and violent response, resulting in the injury of over a hundred people and the destruction of numerous homes. Kutik's remarks were highly likely to and, in fact, did lead to a breach of the peace. Third, Kutik's speech was presented in an excessively inflammatory and hostile manner such that it failed to contribute meaningfully to religious debate. Kutik's emotionally charged and absolutist words were designed to elicit strong negative reactions. Additionally, Kutik did not make his remarks in a decent or moderate manner so as to contribute to a reasoned exchange of ideas. Therefore, Kutik's remarks were incitement and violated Article 2(a) of the Charter.

III. Kutik's remarks violated Article 2(b) of the Charter, which prohibits provocation and defines provocation as speech that deliberately hurts the feelings or values of Malani culture and triggers violent protests. A speaker must intend to hurt religious feelings, which is determined by examining the speech's language, tone, style, and context. Here, Kutik chose to disseminate his speech widely and instantaneously to potentially millions of viewers even though Lydina's religious climate was already rife with tension. Thus, it is reasonably inferred that Kutik calculated his speech to hurt religious feelings associated with Malani culture in violation of Article 2(b) of the Charter.

IV. The Charter is valid under the ICCPR as a legitimate restriction on freedom of expression because it promotes respect, protects against violence, and preserves public safety, peace, and order. The Charter's restrictions are valid if they are prescribed by law, purport to protect a legitimate governmental interest, and are necessary. The Charter is appropriately prescribed by law because it was enacted legally and legitimately several years before the publication of Kutik's video. Furthermore, because the Charter provides remedies through subsequent measures, it avoids prior censorship.

Additionally, the Charter was designed to protect public safety, peace, order, and cultural values, which are legitimate governmental interests. States may restrict expression to protect the quality of life of a community and prevent potential threats to public safety. Lydina signed the Charter specifically to prevent religious violence; this was a rational purpose, considering Lydina's history of religiously motivated violence.

The Charter's restrictions are necessary to prevent internal disorder. Restrictions are necessary when they preserve a state's margin of appreciation, are reasonable and proportionate to a need, and are written narrowly to address that need. States have a wide margin of appreciation to determine which situations will lead to internal religious violence, as states are uniquely positioned to identify and respond to threats within their borders. Lydina determined that social media could uniquely exacerbate religious tensions; that determination was within Lydina's range of discretion. In addition, the Charter reasonably promotes public safety without unduly impairing individuals' rights. The Charter is proportionate to Lydina's public safety needs because, while religiously inflammatory speech poses a significant risk to Lydinan citizens' safety, the Charter only minimally restricts speech by proscribing only incitement and provocative speech.

Finally, the Charter is narrowly tailored to achieve Lydina's legitimate state interests of protecting public health and safety. The ability to restrict speech when necessary applies both online and offline. The Charter's restrictions only apply to incendiary and provocative speech; this narrow application adequately limits the scope of its online application. The Charter appropriately applies to ISPs as is necessary to achieve Lydina's legitimate governmental goals. Therefore, because the Charter is legally prescribed, necessary, and reasonably proportionate to Lydina's interest in protecting its citizens against religious violence, it is valid under the ICCPR.

## ARGUMENTS

A government's first duty is to protect its citizens. Religiously motivated violence and tensions often cause significant and enduring disorder and harm to a state, and a government must protect its citizens against these internal threats to stability and peace. To protect its citizens against such threats, Lydina enforced a regional charter against the provocative and incendiary speech of Deri Kutik. Kutik's inflammatory remarks, published on DigiTube, immediately spawned hatred and violence that caused the destruction of businesses, homes, and a historic site, and also injured over one hundred people within a week. Under the Charter, a document designed to maintain order and peace, Kutik and DigiTube are accountable for this inflammatory speech that threatened to force religious conversions and claimed religious superiority. Kutik's speech disrupted the religious, cultural, and ethical values of Malani society, incited religious hatred and violence, and deliberately provoked hatred based on religious feelings. Furthermore, the Charter validly protects Lydinan citizens without unduly restricting their rights under the ICCPR.

I. THE APPLICANTS VIOLATED ARTICLE 1(B) OF THE CHARTER BECAUSE KUTIK'S REMARKS UPSET THE RELIGIOUS AND ETHICAL VALUES OF MALANI CULTURE BY THREATENING TO FORCE RELIGIOUS CONVERSIONS AND PROCLAIMING THAT ALL PARDUISTS ARE INFERIOR.

A people's 'cultural heritage [is] essential to their group identity',<sup>43</sup> and protections by a state can help preserve a culture's 'identity and integrity'.<sup>44</sup> Culture includes religious beliefs of a group that affect 'art and literature, lifestyles, ways of living together, value systems, traditions

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<sup>43</sup> *Centre for Minority Rights Development v Kenya* (2010) AHRLR 75 (ACHPR 2009), para 241.

<sup>44</sup> *Moiwana Community v Suriname* IACtHR (2005) Series C No 124, para 101.

and beliefs'.<sup>45</sup> The ability to publicly express religious values is critical to preserving individual<sup>46</sup> and cultural identities. 'Cultural identity ... encompass[es] a group's religion, language, and other defining characteristics.'<sup>47</sup> Culture is a 'complex whole which includes a spiritual and physical association with one's ... morals, customs ... [and] the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups'.<sup>48</sup>

Internationally, groups have a fundamental right to 'practise and revitalize' their cultures,<sup>49</sup> including the right to 'manifest, practise, develop and teach ... spiritual and religious traditions, customs and ceremonies'.<sup>50</sup> Both the ICCPR Article 27<sup>51</sup> and the UDHR<sup>52</sup> seek to protect the cultural life of communities. States likewise play a critical role in protecting culture, as they must safeguard, defend, and promote traditional values of a community.<sup>53</sup> Protections for culture are determined within the context of each state,<sup>54</sup> and the mechanisms used to protect

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<sup>45</sup> UNESCO 'Universal Declaration on Cultural Diversity' (2 November 2001) 31 C/Res 25 preamble.

<sup>46</sup> *Koteski v The Former Yugoslav Republic of Macedonia* (1999) 45 EHRR 31, para 48.

<sup>47</sup> *Centre for Minority Rights Development v Kenya* (2010) AHRLR 75 (ACHPR 2009), para 241.

<sup>48</sup> *ibid.*

<sup>49</sup> Universal Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295 (UDRIP) art 11.

<sup>50</sup> *ibid* art 12.

<sup>51</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 27. See also International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3 (ICESCR) art 15(1)(a).

<sup>52</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 27.

<sup>53</sup> *Lansman v Finland* Communication No 511/1992 UN Doc CCPR/C/49/D/511/1992 (1994), para 7.10.

<sup>54</sup> *ibid*, para 9.3.

culture can vary dramatically in different contexts, even within one state.<sup>55</sup> To determine this context and whether cultural values are violated, courts consider a state's demographics, history, and religious composition.<sup>56</sup>

Regardless of the context, states have a duty to promote and protect 'moral and traditional values recognised by the Community'.<sup>57</sup> Pursuant to this duty, Article 1(b) of the Charter requires member states to ensure media compliance 'with the religious and ethical values of Malani culture'.<sup>58</sup> Kutik and DigiTube violated Malani cultural values by publishing Kutik's insults and threats to Parduism, a religion that has a strong connection to Malani culture. Further, Lydina determined that Kutik's statements violated Malani culture, and this determination deserves strong deference.

A. Kutik's remarks violated Malani culture by raising and strengthening hostility towards Parduism, a religion closely interconnected with Malani culture.

Kutik's remarks offended Malani cultural values because they sparked intense hatred towards Parduism, a religion closely intertwined with Malani culture. Speech that raises or strengthens negative sentiments against a community is an attack on that community's culture.<sup>59</sup> Attacks on culture include mocking and criticising religious beliefs that are closely affiliated with cultural sentiments.<sup>60</sup> Statements that offend a dominant religion in a religiously

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<sup>55</sup> *Miller v California* 413 US 15, 32–33 (1973).

<sup>56</sup> *Lansman v Finland* Communication No 511/1992 UN Doc CCPR/C/49/D/511/1992 (1994); *Chitay Nech v Guatemala* IACtHR (2010) Series C No 212, paras 135, 146, 167.

<sup>57</sup> *Malawi African Association v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 136. See also *Mayagna (Sumo) Awas Tingni Community v Nicaragua* IACtHR (2001) Series C No 79, para 83.

<sup>58</sup> *Compromis*, para 15.

<sup>59</sup> *Faurisson v France* Communication No 550/1993 UN Doc CCPR/C/58/D/550/1993 (1986), para 9.6.

<sup>60</sup> *ibid*; *Garaudy v France* ECHR 2003-IX 343.

homogenous state where culture and religion are historically and pervasively intertwined also offend the state's cultural values.<sup>61</sup>

In this case, Kutik's statements negatively characterised and impacted the cultural values of a majority of Lydinans. Parduism strongly influences Malani social values<sup>62</sup> and is closely intertwined with Malani culture, as 'Parduism has been the majority religion in Lydina for centuries and has developed a strong cultural bond for Lydinan Malanis'.<sup>63</sup> As a majority of Malanis are Parduists,<sup>64</sup> and because Parduism strongly influences Malani culture,<sup>65</sup> Kutik threatened and insulted Malani cultural values by referring to all Parduists as inferior.<sup>66</sup> Additionally, threats of 'forced assimilation' violate cultural values.<sup>67</sup> Kutik threatened to force conversions by declaring that all Parduists 'should be converted—by any means—to believe in Saduja'.<sup>68</sup> Therefore, Kutik's statements violated Article 1(b) of the Charter by failing to comply 'with the religious and ethical values of Malani culture and society'.<sup>69</sup>

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<sup>61</sup> *Murphy v Ireland* (2004) 38 EHRR 212, paras 38–40.

<sup>62</sup> *Compromis*, para 5.

<sup>63</sup> *ibid*, para 6.

<sup>64</sup> *ibid*, paras 5–6.

<sup>65</sup> *ibid*.

<sup>66</sup> *ibid*, para 8.

<sup>67</sup> *Centre for Minority Rights Development v Kenya* (2010) AHRLR 75 (ACHPR 2009), para 248.

<sup>68</sup> *Compromis*, para 8.

<sup>69</sup> *ibid*, para 15.

B. Lydina's determination that Kutik's statements violated Malani cultural values deserves substantial deference.

States, rather than the international community, should determine when speech violates cultural values.<sup>70</sup> Domestic courts can best determine cultural violations because they are familiar with the state's history and cultural sensitivities.<sup>71</sup> For example, in *Kokkinakis v Greece*, the ECHR provided substantial deference to Greece's decision that a video offensive to the Eastern Orthodox religion violated Greek culture.<sup>72</sup> In that case, the Court recognised that Eastern Orthodoxy 'symbolised the maintenance of Greek culture and the Greek language, [and] took an active part in the Greek people's struggle for emancipation'.<sup>73</sup> As such, Greek identity was closely associated with involvement in Eastern Orthodoxy.<sup>74</sup> The ECHR recognised Greece's determination that offence to a religion intimately intertwined with Greek culture was offence to Greek culture.<sup>75</sup> In accordance with this principle, states must 'take measures aimed at repressing certain forms of conduct' that are dissonant with cultural values.<sup>76</sup> Each state has reasonable discretion to determine if insult to religious sentiments offends cultural values, and such determinations deserve international deference.<sup>77</sup>

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<sup>70</sup> *Manoussakis v Greece* (1997) 23 EHRR 387, para 44.

<sup>71</sup> *Murphy v Ireland* (2004) 38 EHRR 212, para 37; *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004), para 51.

<sup>72</sup> *Kokkinakis v Greece* (1993) 17 EHRR 397, para 14.

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*, para 14.

<sup>76</sup> *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, para 47.

<sup>77</sup> *Manoussakis v Greece* (1997) 23 EHRR 387, para 44.

In this case, Lydina determined that Kutik’s video attacking Parduism violated Malani cultural values.<sup>78</sup> This determination was reasonable, considering that seventy-five percent of the Lydinan population ascribes to Parduism<sup>79</sup> and that ‘there are strong influences of Parduism in [Malani] culture including in diet, music, dress, and social values’.<sup>80</sup> Because Parduism significantly influences Malani culture, Lydina concluded that offence to Parduism is offence to Malani culture, and this determination deserves deference. Additionally, most Lydinans are ethnically Malani<sup>81</sup> such that insults to Malani culture profoundly impact a majority of Lydinans. In determining that Kutik’s statements violated cultural values, Lydina sought to alleviate widespread and considerable offence to a significant majority of Malanis. This rational determination is entitled to deference. Thus, Kutik’s statements upset Malani cultural values in violation of Article 1(b) of the Charter.

II. THE APPLICANTS VIOLATED ARTICLE 2(A) OF THE CHARTER BECAUSE KUTIK’S REMARKS USED INFLAMMATORY LANGUAGE TO INCITE IMMEDIATE HATRED, DIVISION, AND VIOLENT PROTESTS THAT DESTROYED NUMEROUS HOMES AND BUSINESSES AND INJURED OVER A HUNDRED PEOPLE.

Though freedom of expression is protected under international law,<sup>82</sup> it is never absolute<sup>83</sup> and ‘must yield to the interests of society in some circumstances’.<sup>84</sup> States establish

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<sup>78</sup> Compromis, para 21.

<sup>79</sup> *ibid*, para 2.

<sup>80</sup> *ibid*, para 5.

<sup>81</sup> *ibid*.

<sup>82</sup> UNHRC ‘General Comment 34’ in ‘Article 19: Freedoms of Opinion and Expression’ (2011) UN Doc CCPR/C/GC/34.

<sup>83</sup> *Miller v California* 413 US 15, 23 (1973).

<sup>84</sup> *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004), para 41.

legal limits on expression to prevent ‘discrimination and distress to others’.<sup>85</sup> Specifically, Article 20(2) of the ICCPR provides that ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.<sup>86</sup> It further requires state signatories to enact laws that guard against incitement, including religiously offensive speech likely to instigate violence.<sup>87</sup> Pursuant to this requirement, Article 2(a) of the Charter prohibits ‘incitement of hatred based on race, religion, ethnicity, and gender’.<sup>88</sup>

The dangers of incitement are so severe that the UNHRC passed a resolution that encourages states to prohibit incitement.<sup>89</sup> Through the resolution, the UNHRC sought to ‘decry and condemn free speech that insults or outrages ... on the basis of ... religious beliefs’.<sup>90</sup> Thus, incitement is not protected under the ICCPR.<sup>91</sup> Defining and identifying incitement involves evaluating the speech itself and its context;<sup>92</sup> therefore, incitement is determined on a case-by-case basis.<sup>93</sup> In this case, Kutik’s video, as disseminated by DigiTube, was incitement for three reasons: first, because it interfered with Parduists’ rights to peacefully hold their religious

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<sup>85</sup> *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999), para 72.

<sup>86</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 20(2).

<sup>87</sup> *JRT & WG Party v Canada* Communication No 104/1981 UN Doc CCPR/C/18/D/104/1981 (1983), para 8.

<sup>88</sup> *Compromis*, para 15.

<sup>89</sup> UNHRC Res 16/18 (2011) UN Doc A/HRC/RES/16/18.

<sup>90</sup> Caleb Holzaepfel, ‘Can I Say That?: How an International Blasphemy Law Pits the Freedom of Religion Against the Freedom of Speech’ (2014) 28 *Emory Intl L Rev* 597, 599. See also UNHRC Res 16/18 (2011) UN Doc A/HRC/RES/16/18.

<sup>91</sup> *JRT & WG Party v Canada* Communication No 104/1981 UN Doc CCPR/C/18/D/104/1981 (1983), para 8.

<sup>92</sup> *Murphy v Ireland* (2004) 38 EHRR 212; *Wisconsin v Mitchell* 508 US 476, 484–85 (1993).

<sup>93</sup> *JRT & WG Party v Canada* Communication No 104/1981 UN Doc CCPR/C/18/D/104/1981 (1983), para 8.

beliefs; second, because it was highly likely, upon utterance, to lead to a breach of the peace; and third, because it failed to make a meaningful contribution to academic or religious debate.

A. Kutik's statements outraged Parduist listeners and interfered with their rights to peacefully hold and enjoy their religious beliefs.

Listeners have a right 'not to be offended in their religious feelings'.<sup>94</sup> To identify incitement, courts consider emotional harm caused to listeners, the speech's historical context, and current religious and cultural frictions.<sup>95</sup> Offensive speech, particularly speech that incites hatred, 'is a form of psychological assault on the listeners and on society as a whole' as it creates 'feelings of prejudice and inferiority' and causes inner turmoil.<sup>96</sup> Accordingly, incitement is speech that promotes feelings of hatred or enmity between groups.<sup>97</sup> For example, Australia forbids religious speech that 'incites hatred against, serious contempt for, or revulsion or serious ridicule of' persons or religious groups.<sup>98</sup> Similarly, Ireland forbids speech that is 'grossly abusive or insulting ... to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion'.<sup>99</sup>

Incitement does not have to advocate for lawless action or a breach of the peace.<sup>100</sup> Rather, speech is incitement if it is 'gratuitously offensive' or 'insulting'.<sup>101</sup> To determine if

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<sup>94</sup> *Gay News Ltd v United Kingdom* (1982) 5 EHRR 123, para 11.

<sup>95</sup> *Murphy v Ireland* (2004) 38 EHRR 212; *Wisconsin v Mitchell* 508 US 476, 484–85 (1993).

<sup>96</sup> Puja Kapai & Anne S Y Cheung 'Hanging in a Balance: Freedom of Expression and Religion' (2009) *Buffalo Human Rights L Rev* 41, 57–58. See also *R v Keegstra* [1990] 3 SCR 697; Promotion of Equality and Prevention of Unfair Discrimination Act 2000 No 4 (South Africa) s 10.

<sup>97</sup> *Kali Charan Sharma v King-Emperor* AIR 1927 All 654, 654.

<sup>98</sup> Racial and Religious Tolerance Act 2001 (Vic) (RRTA) s 8.

<sup>99</sup> Defamation Act 2009 SI 517/2009 s 36(2)(a).

<sup>100</sup> *Murphy v Ireland* (2004) 38 EHRR 212.

speech is gratuitously offensive, courts consider the speech's distribution and whether it was a vehement attack against a religion that is incompatible with tolerance, social peace, and non-discrimination.<sup>102</sup> Religious blasphemy is incitement when there is a 'pressing social need' to shelter a religious group from offence and hatred.<sup>103</sup> Deterring bias, prejudice, and intolerance in a climate rife with inflammatory religious tensions is a pressing social need.<sup>104</sup> 'The respect for the religious feelings of believers ... [is] violated by provocative portrayals of objects of religious veneration; and such provocative portrayals can be regarded as [a] malicious violation of the spirit of tolerance.'<sup>105</sup>

For example, in *Murphy v Ireland*, the ECHR held that speech was incitement because it was potentially offensive to Catholics.<sup>106</sup> In doing so, the ECHR carefully analysed the speech's impact on Ireland's 'religiously homogeneous' population, the history of Irish religious divisions, and current Irish religious tensions.<sup>107</sup> Similarly, in *Otto-Preminger-Institut v Austria*, the ECHR held that a ban on speech was valid when the speech was a 'malicious violation of the spirit of tolerance'.<sup>108</sup> In that case, Austria banned a film containing offensive characterisations of God, and the ECHR upheld Austria's restrictions banning the film.<sup>109</sup> The ECHR held that

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<sup>101</sup> *Giniewski v France* (2007) 45 EHRR 23, paras 43, 52; *Kutlular v Turkey* App no 73715/01 (ECHR, 29 April 2008), para 47.

<sup>102</sup> *Norwood v United Kingdom* ECHR 2004-XI 343.

<sup>103</sup> *IA v Turkey* (2007) 45 EHRR 703.

<sup>104</sup> *Ross v Canada* Communication No 736/1997 UN Doc CCPR/C/70/D/736/1997 (2000), para 11.6.

<sup>105</sup> *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, para 47.

<sup>106</sup> *Murphy v Ireland* (2004) 38 EHRR 212, para 73.

<sup>107</sup> *ibid*, para 51.

<sup>108</sup> *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34.

<sup>109</sup> *ibid*.

speech is gratuitously offensive when it insults a majority of the population, aggravates pre-existing tensions, and heightens the risk of internal disorder and violence.<sup>110</sup> Thus, states, rather than the international community, can best assess gratuitously offensive speech on an ad hoc basis.<sup>111</sup>

Here, Kutik's remarks were gratuitously offensive because they were hateful and excessive attacks on a majority of Lydinans' rights to peacefully enjoy their religious beliefs. Kutik's remarks included assertions that 'Saduja is superior to Parduism', that Parduism relies on blind belief, and that 'all Parduists are inferior and should be converted—by any means—to believe in Saduja'.<sup>112</sup> These statements are facially offensive, as they describe Parduists using charged language and derogatory terms. Additionally, Kutik proclaimed that part of the Zofftor was fabricated,<sup>113</sup> which is highly offensive to Parduists because they possess 'deep faith in the divine origins of the Zofftor'.<sup>114</sup> Indeed, many Parduists were extremely outraged upon viewing the video.<sup>115</sup> Because seventy-five percent of Lydina's population is Parduist,<sup>116</sup> Kutik's statements, taken in their context, openly ridiculed a majority of the population's beliefs, labelling Parduists as inferior human beings and threatening to force religious conversions 'by any means'. These extreme remarks encouraged hatred and enmity, and, thus, were incitement.

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<sup>110</sup> *ibid.*

<sup>111</sup> *ibid.*

<sup>112</sup> *Compromis*, para 8.

<sup>113</sup> *ibid.*, para 9.

<sup>114</sup> *ibid.*, paras 10–11.

<sup>115</sup> *ibid.*, para 11.

<sup>116</sup> *ibid.*, para 2.

B. Kutik's remarks were highly likely, upon utterance, to lead to a breach of the peace.

Incitement is speech that promotes, encourages, or fosters conduct that disturbs 'public order and tranquillity' and is 'likely to produce violence in others'.<sup>117</sup> Lawless action need not actually occur; the speech must create only the potential for a disturbance.<sup>118</sup> Similarly, the speech need not propose violence; it must be only likely to lead to a breach of the peace.<sup>119</sup> 'When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the state to prevent or punish is obvious.'<sup>120</sup> For example, speech is more likely to be considered incitement when a state shows that many of its citizens would have responded to the speech with anger, or when the state can show that more than an 'undifferentiated fear or apprehension of disturbance' existed before the speech.<sup>121</sup>

Here, Kutik's comments, upon their utterance, were highly likely to lead to an immediate breach of the peace. Lydina is religiously volatile, as religiously motivated violence increasingly threatens public safety; Parduists and Sadujists are 'frequently involved in violence against each other', which has 'led to many riots and disruptions in the country'.<sup>122</sup> In recent years, 'religious

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<sup>117</sup> American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 13(5); *Cantwell v Connecticut* 310 US 296, 308 (1940).

<sup>118</sup> *Texas v Johnson* 491 US 397, 408 (1989).

<sup>119</sup> *Glimmerveen v Netherlands* (1982) 4 EHRR 260.

<sup>120</sup> *Cantwell v Connecticut* 310 US 296, 308 (1940). See also *AK and AR v Uzbekistan* Communication No 1233/2003 UN Doc CCPR/C/95/D/1233/2003 (2009), paras 2.4, 5.2, 7.2.

<sup>121</sup> *Cohen v California* 403 US 15, 23 (1971).

<sup>122</sup> *Compromis*, para 3.

violence has increased markedly between the adherents of the two religions'.<sup>123</sup> For instance, one online post offensive to Saduja 'caused an uproar' and resulted in at least one arson attempt.<sup>124</sup> Here, the response to Kutik's video was sudden, chaotic, and violent: rioting spread within a week, Sadujists were attacked, over one hundred people were injured, and numerous homes, businesses, and a historic site were 'completely destroyed'.<sup>125</sup> Considering the history of violence and escalating religious tensions in Lydina, a violent reaction to Kutik's statements was highly likely and, in fact, did occur. Therefore, Kutik's remarks were incitement.

C. Kutik's remarks failed to contribute to progressive religious discussions and were presented in an excessively inflammatory and hostile manner.

When considering whether speech is protected under the ICCPR, courts may consider the social utility of the speech.<sup>126</sup> If otherwise unprotected speech contributes 'to any form of public debate capable of furthering progress in human affairs', the speech may nonetheless be protected.<sup>127</sup> This test evaluates the speech's primary purpose<sup>128</sup> and asks whether the speech made a meaningful contribution to public debate<sup>129</sup> as an 'essential part of any exposition of ideas'.<sup>130</sup> Religious commentary, even if offensive, is permissible under this standard if it is

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<sup>123</sup> *ibid*, para 4.

<sup>124</sup> *ibid*.

<sup>125</sup> *ibid*, paras 11–12.

<sup>126</sup> *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, paras 56–57.

<sup>127</sup> *ibid*, para 49. See also *Wingrove v United Kingdom* (1997) 24 EHRR 1, para 58; *IA v Turkey* (2007) 45 EHRR 703, para 29.

<sup>128</sup> *ARM Chappell v United Kingdom* (1987) 53 EHRR 241.

<sup>129</sup> *Giniewski v France* (2007) 45 EHRR 23, paras 24, 28.

<sup>130</sup> *Chaplinsky v New Hampshire* 315 US 568, 572 (1942).

presented in a ‘decent and temperate’ manner.<sup>131</sup> However, speech is not protected if it is ‘of such slight social value ... that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality’.<sup>132</sup>

Kutik’s remarks were patently offensive and designed to elicit strong negative reactions from DigiTube viewers. The strong history of religious tension and violence in Lydina created an exceedingly hostile environment towards offensive religious commentary.<sup>133</sup> Kutik nonetheless proclaimed the inferiority of all Parduists and called for their conversion ‘by any means’.<sup>134</sup> He also used charged words, describing belief in Parduism as ‘blind’.<sup>135</sup> Kutik’s remarks used aggressive language and were phrased as absolute statements, indicating that they were designed to be patently offensive in Lydina’s religiously tense environment. Accordingly, the statements, as presented, were not ‘decent and temperate’, which is required in order for speech to qualify for heightened protection.<sup>136</sup> Kutik’s remarks were not presented objectively or constructively so as to encourage discussion and exposition of ideas. Kutik’s statements exacerbated the violent conditions within Lydina and were not essential to public debate; as such, they are undeserving of heightened protection. Because Kutik’s statements were gratuitously offensive, likely to produce an imminent breach of the peace, and were not presented in a decent and moderate manner, the statements were incitement under Article 2(a) of the Charter.

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<sup>131</sup> *Wingrove v United Kingdom* (1997) 24 EHRR 1, para 27.

<sup>132</sup> *Chaplinsky v New Hampshire* 315 US 568, 572 (1942).

<sup>133</sup> *Compromis*, paras 3–4.

<sup>134</sup> *ibid*, para 8.

<sup>135</sup> *ibid*.

<sup>136</sup> *Wingrove v United Kingdom* (1997) 24 EHRR 1, para 27.

III. THE APPLICANTS VIOLATED ARTICLE 2(B) OF THE CHARTER BECAUSE KUTIK'S STATEMENTS DELIBERATELY OFFENDED MALANI CULTURAL VALUES BY INTENTIONALLY USING RADICAL LANGUAGE TO FOSTER ANTAGONISM AND TRIGGER VIOLENT PROTESTS.

Article 2(b) of the Charter requires signatory states to prohibit provocation in media, defining provocation as 'speech or conduct that deliberately hurts the feelings or values of Malani culture and triggers violent protest inspired by Malani solidarity'.<sup>137</sup> To determine whether a speaker intended to hurt religious feelings, courts scrutinise the words used<sup>138</sup> and the context of the speech.<sup>139</sup> 'It is neither possible nor desirable to list all situations which may manifest the deliberate intention of wounding religious feelings. That intention may be manifested by the speaker declaring it in so many words, or by the circumstances surrounding ... the utterance, sound or gesture.'<sup>140</sup> Intent is inferred from the 'contemptuous, reviling, insulting, scurrilous, or ludicrous tone, style and spirit in which the subject was presented'.<sup>141</sup> Provocative language may also include 'profane, indecent, or abusive remarks directed to the person of the hearer'.<sup>142</sup>

In this case, Kutik's speech was provocation because it deliberately hurt the religious feelings and values of Malani culture and triggered violent protests in solidarity. Kutik chose to disseminate his speech online, which instantaneously spreads speech to potentially millions of

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<sup>137</sup> Compromis, para 15.

<sup>138</sup> *Dibagula v The Republic* (2003) AHRLR 274 (TzCA 2003), paras 11, 15–17.

<sup>139</sup> *ibid*, paras 15–17.

<sup>140</sup> *ibid*, para 16.

<sup>141</sup> *Wingrove v United Kingdom* (1997) 24 EHRR 1, paras 27, 38, 48, 60.

<sup>142</sup> *Cantwell v Connecticut* 310 US 296, 309–10 (1940).

viewers. Considering the tense religious and social climate of Lydina,<sup>143</sup> the strong influence that Parduism and Malani culture have on each other, and historical clashes between religions within Lydina,<sup>144</sup> it is a reasonable inference that Kutik calculated his speech and its widespread distribution to hurt feelings associated with Malani culture. Furthermore, Kutik's comments triggered violent protests by Parduists offended by the speech, who acted in solidarity in defence of Parduism.<sup>145</sup> Because Parduism and Malani culture are intimately intertwined,<sup>146</sup> the protests were in solidarity in defence of Malani culture. These protests injured over one hundred people and destroyed numerous homes, businesses, and a historic site.<sup>147</sup> Therefore, because Kutik deliberately hurt the religious feelings associated with Malani culture and triggered violent protests inspired by Malani solidarity, his speech was provocation under Article 2(b) of the Charter.

IV. THE CHARTER IS VALID UNDER THE ICCPR BECAUSE IT PROTECTS AGAINST VIOLENCE AND PRESERVES ORDER WHILE AVOIDING UNDUE INFRINGEMENT OF INDIVIDUAL RIGHTS.

Freedom of expression is not absolute and may be limited in certain circumstances for legitimate purposes.<sup>148</sup> Freedom of expression 'must be exercised in a context of respect'<sup>149</sup> and can be restricted when it poses 'some substantial threat to public safety, peace or order'.<sup>150</sup>

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<sup>143</sup> Compromis, paras 3–4.

<sup>144</sup> *ibid*, para 3.

<sup>145</sup> *ibid*, para 11.

<sup>146</sup> *ibid*, paras 5–6.

<sup>147</sup> *ibid*, para 12.

<sup>148</sup> *Ginsberg v New York* 390 US 629 (1968); *Ward v Rock Against Racism* 491 US 781 (1989).

<sup>149</sup> *Tristán Donoso v Panama* IACtHR (2009) Series C No 193, para 112.

<sup>150</sup> *Sherbert v Verner* 374 US 398, 403 (1963).

Restrictions on religious expression are justified when clashes between expression and religion risk instigating violence or hatred.<sup>151</sup> A state must protect its citizens from insults and religious offence if freedom of religion is to be meaningful.<sup>152</sup>

The freedoms of religion and expression are governed by Articles 18 and 19 of the ICCPR.<sup>153</sup> Lydina made a reservation to Articles 18 through 20 of the ICCPR, expressing that ‘Proselytism and other acts that may lead to division between religions are not protected by the Covenant’.<sup>154</sup> This reservation is ‘specific and transparent’<sup>155</sup> because it limits its application to religiously divisive speech and plainly explains that such speech is unprotected in Lydina. Because the reservation was specific and transparent,<sup>156</sup> it is valid. The Charter’s restrictions are within the scope of this reservation because the Charter restricts only speech that may cause religious division. Therefore, speech restricted by the Charter, such as the speech in this case, is unprotected under the ICCPR pursuant to Lydina’s reservations.

Alternatively, if Lydina’s reservations are invalid, the Charter is nonetheless valid under the ICCPR. Under the ICCPR, restrictions on free expression must be prescribed by law and necessary for either ‘respect of the rights or reputations of others’ or ‘the protection of national

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<sup>151</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 18–19; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (European Convention) arts 10, 19; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) arts 12–13; African Charter on Human and Peoples’ Rights (adopted 27 July 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter) art 8.

<sup>152</sup> *Kokkinakis v Greece* (1993) 17 EHRR 397, para 31.

<sup>153</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 18–19.

<sup>154</sup> *Compromis*, para 18.

<sup>155</sup> *Cabal and Pasini v Australia* Communication No 1020/2001 UN Doc CCPR/C/78/D/1020/2001 (2003), para 7.4.

<sup>156</sup> *Fanali v Italy* Communication No 75/1980 UN Doc CCPR/C/18/D/75/1980 (1983), paras 11.6, 12.

security or of public order ... or morals'.<sup>157</sup> Courts applying the ICCPR use a three-prong test to determine when restrictions are valid.<sup>158</sup> Restrictions must: (1) be prescribed by law; (2) genuinely purport to protect a legitimate governmental interest; and (3) be necessary in a democratic society.<sup>159</sup> All three prongs must be satisfied for the restrictions to be valid.<sup>160</sup> Here, the Charter is valid because it is a legally prescribed, necessary, and reasonably proportionate way to promote the government's significant interest in protecting Lydina's citizens from religiously motivated violence.

A. The Charter is legitimately and appropriately prescribed by law.

Restrictions on expression must be appropriately prescribed by law and must not restrict speech via prior censorship.<sup>161</sup> This guards against arbitrary governmental restrictions on individual rights.<sup>162</sup> To satisfy this requirement, the restrictions must be enacted legally and legitimately by the state's sovereign prior to an applicant's alleged violation of the restrictions.<sup>163</sup> The Charter is valid because it was properly enacted in 2008, years prior to the events of this case.<sup>164</sup> Lydina enacted the CIA pursuant to the Charter's provisions in 2009,<sup>165</sup> accordingly, the

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<sup>157</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19.

<sup>158</sup> *Herrera Ulloa v Costa Rica* IACtHR (2004) Series C No 107, para 120.

<sup>159</sup> *ibid.* See also Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (European Convention) art 10(2); *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, para 42; *Sürek v Turkey* ECHR 1999-IV 355, para 44.

<sup>160</sup> *Ríos v Venezuela* IACtHR (2009) Series C No 194, para 346.

<sup>161</sup> American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 12(3); Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 29(2).

<sup>162</sup> *Kalac v Turkey* (1997) 27 EHRR 552, para 26.

<sup>163</sup> *Zegveld v Eritrea* (2003) AHRLR 84 (ACHPR 2003), paras 59–61.

<sup>164</sup> *Compromis*, para 15.

Charter and the CIA were appropriately established for several years before Kutik's video went viral. Nothing in the record indicates that the Charter and the CIA were entered contrary to Lydina's laws. Therefore, the Charter is appropriately and legally prescribed by law.

Significantly, prior censorship laws are invalid because they are undue restrictions on the 'free circulation of ideas and opinions'.<sup>166</sup> 'Abuse of freedom of information thus cannot be controlled by preventative measures but only through the subsequent imposition of sanctions.'<sup>167</sup> Accordingly, civil remedies, rather than bans on speech, are appropriate means of redress when restricting free expression.<sup>168</sup> The Charter validly operates through subsequent measures. Neither the CIA nor the Charter prohibits speech before its utterance; the CIA instead provides redress after Charter violations by allowing civil suits.<sup>169</sup> Both the Charter and the CIA do not include criminal punishments for behaviour that violates the Charter; civil remedies are the only means of recourse under the Charter. Accordingly, the Charter appropriately operates through subsequent remedies and does not amount to prior censorship. Therefore, the Charter is legitimately prescribed by law.

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<sup>165</sup> *ibid*, para 16.

<sup>166</sup> Inter-American Declaration of Principles on Freedom of Expression, adopted by the Inter-American Commission on Human Rights (20 October 2000), para 5; *Ricardo Canese v Paraguay* IACtHR (2004) Series C No 111, para 95.

<sup>167</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, IACtHR Series A No 5 (13 November 1985), para 39.

<sup>168</sup> Inter-American Declaration of Principles on Freedom of Expression, adopted by the Inter-American Commission on Human Rights (20 October 2000), para 10.

<sup>169</sup> *Compromis*, paras 18–21; *Clarifications*, para 15.

- B. The Charter's purposes of safeguarding public safety, peace, and order and protecting religious and cultural values are reasonable and legitimate governmental purposes.

The Charter's purpose must be to promote or protect a legitimate governmental interest.<sup>170</sup> Its restrictions are permissible 'to protect public safety, order, health, or morals or the fundamental rights and freedoms of others',<sup>171</sup> or 'for the protection of national security or of public order'.<sup>172</sup> When restricting expression, states must 'specify the precise nature of the threat allegedly posed'.<sup>173</sup> Importantly, a state has 'an obvious interest in the preservation and protection of peace and good order within her borders';<sup>174</sup> therefore, preventing violence is a legitimate interest.<sup>175</sup>

Likewise, preserving order is a legitimate purpose for restricting freedom of expression<sup>176</sup> when threats to internal order are 'pressing and substantial'.<sup>177</sup> Restricting expression is necessary to prevent disorder and protect 'the quality of life in the community at large'.<sup>178</sup> Even

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<sup>170</sup> *Njaru v Cameroon* Communication No 1353/2005 UN Doc CCPR/C/89/D/1353/2005 (2007), para 6.4.

<sup>171</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 18(3).

<sup>172</sup> *ibid* art 19(3); *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004), para 43; UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, para 21.

<sup>173</sup> *Kim v Republic of Korea* Communication No 574/1994 UN Doc CCPR/C/64/D/574/1994 (1998), para 12.5.

<sup>174</sup> *Cantwell v Connecticut* 310 US 296, 307 (1940).

<sup>175</sup> *Beauharnais v Illinois* 343 US 250, 342–43 (1952).

<sup>176</sup> *Refah Partisi v Turkey* (2003) 37 EHRR 1, paras 51, 67; *Association Ekin v France* (2002) 35 EHRR 35, paras 3, 48; *Ceylan v Turkey* (2000) 30 EHRR 73, paras 24, 26–28.

<sup>177</sup> *R v Oaks* [1986] 1 SCR 103. See also *Murphy v Ireland* (2004) 38 EHRR 212, paras 15, 48, 54, 59.

<sup>178</sup> *City of Renton v Playtime Theatres Inc* 475 US 41, 54 (1986).

theoretical threats to public safety and pressing social needs justify restrictions on expression.<sup>179</sup> As long as a threat to society is reasonable and objective, protection against that threat is a legitimate governmental purpose.<sup>180</sup> For instance, in *Mouvement Raëlien Suisse v Switzerland*, the ECHR found several legitimate purposes behind banning a poster claiming to communicate a message from extra-terrestrials.<sup>181</sup> The ECHR held that these legitimate purposes included promoting public order, safety, and morality, even though the poster did not pose a direct, significant threat to those values and did not display unlawful, offensive, or shocking content.<sup>182</sup>

A state may legitimately seek to promote ‘respect for the religious feelings of believers’ through restrictions on freedom of expression, as there is frequently a correlation between incendiary religious remarks and violence.<sup>183</sup> Restrictions designed to prevent religious violence are vital in many states.<sup>184</sup> For example, in 2011, fifty-nine states banned defamation of religion; at that time, fourteen of those states were experiencing at least a twenty-eight percent increase in religiously motivated violence.<sup>185</sup> In those states, restrictions were necessary to prevent violence and promote public order. Restrictions necessary to protect public order are valid so long as they

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<sup>179</sup> *Herrera Ulloa v Costa Rica* IACtHR (2004) Series C No 107, para 122; *SAS v France* App no 43835/11 (ECHR, 1 July 2014), para 51.

<sup>180</sup> *Sister Immaculate Joseph v Sri Lanka* Communication No 1249/2004 UN Doc CCPR/C/85/D/1249/2004 (2005), para 7.4.

<sup>181</sup> *Mouvement Raëlien Suisse v Switzerland* (2013) 56 EHRR 14, para 14.

<sup>182</sup> *ibid*, paras 44, 72.

<sup>183</sup> *Otto-Preminger-Institut v Austria* (1994) 19 EHRR 34, paras 47, 48, 52. See also *Gay News Ltd v United Kingdom* (1982) 5 ECHR 123.

<sup>184</sup> *Faurisson v France* Communication No 550/1993 UN Doc CCPR/C/58/D/550/1993 (1986), paras 2, 4–5.

<sup>185</sup> Caleb Holzaepfel, ‘Can I Say That?: How an International Blasphemy Law Pits the Freedom of Religion Against the Freedom of Speech’ (2014) 28 *Emory Intl L Rev* 597, 599.

do not have the ‘purpose or effect’ of hampering ‘the observance of one or all religions’ or ‘to discriminate invidiously between religions’.<sup>186</sup>

Lydina signed the Charter specifically ‘to prevent religion-based violence within the country’.<sup>187</sup> Lydina was not the only country who deemed this a necessary restriction, as it was a regional Charter.<sup>188</sup> This purpose was rational, considering Lydina’s history of religiously motivated violence and the tendency of social media to exacerbate religious tensions.<sup>189</sup> As religious tensions and religiously motivated violence were escalating in Lydina,<sup>190</sup> it was reasonable for Lydina to conclude that increased inflammatory social media use could potentially undermine public safety and order. Additionally, the Charter’s provisions, specifically those of Article 1(b), expressly articulate the goal of protecting Malani cultural values.<sup>191</sup> The Charter’s purposes of promoting stability and public safety and protecting cultural values are legitimate.

C. The Charter’s restrictions are necessary to protect states against chaos and violence.

The Charter must be ‘necessary in a democratic society’<sup>192</sup> to ‘achieve a legitimate purpose’.<sup>193</sup> A measure is not necessary, and therefore is invalid, if its objectives are achievable

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<sup>186</sup> *Sherbert v Verner* 374 US 398, 404 (1963). See also UNHRC ‘General Comment 34’ in ‘Article 19: Freedoms of Opinion and Expression’ (2011) UN Doc CCPR/C/GC/34, para 48.

<sup>187</sup> *Compromis*, para 15.

<sup>188</sup> *ibid.*

<sup>189</sup> *ibid.*, paras 3–4.

<sup>190</sup> *ibid.*, para 4.

<sup>191</sup> *ibid.*, para 15.

<sup>192</sup> *Sener v Turkey* (2003) 37 EHRR 34, para 28.

<sup>193</sup> *Keun-Tae Kim v Republic of Korea* Communication No 574/1994 UN Doc CCPR/C/64/D/574/1994 (1999), para 12.2.

through less restrictive means.<sup>194</sup> Restrictions are necessary if they: (1) preserve the state's margin of appreciation; (2) are reasonable and proportionate to the need; and (3) are narrowly written.<sup>195</sup> Here, the Charter's restrictions on expression are necessary to protect Lydina against internal disorder and violence.

1. *Lydina has a wide margin of appreciation to restrict expression for protection of religious sentiments against internal threats.*

States have a wide margin of appreciation to restrict expression when restrictions relate 'to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion'.<sup>196</sup> Each individual state is best suited to regulate offensive speech within its borders to protect its citizens against religious violence,<sup>197</sup> and each state's lawmakers are 'uniquely positioned' to identify and respond to situations where speech threatens the integrity of the state.<sup>198</sup> This margin of appreciation provides state lawmakers flexibility to use 'legislative efforts to deal with obstinate social issues'.<sup>199</sup> Accordingly, states' decisions to regulate expression, particularly to protect against incitement, are entitled to deference.<sup>200</sup> States have greater latitude to regulate expression when necessary to avoid inflammation of religious tensions.<sup>201</sup>

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<sup>194</sup> *Ballantyne v Canada* Communication No 359/1989 UN Doc CCPR/C/47/D/359/1989 (1993), para 11.4.

<sup>195</sup> *Silver v United Kingdom* (1983) 63 EHRR 347, paras 84, 97.

<sup>196</sup> *Wingrove v United Kingdom* (1997) 24 EHRR 1, para 58.

<sup>197</sup> *Handyside v United Kingdom* (1976) 1 EHRR 737, paras 48, 60; *Murphy v Ireland* (2004) 38 EHRR 212, para 37.

<sup>198</sup> *Holder v Humanitarian Law Project* 561 US 1, 35–36 (2010).

<sup>199</sup> *Beauharnais v Illinois* 343 US 250, 262 (1952).

<sup>200</sup> *Giniewski v France* (2007) 45 EHRR 23, para 48.

<sup>201</sup> *Mouvement Raëlien Suisse v Switzerland* (2013) 56 EHRR 14, paras 48, 50.

Lydina determined that social media can uniquely exacerbate religious tensions and pose a threat to order and peace within its borders.<sup>202</sup> Lydina is specially positioned to determine what internal threats justify regulation of expression to protect public safety and ‘strike a balance between competing private and public interests’.<sup>203</sup> Therefore, under the margin of appreciation, Lydina’s determination that hateful and offensive online speech may cause internal violence and disorder is entitled to deference.

2. *The Charter is a reasonable and proportionate response to impending violence and instability because it promotes public safety without impairing individuals’ rights.*

Restrictions ‘must be directly related to the specific need on which they are predicated’,<sup>204</sup> and any interference with free expression must be ‘proportionate to the aim pursued’.<sup>205</sup> This requirement protects against arbitrary restrictions on free expression by considering whether a law is specific, fair, and reasonable, and whether it allows for transparent application.<sup>206</sup> The need for restrictions on expression must outweigh the need for enjoyment of full rights.<sup>207</sup> No law should be a ‘blanket restriction on the freedom of expression’.<sup>208</sup>

Inflammatory online religious speech poses a significant risk to Lydina. Religious violence in Lydina is dramatically escalating, and religious adherents ‘are frequently involved in

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<sup>202</sup> Compromis, paras 4, 15.

<sup>203</sup> *Dickson v United Kingdom* (2007) 41 EHRR 21, para 78.

<sup>204</sup> UNHRC ‘General Comment 34’ in ‘Article 19: Freedoms of Opinion and Expression’ (2011) UN Doc CCPR/C/GC/34, para 22.

<sup>205</sup> *Doğan v Turkey* App no 50693/99 (ECHR, 10 January 2006), paras 150, 152.

<sup>206</sup> *Gauthier v Canada* Communication No 633/1995 UN Doc CCPR/C/65/D/633/1995 (1999), para 13.6.

<sup>207</sup> *Ricardo Canese v Paraguay* IACtHR (2004) Series C No 111, para 96.

<sup>208</sup> *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999), para 80.

violence against each other'.<sup>209</sup> Social media allows for the instantaneous dissemination of religiously offensive speech, which previously resulted in an immediate uproar and an arson attempt in Lydina.<sup>210</sup> Following Kutik's posting, over one hundred people were injured in riots lasting over seven days, and numerous homes and businesses were completely destroyed.<sup>211</sup> In contrast to this significant safety risk, the Charter's restrictions on freedom of expression are minimal. The Charter mandates respect for human dignity and religious, ethical, and social traditions by prohibiting speech that insults other religions, incites hatred, and deliberately provokes violent protests.<sup>212</sup> These restrictions reasonably carry out the Charter's purpose of preventing religiously motivated violence. Consequently, because the Charter's purposes rationally promote public safety, minimally impair the rights of Lydinans, and benefit the state's collective well-being, the Charter's restrictions are reasonable and proportionate.

3. *The Charter's scope is appropriately limited because its aim of preserving public safety could not be achieved through lesser governmental measures.*

Restrictions on free expression that achieve the legitimate aims of a state should be applied as narrowly as possible.<sup>213</sup> If there are no alternative courses of action that would equally promote the state's goals, then the restrictions are narrow.<sup>214</sup> Restrictions should not be

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<sup>209</sup> Compromis, paras 3–4.

<sup>210</sup> *ibid*, para 34.

<sup>211</sup> *ibid*, paras 11–12.

<sup>212</sup> *ibid*, para 15.

<sup>213</sup> *Shelton v Tucker* 364 US 479, 488 (1969); *Herrera Ulloa v Costa Rica* IACtHR (2004) Series C No 107, para 123.

<sup>214</sup> *Yoon and Choi v Republic of Korea* Communication No 1321/1322/2004 UN Doc CCPR/C/88/D/1321-1322/2004 (2006), paras 6.4, 8.3. See also UNHRC 'General Comment 34' in 'Article 19: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34, paras 33–34.

overreaching or overbroad, nor should they have a disproportionate discriminatory impact.<sup>215</sup> ‘If there are various options to achieve [the legitimate] objective, the one which least restricts the protected right should be selected.’<sup>216</sup> Accordingly, the Charter must be closely tailored to accomplishing its legitimate objective.<sup>217</sup>

The Charter minimally and narrowly applies only to speech likely to cause violence or a breach of the peace. Lydina designed the restrictions to penalise catalytic speech likely to reignite religious tensions.<sup>218</sup> The Charter does not censor speech, but only allows for subsequent recovery after damages are incurred;<sup>219</sup> this method of recourse is the least restrictive means of rectifying damage caused by incitement. Therefore, because the Charter only restricts free expression as is necessary to protect public safety, its restrictions are appropriately narrow.

Additionally, DigiTube’s liability under the Charter for Kutik’s incendiary and provocative speech is valid because states may restrict online expression when necessary to achieve these narrowly tailored, legitimate governmental goals.<sup>220</sup> Communication via audio-visual media is more powerful than other types of communication.<sup>221</sup> Internet communication has a ‘global and open nature’<sup>222</sup> and is part of a ‘never-ending world-wide conversation’ capable

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<sup>215</sup> *Murphy v Ireland* (2004) 38 EHRR 212, paras 68, 74.

<sup>216</sup> *Ricardo Canese v Paraguay* IACtHR (2004) Series C No 111, para 96.

<sup>217</sup> UNHRC ‘General Comment 34’ in ‘Article 19: Freedoms of Opinion and Expression’ (2011) UN Doc CCPR/C/GC/34, para 34.

<sup>218</sup> *Compromis*, para 15.

<sup>219</sup> *ibid*, para 20.

<sup>220</sup> *Citron v Zündel* (2002) CanLII 23557 (CHRT), paras 74–77, 82–83.

<sup>221</sup> *Murphy v Ireland* (2004) 38 EHRR 212, para 69.

<sup>222</sup> UNHRC Res 20/8 (2012) UN Doc A/HRC/20/L.13, para 2.

of ‘blurring the distinction between “speakers” and “listeners”’.<sup>223</sup> Accordingly, states ‘should take into account the differences between the print and broadcast sectors and the internet’<sup>224</sup> because online expression spreads instantly around the world. Because internet speech receives the same protections as audible speech,<sup>225</sup> online expression may be restricted to protect culture and prevent incitement.<sup>226</sup>

ISPs operate in a highly public forum with the potential for instantaneous mass dissemination of ideas around the world. The Charter and the CIA ensure compliance with their valid restrictions on expression by holding ISPs liable for incendiary speech published and disseminated by ISPs.<sup>227</sup> Under the CIA, liability attaches to ISPs for distribution of illegal content ‘to a dispersed audience via any electronic mass communications media in a one-to-many model’.<sup>228</sup> The Charter limits its application to only the narrow categories of incendiary and provocative speech.<sup>229</sup> Accordingly, the restrictions on ISPs under the Charter and the CIA appropriately ensure compliance with the Charter in the online world of instantaneous mass communication. Therefore, under the ICCPR, the Charter is valid because it is a legally prescribed, necessary, and reasonably proportionate means of protecting Lydina’s citizens against religious violence.

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<sup>223</sup> *American Civil Liberties Union v Reno* 929 F Supp 824, 843, 883 (ED Pa 1996).

<sup>224</sup> UNHRC ‘General Comment 34’ in ‘Article 19: Freedoms of Opinion and Expression’ (2011) UN Doc CCPR/C/GC/34, para 39.

<sup>225</sup> *Reno v American Civil Liberties Union* 521 US 844 (1997); Council of Europe (Committee of Ministers) ‘Human Rights and the Rule of Law in the Information Society’ CM (2005) 56 (13 May 2005), paras 4–5, 8.

<sup>226</sup> *Citron v Zündel* (2002) CanLII 23557 (CHRT), paras 204–07. See also UNHRC ‘General Comment 34’ in ‘Article 19: Freedoms of Opinion and Expression’ (2011) UN Doc CCPR/C/GC/34, para 43.

<sup>227</sup> *Compromis*, paras 15, 17.

<sup>228</sup> *Clarifications*, para 10.

<sup>229</sup> *Compromis*, para 15.

## **PRAYER**

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

1. Kutik's remarks, published and disseminated by DigiTube, violated Article 1(b) of the Charter by insulting Malani religious and cultural values.
2. Kutik's remarks, published and disseminated by DigiTube, violated Article 2(a) of the Charter by inciting religiously motivated violence.
3. Kutik's remarks, published and disseminated by DigiTube, violated Article 2(b) of the Charter by deliberately provoking violence inspired by cultural solidarity.
4. The Charter, which protects against religious violence and preserves order within Lydina, is valid under the ICCPR.

Respectfully submitted this fourteenth day of December,

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Counsel for the Respondent