

THE 2015–2016 PRICE MEDIA LAW  
MOOT COURT COMPETITION

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UMANI & CHATTER  
(APPLICANTS)

V.

THE REPUBLIC OF OMERIA  
(RESPONDENT)

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MEMORIAL FOR APPLICANTS

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## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACommHPR	African Commission on Human and Peoples' Rights
ATEL	Anti-Terrorism & Extremism Law of 2012
CERD	Committee on the Elimination of Racial Discrimination
CJEU	Court of Justice of the European Union
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
NHA	No Hate Act of 2011
OHCHR	United Nations Office of the High Commissioner for Human Rights
SCOTUS	Supreme Court of the United States of America
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council

US

United States of America

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## STATEMENT OF RELEVANT FACTS

### Background of Omeria

A. Omeria became an independent state after a war with Brinnah in 1952. Following an armistice, many ethnic Brinnans left Omeria for Brinnah. However, to this day, enclaves of Brinnan settlements remain along the border.

B. In recent times, Omeria has become one of the heaviest users of internet bandwidth per capita in the world. This was because of a campaign to bring free high-speed internet access to the public in 2010.

### The ATEL and the NHA

C. In 2011, Omeria enacted the NHA, which criminalises any online dissemination of statements that threaten, insult, or degrade a group of persons on the basis of ethnicity is criminalised. The NHA also holds a person or entity responsible for facilitating another's statement prohibited under the Act. However, the NHA does not apply to artistic or journalistic expression.

D. In 2012, Omeria enacted the ATEL, which criminalises the publication of extremist statements. The ATEL prescribes either criminal or civil punishment for offenders. However, the ATEL does not indicate a maximum sentence. Additionally, the ATEL provides for the issuance of emergency court orders to provisionally remedy violations of the ATEL.

## **Omeria's prosecution of Umani and Chatter**

E. Chatter is the most popular social media platform for communication in Omeria. It operates as a web-based and mobile application. Users can interact with each other by re-chatting and responding to each others' posts. Many media organisations use Chatter as a forum to promote their news stories and editorial content. Omerian politicians are also very active on Chatter. For instance, Omeria's Prime Minister has 2,894,012 followers whilst the Justice Minister has 508,995 followers.

F. Umani runs an anonymous Chatter account under the name @TheVigilanteInsider. @TheVigilanteInsider is known to spread gossip about political figures, crack satirical jokes, and make witty poems at many public figures' expense. In line with this, @TheVigilanteInsider's bio states: '[p]olitical poet telling the truth from the corridors of power'. The account is very popular and has garnered 844,056 followers.

G. Umani has been making controversial posts on Chatter from as early as 2009. In 2014, he was prosecuted for some of his posts. He was prosecuted under the NHA for posts #1–3, and the ATEL for posts #4–6. Notably, posts #1–2 were published before the enactment of the NHA, and post #3 was deleted by Umani four minutes after it was posted.

H. In posts #1–3, Umani referred to events in Omeria that concerned Brinnans. In particular, many commentators took post #2 to refer to a speculation that Omeria used chemical weapons during a one-month-long war with Brinnah. Furthermore, posts #4–6, which were made close to the anniversary of the Armistice, led Omeria's leading newspaper to

question the anti-Brinnan stance amongst high-ranking government officials. For instance, the Justice Minister, Umani's long-time boss, has a well-known hard-line stance against Brinnans.

I. In the process of prosecuting Umani, Omeria obtained a court order pursuant to the ATEL to force Chatter to delete posts #4–6 and reveal the identity of @TheVigilanteInsider. Chatter promptly deleted the posts, but initially refused to reveal Umani's identity. However, following a daily fine of US\$ 10,000, Chatter was eventually forced to cooperate with the Omerian authorities after seven days.

J. After obtaining Umani's identity, Omeria released his identity to the media before sentencing him to a two-year jail term. Chatter was also convicted for posts #1 and #3 under the NHA for facilitating Umani's speech, and for posts #4–6 under the ATEL for reckless monitoring. Chatter was not held liable for post #2, over which it had temporarily suspended Umani's account. It was, however, fined US\$ 5 million, in addition to the US\$ 70,000 imposed previously for refusing to disclose Umani's identity.

## **STATEMENT OF JURISDICTION**

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

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



## QUESTIONS PRESENTED

1. Whether Omeria violated Umani's rights to freedom of expression and privacy by removing Umani's identity and imprisoning him for two years, under the NHA, for posts #1–3, which included posts published before the enactment of the NHA.
2. Whether Omeria violated Chatter's rights to freedom of expression and privacy by imposing a US\$ 5 million fine on Chatter, under the NHA, for merely hosting posts #1 and #3.
3. Whether Omeria violated Umani's rights to freedom of expression and privacy by prosecuting Umani, under the ATEL, for engaging in controversial issues through satire in posts #4–6.
4. Whether Omeria violated Chatter's rights to freedom of expression and privacy by imposing a US\$ 5.07 million fine on Chatter, for posts #4–6, under the ATEL, despite having deleted those posts.

## SUMMARY OF ARGUMENTS

### **OMERIA'S PROSECUTION OF UMANI UNDER THE NHA VIOLATED UMANI'S RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY**

A. Freedom of expression, as the vehicle for free discourse in the public sphere, is the foundation stone of a democracy. The internet, in particular, has been noted to enhance an individual's enjoyment of this freedom. Additionally, online anonymity allows individuals to engage in controversial debate without fear of condemnation. In this respect, an individual's freedom of expression and right to privacy are intertwined.

B. Omeria, in prosecuting Umani under the NHA, interfered with Umani's rights to freedom of expression and privacy. This is because any sanction imposed on an individual is an interference with his freedom of expression. Additionally, the trespassing of Umani's reasonable expectation of privacy was an interference with his right to privacy. These interferences were unjustified as they were neither prescribed by law nor necessary in a democratic society.

C. The prosecution was not prescribed by law as the NHA is imprecise, and there was no legal basis to prosecute Umani. The NHA is imprecise as the scope of the terms 'threatening, insulting or degrading' is overly vague. There was also no legal basis to prosecute Umani. First, the prosecution involved an inappropriate use of information procured under the ATEL Section 6 court order. Secondly, the prosecution was retroactive as posts #1-2 were published before the enactment of the NHA.

D. There was also no pressing social need to prosecute Umani as his posts were not hate speech. First, the posts were intended to be art in the form of satire. Secondly, while posts #1–3 may seem hostile read literally, satire necessarily carries the risk of offending others to stimulate discussion on controversial social issues. Thirdly, posts #1–3 were unlikely to incite hostility, discrimination, or violence. Finally, significance must be placed on the pluralistic and self-regulating nature of social media.

E. Furthermore, the two-year jail term was disproportionate. In examining the proportionality of Omeria’s actions, the doctrine of margin of appreciation is inapplicable. Even if a margin of appreciation were accorded to Omeria, this margin should not be unduly wide. Omeria’s sudden prosecution of Umani was disproportionate given Omeria’s prolonged toleration of posts #1–3. Moreover, the two-year jail term imposed on Umani was excessive in comparison to the sentences other states have imposed.

### **OMERIA’S PROSECUTION OF CHATTER UNDER THE NHA VIOLATED CHATTER’S RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY**

F. Corporations are capable of possessing the rights to freedom of expression and privacy. Freedom of expression encompasses the right of corporations like Chatter to impart information. Similarly, the right to privacy should encompass a derivative right to privacy of social media platforms like Chatter to protect the privacy rights of its users.

G. Forcing Chatter to reveal Umani’s identity and fining Chatter for posts #1 and #3 under the NHA interfered with Chatter’s rights to freedom of expression and privacy. Omeria’s

actions were unjustified as there was no pressing social need to fine Chatter and additionally, the fines were disproportionate.

H. There was no pressing social need to fine Chatter. First, Chatter is a mere passive intermediary. This is because Chatter exercises a limited degree of control over its user content. Secondly, Chatter should not be liable for posts #1 and #3 despite having received user complaints as the state is best placed to determine the legality of such content. Thirdly, Chatter faces especial difficulty in determining the legality of posts #1 and #3. Finally, requiring an intermediary to decide the legality of its users' posts is susceptible to abuse as it lacks elements of due process, such as the opportunity to appeal a takedown request.

I. Furthermore, the fine was disproportionate as the quantum was excessive. The sum of US\$ 5 million is over and above sanctions imposed on intermediaries in other states. Such excessive fines would create a significant chilling effect on social media intermediaries.

### **OMERIA'S PROSECUTION OF UMANI UNDER THE ATEL WAS UNJUSTIFIED**

J. Omeria's prosecution of Umani under the ATEL was unjustified as it was not prescribed by law and not necessary in a democratic society.

K. The prosecution was not prescribed by law as the ATEL has inadequate safeguards against unfettered discretion, and is insufficiently precise. First, Section 3 is insufficiently precise as the term 'indirectly encouraged' is overly vague. Secondly, Section 5 is insufficiently precise as no maximum punishment is prescribed. The lack of a maximum punishment in Section 5 also affects the adequacy of its safeguards. Finally, Section 6 does not

contain adequate safeguards against unfettered discretion as there is no fetter on emergency orders that a court may issue.

L. There was also no pressing social need to imprison Umani. First, Umani did not intend posts #4–6 to incite imminent violence as he was merely making satirical statements. Secondly, posts #4–6 are unlikely to incite imminent violence as social media allows statements to be exposed to counter-narratives. Thirdly, it cannot be argued that @TheVigilanteInsider’s online popularity necessarily exacerbated the nature of posts #4–6 as @TheVigilanteInsider’s sphere of influence is limited to his role as a satirist. Fourthly, posts #4–6 are unlikely to incite imminent violence despite Umani’s correspondence with @Nightwatcher00 as @Nightwatcher00 is unlikely to be an account operated by the actual terrorist organisation. Ultimately, posts #4–6 should be protected as they are social commentary and political speech that encourage discourse.

M. Both the disclosure of Umani’s identity to media outlets and subsequent imprisonment were disproportionate to the aim of protecting national security. This is because the identity of an individual under investigations should not be publicised until the allegation has been substantiated to protect the individual from harassment and unnecessarily putting the individual’s reputation at risk. The two-year jail term was also disproportionate as imprisonment can rarely be justified as a proportionate measure. Furthermore, other states have imposed far lesser sentences upon individuals that were found guilty of making extremist speech.

## **OMERIA'S PROSECUTION OF CHATTER UNDER THE ATEL VIOLATED CHATTER'S FREEDOM OF EXPRESSION AND PRIVACY**

N. There was no pressing social need to fine Chatter for posts #4–6. First, Chatter is a mere passive intermediary. Secondly, while Chatter may have received complaints over posts #4–6, it should not be made to determine the legality of the posts. Thirdly, imposing liability on Chatter may result in a chilling effect on the freedom of expression. Fourthly, while intermediaries may have a wide variety of technical tools to identify questionable content, these tools offer little guidance in determining the legality of such content. Finally, it is unduly onerous to require social media intermediaries to trawl through the immense amount of content that they host.

O. Furthermore, the fine was disproportionate as the quantum was excessive. The sum of US\$ 5.07 million is over and above sanctions imposed on intermediaries in other states. Chatter was fined an exceptional sum of US\$ 5.07 million, despite obeying the take-down request. Additionally, states have encouraged co-monitoring between intermediaries and governments as opposed to pinning liability on intermediaries.

## ARGUMENTS

### I. OMERIA VIOLATED UMANI'S RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY BY PROSECUTING UMANI UNDER THE NHA FOR POSTS #1-3

1. The freedom of expression, reflected in Article 19 of the UDHR<sup>1</sup> and ICCPR,<sup>2</sup> is 'the foundation stone for every free and democratic society'.<sup>3</sup> It is the vehicle for public discourse.<sup>4</sup> Essential to the freedom of expression online is the right to remain anonymous, an aspect of the right to privacy reflected in Article 12 of the UDHR and Article 17 of the ICCPR.<sup>5</sup> This is because online anonymity 'allows individuals to express themselves freely without fear of retribution'.<sup>6</sup> Accordingly, any interference should not render these rights illusory.<sup>7</sup>

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<sup>1</sup> UDHR (adopted 10 December 1948) UNGA Res 217A (III)

<sup>2</sup> ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171. See also ECHR (adopted 4 November 1950, entered into force 3 September 1953) art 10; ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13.

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

<sup>4</sup> General Comment 34 (n 3) para 2; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (17 April 2013) UN Doc A/HRC/23/40 ('UNHRC April 2013 Report') para 30.

<sup>5</sup> Lord Neuberger, 'What's in a Name?: Privacy and Anonymous Speech on the Internet Conference 5RB Keynote Speech' (30 September 2014) <<https://www.supremecourt.uk/docs/speech-140930.pdf>> accessed 17 January 2016, para 24; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (22 May 2015) UN Doc A/HRC/29/32 ('UNHRC May 2015 Report') para 47.

<sup>6</sup> UNHRC April 2013 Report (n 4) para 23. See also UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (16 May 2011) UN Doc A/HRC/17/27 ('UNHRC May 2011 Report') paras 22-23; Lord Neuberger (n 5) para 24; UNHRC May 2015 Report (n 5) para 47.

<sup>7</sup> UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (28 February 2008) UN Doc A/HRC/7/14 ('UNHRC February 2008 Report') para 49; General Comment 34 (n 3) para 21.

2. States also have a duty to curtail hate speech, namely, the ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.<sup>8</sup> However, in executing this duty, an interference may only be justified if it is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society.<sup>9</sup> These three requirements have been applied by the UNHRC,<sup>10</sup> IACtHR,<sup>11</sup> ECtHR,<sup>12</sup> and ACommHPR.<sup>13</sup>

3. Omeria’s procurement of Umani’s identity and imprisonment of Umani for posts #1–3 interfered with his: (A) rights to freedom of expression and privacy. Omeria violated these rights as (B) the prosecution was unjustified.

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<sup>8</sup> ICCPR art 20(2). See also *Malcolm Ross v Canada* UN Doc CCPR/C/70/D/736/1997 (HRC, 18 October 2000) (‘*Malcolm Ross*’) para 11.5; UNHRC May 2011 Report (n 6) para 25; UNHRC, ‘Report of the Special Rapporteur on Minority Issues’ (5 January 2015) UN Doc A/HRC/28/64 (‘UNHRC January 2015 Report’) paras 52–54; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) (‘*Delfi June 2015*’) paras 48, 131.

<sup>9</sup> UNHRC April 2013 Report (n 4) paras 28–29.

<sup>10</sup> *Womah Mukong v Cameroon* UN Doc CCPR/C/51/D/458/1991 (HRC, 10 August 1994) para 9.7; *Sohn v Republic of Korea* UN Doc CCPR/C/54/D/518/1992 (HRC, 19 July 1995) para 10.4; *Malcolm Ross* (n 8) para 11.2; *Velichkin v Belarus* UN Doc CCPR/C/85/D/1022/2001 (HRC, 20 October 2005) para 7.3; UNHRC May 2011 Report (n 6) para 24; UNGA, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (10 August 2011) UN Doc A/66/290 (‘UNGA August 2011 Report’) para 15; General Comment 34 (n 3) para 35; UNHRC April 2013 Report (n 4) para 29.

<sup>11</sup> *Francisco Martorell v Chile* (IACtHR, 3 May 1996) para 55; *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 120; IACHR, ‘Report of the Special Rapporteur for Freedom of Expression’ (2009) OEA/SER L/V/II Doc 51 paras 58–64.

<sup>12</sup> *Handyside v UK* App no 5393/72 (ECtHR, 7 December 1976) (‘*Handyside*’) para 49; *Sunday Times v UK (No 1)* App no 6538/74 (ECtHR, 26 April 1979) (‘*Sunday Times*’) para 45; *Ceylan v Turkey* App no 23556/94 (ECtHR 8 July 1999) para 24; *Murat Vural v Turkey* App no 9540/07 (ECtHR, 21 January 2015) (‘*Murat Vural*’) para 59; *Perincek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015) (‘*Perincek*’) para 124.

<sup>13</sup> ACommHPR, ‘Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa’ (2002) ACHPR/Res 62(XXXII)02 Principle II; *Interights v Mauritania* AHRLR 87 Comm no 242/2001 (ACommHPR, 2004) paras 78–79; *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* AHRLR 268 Comm no 294/04 (ACommHPR, 2009) para 80.



**A. THE PROSECUTION INTERFERED WITH UMANI’S RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY AS UMANI WAS SANCTIONED AND HIS REASONABLE EXPECTATION OF PRIVACY WAS TRESPASSED**

4. An interference with the freedom of expression is broadly defined and includes prosecutions.<sup>14</sup> Omeria’s prosecution of Umani under the NHA for posts #1–3 was therefore an interference with his freedom of expression.

5. The right to privacy is interfered with when one’s reasonable expectation of privacy has been trespassed.<sup>15</sup> Whether there is a reasonable expectation of privacy depends on the nature of the information sought.<sup>16</sup> There is a reasonable expectation of privacy over IP addresses where they reveal information closely associated with an individual’s private life, such as his home or location.<sup>17</sup> Since the IP addresses were connected to Umani’s smartphone, work computer, and his 16-year-old daughter’s home computer,<sup>18</sup> Umani had a reasonable

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<sup>14</sup> *Malcolm Ross* (n 8) para 11.1; UNHRC May 2011 Report (n 6) para 22; General Comment 34 (n 3) para 11; *Perincek* (n 12) para 117. See also ECHR art 10(2); Guðmundur Alfredsson and Asbjørn Eide, *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff 1999) 409; Dirk Ehlers, *European Fundamental Rights and Freedoms* (Walter de Gruyter 2007) 106.

<sup>15</sup> *Katz v US* (1967) 389 US 347 para 62; *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010) para 44; *R v Spencer* [2014] 2 SCR 212 (*‘Spencer’*) para 17.

<sup>16</sup> *Spencer* (n 15) para 18. See also *US v Jones* No 10–1259 (132 S Ct 945, 23 January 2012) (*‘Jones’*) 6; *Riley v California* No 13–132 (134 S Ct 2473, 25 June 2014) (*‘Riley’*) 23, 28.

<sup>17</sup> Pinsent Masons, ‘IP Addresses and the Data Protection Act’ (2008) <<http://www.out-law.com/page-8060>> accessed 17 January 2016. See also Peter Scharr, ‘IP Addresses are Personal Data, EU Regulator Says’ (2008) <<https://www.sbs.ox.ac.uk/cybersecurity-capacity/system/files/IP%20addresses%20subject%20to%20Personal%20Data%20Regulation.pdf>> accessed 17 January 2016; Office of the Privacy Commissioner of Canada, ‘What an IP Address Can Reveal about You’ (2013) <[https://www.priv.gc.ca/information/research-recherche/2013/ip\\_201305\\_e.asp](https://www.priv.gc.ca/information/research-recherche/2013/ip_201305_e.asp)> accessed 17 January 2016.

<sup>18</sup> Para 17 of the facts.

expectation of privacy over the IP addresses. Omeria, in forcing Chatter to disclose the IP addresses,<sup>19</sup> interfered with Umani's privacy.

6. Umani's status as a minister cannot diminish his reasonable expectation of privacy, as @TheVigilanteInsider is an account run in his separate personal capacity. This is because a 'distinction has to be made between private individuals and persons acting in a public context'.<sup>20</sup>

7. It also cannot be argued that Umani has no reasonable expectation of privacy merely because he was suspected to have breached the NHA. The 'nature of privacy interests does not depend on whether... privacy shelters legal or illegal activity'.<sup>21</sup> Rather, 'whether people generally have a privacy interest in the information'.<sup>22</sup> Thus, an alleged criminal may still have a reasonable expectation of privacy.

## **B. THE PROSECUTION WAS UNJUSTIFIED**

8. Although Omeria may have acted in pursuance of a legitimate aim, the prosecution of Umani under the NHA was nevertheless: (1) not prescribed by law; and (2) not necessary in a democratic society.

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<sup>19</sup> Para 17 of the facts.

<sup>20</sup> *Von Hannover v Germany* App no 40660/08 (ECtHR, 7 February 2012) para 110. See also *Petrenco v Modolva* App no 20928/05 (ECtHR, 30 March 2010) para 55.

<sup>21</sup> *Spencer* (n 15) para 36. See also *Jones* (n 16) 6; *Peruzzo and Martens v Germany* App nos 7841/08, 57900/12 (ECtHR, 4 June 2013) paras 32–34; *Riley* (n 16) 23.

<sup>22</sup> *Spencer* (n 15) para 36.

## 1. The prosecution was not prescribed by law

9. A statute is prescribed by law if: (a) it is sufficiently precise; and (b) any prosecution under it has a legal basis.<sup>23</sup>

a. *The NHA is insufficiently precise as Section A is overly vague*

10. Section A in prohibiting ‘threatening, insulting or degrading’ speech, is overly vague. This is notable, as Umani’s liability was incurred under Section A.<sup>24</sup> Other statutes with the same terms have been similarly criticised. The words ‘threatened, insulted or degraded’ in § 266(b) of the Danish Criminal Code<sup>25</sup> have been faulted for being unclear.<sup>26</sup> This led to violent differences over the decision not to prosecute those responsible for the *Jyllands-Posten* Prophet Muhammad cartoons.<sup>27</sup> Likewise, the term ‘insulting’ in the former Section 5 of the

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<sup>23</sup> HRC, ‘General Comment 16’ (19 May 1989) UN Doc CCPR/C/21/Rev 1 paras 3 (‘General Comment 16’) 8; *Müller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) (‘Müller’) para 29; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) (‘Kokkinakis’) para 40; *Lindon, Otchakovsky-Laurens and July v France* App no 21275/02 (ECtHR, 22 October 2007) (‘Lindon’) para 41; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) (‘Editorial Board’) para 52. See also UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR’ (1984) UN Doc E/CN 4/1984/4 principle 17; General Comment 34 (n 3) paras 24–25; UNHRC May 2015 Report (n 5) paras 31–32.

<sup>24</sup> Para 10(a) of the facts.

<sup>25</sup> The Danish Criminal Code, Consolidated Act no 1034 (2 October 2009) (Denmark) s 266(b).

<sup>26</sup> Richard Winfield, ‘An Editorial Controversy Metasizing: Denmark’s Hate Speech Laws’ (2006) 24 *Communications Lawyer* 35; Christopher Coyne and Peter Leeson, *Media, Development, and Institutional Change* (Edward Elgar 2009) 57; Asma Uddin, ‘The UN Defamation of Religions Resolution and Domestic Blasphemy Laws: Creating a Culture of Impunity’ (14 July 2011) <<http://ssrn.com/abstract=1885770>> accessed 17 January 2016.

<sup>27</sup> Winfield (n 26) 35; Coyne and Leeson (n 26) 57; Uddin (n 26) 2.

1986 UK Public Order Act was criticised as ‘subjective and vague’<sup>28</sup> and has since been removed.<sup>29</sup>

*b. There was no legal basis to prosecute Umani as the prosecution involved an inappropriate use of information and was retroactive*

11. There was no legal basis to prosecute Umani under the NHA as the prosecution involved an inappropriate use of information. Laws that restrict an individual’s privacy must be applied for its prescribed purposes.<sup>30</sup> Umani’s prosecution under the NHA was an inappropriate use of information, as it was based on information collected pursuant to a court order made under the ATEL.<sup>31</sup> The court order made under the ATEL is confined to the purpose of ‘provisionally remedy[ing] violations of the’ ATEL,<sup>32</sup> and thus should not have been used for a prosecution under the NHA.

12. Moreover, there was no legal basis to prosecute Umani for posts #1 and #2. Criminal liability cannot be imposed retroactively, as it would be without legal basis.<sup>33</sup> As posts #1 and

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<sup>28</sup> Lord Dear, ‘Let’s Do Away with this Insult to Free Speech’ *The Telegraph* (10 December 2012).

<sup>29</sup> BBC, “‘Insulting Words’ Crime Ditched’ *BBC* (14 January 2013) <<http://www.bbc.com/news/uk-politics-21020737>> accessed 17 January 2016; Robert Booth, “‘Insulting’ to be Dropped from Section 5 of Public Order Act’ *The Guardian* (14 January 2013) <<http://www.theguardian.com/world/2013/jan/14/insulting-section-5-public-order-act>> accessed 17 January 2016.

<sup>30</sup> General Comment 16 (n 23) para 10. See also General Comment 34 (n 3) paras 11, 22.

<sup>31</sup> Para 17 of the facts.

<sup>32</sup> Para 4(f) of the facts.

<sup>33</sup> *Ricardo Canese v Paraguay* (IACtHR, 31 August 2004) para 175; *Sobhraj v Nepal* UN Doc CCPR/C/99/D/1870/2009 (HRC, 21 November 2008) para 7.6; *Kimmel v Argentina* (IACtHR, 2 May 2008) (‘*Kimmel*’) paras 66–68. See also Steven Greer, ‘The Exceptions to Article 8 to 11 of the European Convention on Human Rights’ (1997) Council of Europe 10.

#2 were made before the enactment of the NHA,<sup>34</sup> the prosecution for posts #1 and #2 was retroactive and therefore had no legal basis.

## **2. The prosecution was not necessary in a democratic society**

13. An interference is necessary in a democratic society if it: (a) corresponds to a pressing social need; and (b) is proportionate to the legitimate aim pursued.<sup>35</sup>

*a. There was no pressing social need to prosecute Umani as posts #1–3 were not hate speech*

14. Excessive criminalisation of mere criticism results in a chilling effect on public debate and detracts from the development of a tolerant, pluralist, and democratic society.<sup>36</sup> Hence, a distinction must be drawn between prohibited hate speech and legitimate expression.<sup>37</sup>

15. The UN Rabat Plan provides a framework for drawing the above distinction.<sup>38</sup> The factors to consider include: the intention of the speaker; the content of the speech; the context;

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<sup>34</sup> Paras 9, 14(a)–(b) of the facts.

<sup>35</sup> *Handyside* (n 12) para 48; General Comment 34 (n 3) paras 22, 33–34; UNHRC April 2013 Report (n 4) para 29; *Delfi June 2015* (n 8) para 131.

<sup>36</sup> UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (16 May 2011) UN Doc A/HRC/17/27 (‘UNHRC May 2011 Report’) paras 26, 28; UNHRC, ‘Report of the Special Rapporteur in the Field of Cultural Rights’ (14 March 2013) UN Doc A/HRC/23/34 (‘UNHRC March 2013 Report’) para 89.

<sup>37</sup> UNHRC May 2011 Report (n 36) paras 33–34; UNHRC January 2015 Report (n 8) para 59.

the likelihood of hatred, discrimination, or violence occurring; and the medium used.<sup>39</sup> This framework has been endorsed by the UNHRC.<sup>40</sup>

16. According to the above factors, there was no pressing social need to prosecute Umani as posts #1–3 were not hate speech. First, the posts were intended to be art in the form of satire. For an individual to be liable for hate speech, there must be an intention for the speech to incite hatred, discrimination, or violence.<sup>41</sup> Where the speech is artistic, it is less likely to be intended as hate speech.<sup>42</sup> This is because satire as a form of artistic expression may give rise to multiple interpretations and the exploration of controversial themes should not be taken as endorsement of those themes.<sup>43</sup> For example, in *Karatas v Turkey*, a poem which ‘taken literally might be construed as inciting readers to hatred, revolt and use of violence’,<sup>44</sup> was held to not be hate

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<sup>38</sup> UNHRC, ‘Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence’ (2012) <[http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf)> (‘UNHRC Rabat Plan’) accessed 17 January 2016. See also International Justice Resource Centre, ‘UN launches the Rabat Plan of Action’ (25 February 2013) <<http://www.ijrcenter.org/2013/02/25/un-launches-the-rabat-plan-of-action/>> accessed 17 January 2016; UNHRC March 2013 Report (n 36) para 28; UNHRC January 2015 Report (n 8) para 48.

<sup>39</sup> UNHRC Rabat Plan (n 38). See also UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation no 35 Combating Racist Hate Speech’ (26 September 2013) UN Doc CERD/C/GC/35 para 15; UNHRC, ‘Report of the Special Rapporteur on Freedom of Religion or Belief’ (26 December 2013) UN Doc A/HRC/25/58 para 58.

<sup>40</sup> International Justice Resource Centre, ‘UN launches the Rabat Plan of Action’ (n 38); UNHRC March 2013 Report (n 36) para 28; UNHRC January 2015 Report (n 8) para 48.

<sup>41</sup> *Robert Faurisson v France* UN Doc CCPR/C/58/D/550/1993 (HRC, 8 November 1996) para 10; Amnesty International, ‘Written Contribution to the Thematic Discussion on Racist Hate Speech and Freedom of Opinion and Expression organized by the United Nations Committee on Elimination of Racial Discrimination’ (28 August 2012) <<http://www.ohchr.org/Documents/HRBodies/CERD/Discussions/RacistHatespeech/AmnestyInternational.pdf>> accessed 17 January 2016, 3.

<sup>42</sup> *Karatas v Turkey* App no 23168/94 (ECtHR, 8 July 1999) (‘*Karatas*’) para 56; *Alinak v Turkey* App no 40287/98 (ECtHR, 29 March 2005) para 45; *Ergin v Turkey (No 6)* App no 47533/99 (ECtHR 4 May 2006) paras 32, 34; *Vereinigung Bildender Künstler v Austria* App no 68354/01 (ECtHR 25 January 2007) (‘*Künstler*’) para 33.

<sup>43</sup> *Karatas* (n 42) para 52; UNHRC March 2013 Report (n 36) para 37.

<sup>44</sup> *Karatas* (n 42) paras 10, 49.

speech. The ECtHR highlighted that the poems were ‘artistic in nature’ which made them ‘less a call to an uprising’ but rather legitimate political commentary.<sup>45</sup> Similarly, as @TheVigilanteInsider’s bio provides, his purpose is to be a ‘[p]olitical poet telling truth from the corridors of power’.<sup>46</sup> This is corroborated by his use of poetic devices and jokes in posts #1–3.<sup>47</sup>

17. Secondly, while posts #1–3 read literally may seem hostile, satire necessarily carries the risk of offending others to stimulate discussion on controversial social issues.<sup>48</sup> Posts #1–3 provided a launch pad for important public discussion on Omerian societal issues.<sup>49</sup> In particular, many commentators took post #2 to refer to a speculation that Omeria used chemical weapons during a one-month-long war with Brinnah.<sup>50</sup>

18. Thirdly, posts #1–3 were unlikely to incite hostility, discrimination, or violence. A key factor to consider is whether the speech was understood by its audience as a call to hostility, discrimination, or violence.<sup>51</sup> @TheVigilanteInsider is well-known as a satirist<sup>52</sup> and this

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<sup>45</sup> *Karatas* (n 42) para 52.

<sup>46</sup> Para 13 of the facts.

<sup>47</sup> Paras 14(b)–(c) of the facts.

<sup>48</sup> *Kunstler* (n 42) para 33; UNHRC March 2013 Report (n 36) para 37.

<sup>49</sup> Paras 15–16 of the facts.

<sup>50</sup> Para 15 of the facts.

<sup>51</sup> *Alves Da Silva v Portugal* App no 41665/07 (ECtHR, 20 October 2009) (*‘Alves Da Silva’*) para 28; Susan Benesch, ‘Dangerous Speech: A Proposal to Prevent Group Violence’ (12 January 2012) <<http://www.worldpolicy.org/sites/default/files/Dangerous%20Speech%20Guidelines%20Benesch%20January%202012.pdf>> accessed 17 January 2016, 4; Article 19, ‘Prohibiting Incitement to Discrimination, Hostility or Violence’ (21 December 2012) <<http://www.article19.org/resources.php/resource/3572/en/prohibiting-incitement-to-discrimination,-hostility-or-violence>> accessed 17 January 2016, 41; *Perincek* (n 12) para 66.

<sup>52</sup> Para 13 of the facts.

profile has garnered him more than 800,000 followers.<sup>53</sup> Posts #1–3 would therefore be understood by his audience to be mocking the ‘well-known’ anti-Brinnan stance of the Omeria<sup>54</sup> as opposed to hate speech against Brinnans.

19. Finally, significance must be placed on the pluralistic and self-regulating nature of social media.<sup>55</sup> When speech is part of a wider debate that exposes the audience to alternative views, it is less likely to be hate speech.<sup>56</sup> In *Gündüz v Turkey*, the leader of a controversial Islamic Sect made statements calling for the overthrow of democracy and labelled certain groups as ‘bastards’.<sup>57</sup> The ECtHR held that as the statements were made as part of a televised public debate, any discriminatory views were counterbalanced by other parties.<sup>58</sup> Accordingly, the statements were not hate speech.<sup>59</sup> Similarly, social media is capable of facilitating public debate.<sup>60</sup> Chatter allows users to interact and respond to other users’ posts.<sup>61</sup> Furthermore, posts

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<sup>53</sup> Para 13 of the facts.

<sup>54</sup> Para 12 of the facts.

<sup>55</sup> General Comment 34 (n 3) para 15; UNHRC January 2015 Report (n 8) paras 60, 65, 94–100.

<sup>56</sup> *Gündüz v Turkey* App no 3571/97 (ECtHR, 4 September 2003) (‘*Gündüz*’) para 44; General Comment 34 (n 3) para 34; Benesch (n 51) 4. See also *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) (‘*Jersild*’) para 33; *Tristan Donoso v Panama*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 27 January 2009) para 121.

<sup>57</sup> *Gündüz* (n 56) para 15.

<sup>58</sup> *Gündüz* (n 56) paras 49–51.

<sup>59</sup> *Gündüz* (n 56) para 52.

<sup>60</sup> Phillip Collin and others, ‘The Benefits of Social Networking Services: A Literature Review’ (2011) <[http://www.uws.edu.au/\\_\\_data/assets/pdf\\_file/0003/476337/The-Benefits-of-Social-Networking-Services.pdf](http://www.uws.edu.au/__data/assets/pdf_file/0003/476337/The-Benefits-of-Social-Networking-Services.pdf)> accessed 17 January 2016, 9; OHCHR, ‘Social Media in Egypt: A Powerful Tool for Political Change’ (6 February 2012) <<http://www.ohchr.org/EN/NewsEvents/Pages/SocialMediaInEgypt.aspx>> accessed 17 January 2016; International Conference on Communication, Media, Technology and Design, ‘The Social Media as a Public Sphere: The Rise of Social Opposition’ (9 May 2012) <<http://www.cmdconf.net/2012/makale/92.pdf>> accessed 17 January 2016, 490.

<sup>61</sup> Para 7 of the facts.



#2–3 led to commentators discussing the issues that the posts uncovered, thereby facilitating debate and discussion.<sup>62</sup>

*b. The prosecution was disproportionate as action was only taken years after the posts were published and excessive compared to the sentencing practice of other states*

20. Proportionality requires that states place no greater limitations on rights than necessary to achieve the legitimate aim.<sup>63</sup> The nature and severity of the punishment are relevant.<sup>64</sup> In examining the proportionality of Omeria’s actions, the doctrine of margin of appreciation is inapplicable.<sup>65</sup> This is because the doctrine ‘undermines the protection of human rights according to common standards’, thus ‘betray[ing] the universality of human rights’.<sup>66</sup>

21. Even if a margin of appreciation were accorded to Omeria, it should not be unduly wide. This is because a narrow margin of appreciation is accorded where political speech is at

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<sup>62</sup> Para 15 of the facts.

<sup>63</sup> *Malcolm Ross* (n 8) para 11.6; UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism’ (28 December 2009) UN Doc A/HRC/13/37 para 17.

<sup>64</sup> *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008) (‘*Leroy*’) para 47; *Balsyte-Lideikiene v Lithuania* App no 72596/01 (ECtHR, 4 December 2008) (‘*Balsyte-Lideikiene*’) paras 83–85; *Perincek* (n 12) para 272.

<sup>65</sup> *Ilmari Länsman v Finland* UN Doc CCPR/C/52/D/511/1992 (HRC, 14 October 1993) para 9.4; General Comment 34 (n 3) para 36; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (OUP 2013) 625.

<sup>66</sup> Cora Feingold, ‘The Doctrine of Margin of Appreciation and the European Convention on Human Rights’ (1977) 53 *Notre Dame Law Review* 90, 95; Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) 31 *International Law and Politics* 843, 844; Trevor Allan, ‘Human Rights and Judicial Review; A Critique of “Due Defence”’ (2006) 65(3) *Cambridge Law Journal* 671, 675; Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (OUP 2012) 1.

stake.<sup>67</sup> As stated above, posts #1–3 are satirical political speech.<sup>68</sup> Omeria should therefore be accorded a narrower margin of appreciation.

22. Omeria's sudden prosecution of Umani was disproportionate given Omeria's prolonged toleration of posts #1–3. Individuals should not be made to suffer sudden harsh criminal punishments where the state had not taken action for a prolonged period of time.<sup>69</sup> Posts #1–3 were posted between 2009–2013.<sup>70</sup> However, despite the NHA's enactment in 2011,<sup>71</sup> Umani was only prosecuted in 2014.<sup>72</sup> Moreover, the two-year jail term was disproportionate. Imprisonment, as opposed to civil fines, is a grave sanction which calls for stricter scrutiny.<sup>73</sup> In *Dieudonné M'Bala M'Bala v France*, the ECtHR held that 10,000 euros was a proportionate fine for the public insult of Jews.<sup>74</sup> Similarly, in *Gündüz v Turkey*, the ECtHR held that a two-year jail term for ethnically-motivated hate speech was an 'extremely harsh penalty'.<sup>75</sup> As posts #1–3 were of similar nature to these cases, Umani's two-year jail term<sup>76</sup> was thus disproportionate.

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<sup>67</sup> *Castelles v Spain* App no 11798/85 (ECtHR, 23 April 1992) para 46; *Ceylan* (n 12) para 34; *Perincek* (n 12) paras 124, 230.

<sup>68</sup> See paras 16–18 of this Memorial.

<sup>69</sup> *Lehideux and Isorni v France* App no 24662/94 (ECtHR, 23 September 1998) para 56; *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006) ('*Erbakan*') para 68; Anne Weber, 'Manual on Hate Speech' (2009) <[http://www.coe.int/t/dghl/standardsetting/hrpolicy/publications/hate\\_speech\\_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/publications/hate_speech_en.pdf)> accessed 17 January 2016, 45–46; UNHRC January 2015 Report (n 8) paras 53–54, 56.

<sup>70</sup> Paras 14(a)–(c) of the facts.

<sup>71</sup> Para 9 of the facts.

<sup>72</sup> Paras 17–19 of the facts.

<sup>73</sup> UNHRC May 2011 Report (n 36) para 25; *Perincek* (n 12) paras 272–273.

<sup>74</sup> *Dieudonné M'Bala M'Bala v France* App no 25239/13 (ECtHR, 20 October 2015) paras 15, 42. See also *Malcolm Ross* (n 8) para 11.6; *Balsyte-Lideikiene* (n 64) para 84.

<sup>75</sup> *Gündüz* (n 56) para 52. See also *Perincek* (n 12) para 273.

<sup>76</sup> Para 19 of the facts.

## II. OMERIA VIOLATED CHATTER’S RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY BY PROSECUTING CHATTER UNDER THE NHA FOR POSTS #1 AND #3

23. The rights to freedom of expression and privacy are ‘mutually dependent and reinforcing’; free public discourse on the internet depends on respect for the privacy of users, while anonymous communications enabled by the internet only have value if the freedom of expressions of these platforms are respected.<sup>77</sup>

24. Corporations are capable of possessing the rights to freedom of expression and privacy. Freedom of expression encompasses the right of corporations like Chatter to impart information.<sup>78</sup> While there has been no definitive pronouncement on the existence of a corporation’s right to informational privacy, the ECtHR has acknowledged that corporations have the right to privacy over their business premises.<sup>79</sup> The right to privacy should encompass a derivative right for social media platforms like Chatter to protect the privacy of their users.<sup>80</sup>

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<sup>77</sup> UNHRC April 2013 Report (n 4) para 79. See also UNHRC Rabat Plan (n 38) 10.

<sup>78</sup> *Sunday Times* (n 12) para 45; *Autronic AG v Switzerland* App no 12726/87 (ECtHR, 22 May 1990) para 47; General Comment 34 (n 3) para 13; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) (‘*Delfi October 2013*’) paras 69, 70; *Cengiz v Turkey* App nos 48226/10, 14027/11 (ECtHR, 1 December 2015) para 56. See also UDHR art 19; *National Association for the Advancement of Colored People v Button* (1963) 371 US 415, 428–449; ICCPR art 19; *First National Bank of Boston v Bellotti* (1978) 435 US 765, 783; *Pacific Gas & Electric v Public Utilities Commission* (1986) 475 US 1, 8; *Federal Election Commission v Wisconsin Right to Life Inc* (2007) 551 US 449, 454.

<sup>79</sup> *Société Colas Est v France* App no 37971/97 (ECtHR, 16 April 2002) (‘*Société Colas*’) paras 40–42; *Tamosius v UK* App no 62002/00 (ECtHR, 19 September 2002) (‘*Tamosius*’) paras 8–9. See also Steve Peers and others, *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) para 07.14A.

<sup>80</sup> *Whalen v Roe* (1977) 429 US 589 (‘*Whalen*’) 599; *Société Colas* (n 79) paras 40–42. See also Meir Dan-Cohen, ‘Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State’ (1991) 79 *California Law Review* 1229, 1246; Orin Kerr, ‘The Case for the Third-Party Doctrine’ (2009) 107 *Michigan Law Review* 561, 598; *Burwell, Secretary of Health and Human Services v Hobby Lobby Stores Inc* no 13–354 (134 S Ct 2751, 30 June 2014) 21; Elizabeth Pollman, ‘A Corporate Right to Privacy’ (2014) 99 *Minnesota Law Review* 27, 52.

This is because social media platforms play a special role in safeguarding the vulnerable privacy of their users.<sup>81</sup>

25. Forcing Chatter to reveal Umani's identity and fining Chatter for posts #1 and #3 under the NHA interfered with Chatter's rights to freedom of expression and privacy. As regards freedom of expression, an interference with this right is broadly defined and includes the imposition of any sanctions.<sup>82</sup> The imposition of fines on Chatter was thus an interference with Chatter's freedom of expression. As regards the right to privacy, Chatter's right derives from that of Umani's.<sup>83</sup> Hence, Omeria's interference with Umani's right to privacy, by compelling Chatter to disclose Umani's personal data,<sup>84</sup> is an interference with Chatter's right to privacy.

26. These interferences were unjustified. This is because, as stated above,<sup>85</sup> posts #1–3 were not hate speech, accordingly Chatter should not be held liable under the NHA for facilitating hate speech.<sup>86</sup> Even if posts #1–3 were hate speech, the prosecution was unjustified as it: (A) did not correspond to a pressing social need; and (B) was not proportionate to the legitimate aims pursued.

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<sup>81</sup> UNHRC, 'The Right to Privacy in the Digital Age: Report of the Office of the UN High Commissioner for Human Rights' (30 June 2014) UN Doc A/HRC/27/37 paras 43, 45; UNESCO, 'Fostering Freedom Online: The Role of Internet Intermediaries' (2014) <<http://unesdoc.unesco.org/images/0023/002311/231162e.pdf>> accessed 17 January 2016, 80.

<sup>82</sup> See para 4 of this Memorial.

<sup>83</sup> *Whalen* (n 80) 599; *Société Colas* (n 79) paras 40–42. See also Meir Dan-Cohen (n 80) 1246; Kerr (n 80) 598; *Burwell* (n 80) 21; Pollman (n 80) 52.

<sup>84</sup> See paras 5–7 of this Memorial.

<sup>85</sup> See paras 16–19 of this Memorial.

<sup>86</sup> Para 10(d) of the facts.

**A. THERE WAS NO PRESSING SOCIAL NEED TO PROSECUTE CHATTER AS THE OBLIGATION TO DETERMINE THE LEGALITY OF POSTS #1 AND #3 IS UNDULY ONEROUS**

27. Social media is an important medium for a society's democratic development.<sup>87</sup> Undue regulation of social media may severely impair the ability of these platforms to encourage participation in the public sphere.<sup>88</sup> The ECtHR<sup>89</sup> and CJEU<sup>90</sup> have thus provided the following factors to be considered in determining the existence of a pressing social need to impose liability on intermediaries: the nature of the intermediary; notice of its user content; and the nature of the content.

28. There was no pressing social need to prosecute Chatter. First, Chatter is a mere passive intermediary. The distinction between active and passive intermediaries lies in the degree of control the intermediary has over its user content.<sup>91</sup> The news portal in the ECtHR decision *Delfi v Estonia* is an example of an active intermediary.<sup>92</sup> The portal was noted to create

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<sup>87</sup> Saleem Kassim, 'Twitter Revolution: How the Arab Spring was Helped by Social Media' (3 July 2012) <<http://mic.com/articles/10642/twitter-revolution-how-the-arab-spring-was-helped-by-social-media#.G7RXVc5H3>> accessed 17 January 2016; Jonathan Kaiman, 'Hong Kong Protest Brings Crisis of Confidence for Traditional Media' *The Guardian* (14 June 2014) <<http://www.theguardian.com/world/2014/oct/29/hong-kong-protests-confidence-media>> accessed 17 January 2016.

<sup>88</sup> UNHRC May 2011 Report (n 36) para 37; UNHRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (7 September 2012) UN Doc A/67/357 para 51.

<sup>89</sup> *Delfi October 2013* (n 78) para 85; *Delfi June 2015* (n 8) paras 142–143. See also *Payam Tamiz v Google Inc* [2013] EWCA Civ 68 ('*Payam Tamiz*') paras 7–8, 13–14, 23–25.

<sup>90</sup> *Google France, Google Inc v Louis Vuitton Malletier SA* C-236/08 (CJEU, 23 March 2010) ('*Google France*') para 114; *L'Oreal SA v eBay* C-324/09 (CJEU, 12 July 2011) ('*L'Oreal SA*') paras 111–113. See also Alex Comminos, 'The Liability of Internet Intermediaries in Nigeria, Kenya, South Africa and Uganda: An Uncertain Terrain' (2012) Association for Progressive Communications 11–12.

<sup>91</sup> Council Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L167/10 art 12; *Google France* (n 90) para 114; *Delfi June 2015* (n 8) paras 144–146.

<sup>92</sup> *Delfi June 2015* (n 8) para 144.

content to which users could respond to.<sup>93</sup> Once a response was posted, ‘the actual authors of the comments could not modify or delete their comments’.<sup>94</sup> Only the portal had ‘the technical means’ of doing so and the ECtHR therefore held the portal liable for its user content.<sup>95</sup> In contrast, Chatter does not create content of its own.<sup>96</sup> Moreover, while Chatter does exercise some control over its user content, a user may remove his own posts.<sup>97</sup> Hence, Chatter should not be held to the same standard as active intermediaries.

29. Secondly, Chatter should not be liable for posts #1 and #3 despite having received user complaints. Chatter should not be made to determine the legality of posts #1 and #3. Social media intermediaries generally ‘lack the capacit[y] to determine whether material on the Internet is illegal’.<sup>98</sup> Hence, a number of states only impose liability on intermediaries for failing to take down content upon receiving a court order to do so.<sup>99</sup> Chatter’s obligation was

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<sup>93</sup> *Delfi June 2015* (n 8) para 144.

<sup>94</sup> *Delfi June 2015* (n 8) para 145.

<sup>95</sup> *Delfi June 2015* (n 8) para 145.

<sup>96</sup> Para 6 of the facts.

<sup>97</sup> Para 14(c)(i) of the facts.

<sup>98</sup> Yaman Akdeniz, ‘Governing Racist Content on the Internet: National and International Responses’ (2007) 56 *University New Brunswick Law Journal* 103 paras 143–144. See also Report of the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action on its Fourth Session (2006) UN Doc E/CN.4/2006/18 (‘UN Durban Declaration Report’) para 47; Marshall Leaffer, *Understanding Copyright Law* (LexisNexis 2010) 273; Jacqueline Lipton, ‘Law of the Intermediated Information Exchange’ (2012) 64(5) *Florida Law Review* 1337, 1354; *Shreya Singhal v Union of India* Writ Petition (Criminal) no 167 of 2012 (‘*Shreya Singhal*’) para 117.

<sup>99</sup> Daniel Cooper, ‘Brazil Enacts “Marco Civil” Internet Civil Rights Bill’ *Reuters* (23 April 2014) <<http://www.natlawreview.com/article/brazil-enacts-marco-civil-internet-civil-rights-bill>> accessed 17 January 2016; 23 April 2014, Marco Civil da Internet, Law no 12.965 (23 April 2014) (Brazil) art 19; Yasmine Saleh, ‘Egypt’s Court Overturns Telecom News Monitoring’ *Reuters* (27 November 2010) <[www.reuters.com/article/2010/11/27/us-egypt-media-court-idUSTRE6AQ12V20101127](http://www.reuters.com/article/2010/11/27/us-egypt-media-court-idUSTRE6AQ12V20101127)> accessed 17 January 2016; Adi Kamdar, ‘EFF’s Guide to CDA 230: The Most Important Law Protecting Online Speech’ (6 December 2012) <<https://www.eff.org/deeplinks/2012/12/effs-guide-cda-230-most-important-law-protecting-online-speech>> accessed 17 January 2016; *Shreya Singhal* (n 98) para 117. See also UNHRC May 2011 Report (n 6) para 43.

particularly onerous as it was made responsible for posts published before the enactment of the NHA.<sup>100</sup>

30. Thirdly, Chatter faces especial difficulty in determining the legality of posts #1 and #3. Post #1 merely states that ‘Brinnah’s economy [is] on [the] brink of collapse due to rampant godlessness’ and is not a clear instance of hate speech.<sup>101</sup> Moreover, posts #1 and #3 were meant as satire,<sup>102</sup> this makes it more difficult for intermediaries such as Chatter to distinguish between legitimate expression and hate speech. In contrast, the ECtHR in *Delfi v Estonia* noted that ‘the majority of the words and expressions in question did not include sophisticated metaphors or contain hidden meanings or subtle threats’.<sup>103</sup>

31. Finally, requiring an intermediary to decide the legality of its user content is ‘susceptible to abuse’ as ‘it lacks elements of due process, such as the opportunity to appeal a takedown request’.<sup>104</sup> Such censorship duties would have a chilling effect on speech, because this would lead to ‘self-protective and over-broad private censorship’.<sup>105</sup> Further, such censorship duties have in fact resulted in large social media platforms ceasing operations in

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<sup>100</sup> Paras 9, 14(a)–(b) of the facts.

<sup>101</sup> Para 14(a) of the facts.

<sup>102</sup> Para 13 of the facts.

<sup>103</sup> *Delfi June 2015* (n 8) para 156.

<sup>104</sup> UNESCO, ‘Fostering Freedom Online: The Role of Internet Intermediaries’ (n 81) 41.

<sup>105</sup> UNHRC, ‘Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance’ (6 May 2014) UN Doc A/HRC/26/49 (‘UNHRC May 2014 Report’) para 40. See also Center for Democracy and Technology, ‘Free Speech and Online Intermediaries in an Age of Terror Recruitment’ (2010) <<https://www.cdt.org/files/pdfs/MorrisTerrorRecruitTestimonyFinal.pdf>> accessed 17 January 2016, 8; Felix Wu, ‘Collateral Censorship and the Limits of Intermediary Immunity’ (2011) 87 *Notre Dame Law Review* 293, 304; African Declaration on Internet Rights and Freedoms (28 August 2014) <<http://africaninternetrights.org/declaration>> (‘African Declaration’) accessed 17 January 2016; Corey Omer, ‘Intermediary Liability for Harmful Speech: Lessons from Abroad’ (2014) 28 *Harvard Journal of Law & Technology* 289, 295.

certain states.<sup>106</sup> This has detrimental ramifications on freedom of expression, as social media platforms are the key means by which individuals exercise their freedom of expression.<sup>107</sup>

**B. THE PROSECUTION WAS DISPROPORTIONATE AS THE QUANTUM OF THE FINE WAS EXCESSIVE COMPARED TO THE SENTENCING PRACTICE OF OTHER STATES**

32. The fine was disproportionate as Chatter is a mere passive intermediary. In the ECtHR case of *Delfi v Estonia*, the intermediary was only fined 320 euros, despite being both an active intermediary and also having significant financial strength as a ‘one of the largest [i]nternet news portals in Estonia’.<sup>108</sup> Similarly, Twitter was fined US\$ 51,000 by Turkey for refusing to remove ‘terrorist propaganda’ despite being asked to do so.<sup>109</sup> The US\$ 5 million fine was disproportionate as Chatter is a passive intermediary,<sup>110</sup> and posts #1 and #3, being in the nature of hate speech and not terrorist propaganda, were less severe.

33. Furthermore, while Chatter may be the most popular social media platform in Omeria, the fine of US\$ 5 million is excessive in comparison to the punishments imposed by other states. Many states have stipulated maximum punishments of US\$ 1,500–100,000 in their

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<sup>106</sup> James Fallows, ‘An Interview with David Drummond of Google’ (23 March 2010) <<http://www.theatlantic.com/technology/archive/2010/03/an-interview-with-david-drummond-of-google/37896/>> accessed 17 January 2016; Center for Democracy and Technology. ‘Shielding the Messengers: Protecting Platforms for Expression and Innovation: Version 2’ (2012) <<https://cdt.org/files/pdfs/CDT-Intermediary-Liability-2012.pdf>> accessed 17 January 2016, 23; Vamien McKalin, ‘Google, Facebook and Twitter to Leave Russia? New Law Kills Last Bastion of Free Speech’ *Tech Times* (28 September 2014) <<http://www.techtimes.com/articles/16614/20140928/google-facebook-and-twitter-to-leave-russia-countrys-new-law-kills-last-bastion-of-free-speech.htm>> accessed 17 January 2016

<sup>107</sup> UNHRC May 2011 Report (n 36) para 2; *Delfi* June 2015 (n 8) para 110.

<sup>108</sup> *Delfi* June 2015 (n 8) para 160.

<sup>109</sup> Ercan Gurses, ‘Turkey Fines Twitter for Failure to Remove “Terrorist Propaganda”’: Official’ *Reuters* (11 December 2015) <<http://www.reuters.com/article/us-turkey-twitter-fine-idUSKBN0TU0NK20151211>> accessed 17 January 2016.

<sup>110</sup> See para 28 of this Memorial.



legislation.<sup>111</sup> Chatter was fined an exceptional sum of US\$ 5 million.<sup>112</sup> Such excessive fines may cause social media intermediaries to unduly censor speech.<sup>113</sup> This is especially damaging to free speech given the unprecedented capacity of social media intermediaries to spur positive debate on controversial issues.<sup>114</sup>

### III. OMERIA VIOLATED UMANI'S RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY BY PROSECUTING UMANI UNDER THE ATEL FOR POSTS #4-6

34. Although terrorists have on occasion abused social media,<sup>115</sup> social media remains an important force for societal development.<sup>116</sup> Thus, in protecting national security, states should

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<sup>111</sup> Measures for Managing Internet Information Services, Promulgated by Decree no 292 of the State Council on 25 September 2000 (People's Republic of China) <[http://www.chinaculture.org/gb/en\\_aboutchina/2003-09/24/content\\_23369.htm](http://www.chinaculture.org/gb/en_aboutchina/2003-09/24/content_23369.htm)> accessed 17 January 2016, art 16; Information Technology Act 2000 (India) s 67; Copyright Act 2001 (Kenya) s 38; Pirongrong Ramsoota, 'Internet Intermediary Liability in Thailand' (2015) <[https://publixphere.net/i/noc/page/OI\\_Case\\_Study\\_Internet\\_Intermediary\\_Liability\\_in\\_Thailand](https://publixphere.net/i/noc/page/OI_Case_Study_Internet_Intermediary_Liability_in_Thailand)> accessed 17 January 2016, 10.

<sup>112</sup> Para 20 of the facts.

<sup>113</sup> UNHRC May 2014 Report (n 105) para 40. See also African Declaration (n 105).

<sup>114</sup> Karine Perset, 'The Economic and Social Role of Internet Intermediaries' (2010) <<http://www.oecd.org/internet/ieconomy/44949023.pdf>> accessed 17 January 2016, 43-44; Jerome Antony, 'Refugee Crisis: Growing Social Media Outrage as Gulf Nations Fail to Embrace Syrian Migrants' *International Business Times* (11 September 2015) <<http://www.ibtimes.co.uk/refugee-crisis-questions-raised-over-rich-gulf-nations-not-embracing-syrian-migrants-1519241>> accessed 17 January 2016; Steve Almasy, 'Twitter Offers Ahmed Mohamed Inspiration, Invitations and Internships' *CNN* (17 September 2015) <<http://edition.cnn.com/2015/09/16/us/ahmed-mohamed-social-media-reactions/index.html>> accessed 17 January 2016; Bijian Stephen, 'Social Media Helps Black Lives Matter Fight the Power' (2015) <<http://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/>> accessed 17 January 2016.

<sup>115</sup> UN Counter-Terrorism Committee, 'Global Survey of the Implementation of Security Council Resolution 1373' (2001) <<http://www.un.org/en/sc/ctc/docs/2011-globalsurvey1373.pdf>> accessed 17 January 2016, 7; Telegraph Reporters, 'How Terrorists are Using Social Media' *The Telegraph* (4 November 2014) <<http://www.telegraph.co.uk/news/worldnews/islamic-state/11207681/How-terrorists-are-using-social-media.html>> accessed 17 January 2016; UN Security Council Counter-Terrorism Committee, 'Ten Years on, Security Council Resolution 1624 on Incitement to Terrorism More Relevant than Ever' (10 September 2015) <[http://www.un.org/en/sc/ctc/news/2015-09-10\\_CTC\\_1624\\_10thAnniversary.html](http://www.un.org/en/sc/ctc/news/2015-09-10_CTC_1624_10thAnniversary.html)> accessed 17 January 2016.

be mindful of adopting overbroad measures that unjustifiably interfere with the rights to freedom of expression and privacy.<sup>117</sup>

35. Omeria's removal of Umani's anonymity and imprisonment of Umani for posts #4–6 under the ATEL interfered with Umani's rights to freedom of expression and privacy.<sup>118</sup>

Omeria's interference was neither: (A) prescribed by law; nor (B) necessary in a democratic society.

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<sup>116</sup> UNHRC February 2008 Report (n 7) para 23; Center for Democracy and Technology, 'Regardless of Frontiers: The International Right to Freedom of Expression in the Digital Age' (2011) <[https://cdt.org/files/pdfs/CDT-Regardless\\_of\\_Frontiers\\_v0.5.pdf](https://cdt.org/files/pdfs/CDT-Regardless_of_Frontiers_v0.5.pdf)> accessed 17 January 2016, 2; UNHRC May 2011 Report (n 36) paras 2, 20; UNGA August 2011 Report (n 10) paras 10–13; Frank LaRue and others, 'Joint Declaration on Freedom of Expression and the Internet' (2011) <<http://www.osce.org/fom/78309?download=true>> accessed 17 January 2016, preamble; UNHRC April 2013 Report (n 4) para 13; Monroe Price, *Free Expression, Globalism, and the New Strategic Communication* (Kindle edition, CUP 2014) ch 2; UNHRC May 2015 Report (n 5) para 11.

<sup>117</sup> UNHRC April 2013 Report (n 4) para 60; UN Counter-Terrorism Implementation Task Force, 'Basic Human Rights Reference Guide: Conformity of National Counter-Terrorism Legislation with International Human Rights' (2014) <<http://www.ohchr.org/EN/newyork/Documents/CounterTerrorismLegislation.pdf>> accessed 17 January 2016, 16. See also UNHRC February 2008 Report (n 7) para 47.

<sup>118</sup> See paras 4–7 of this Memorial.

**A. THE PROSECUTION WAS NOT PRESCRIBED BY LAW AS SECTION 3 OF THE ATEL IS INSUFFICIENTLY PRECISE AND SECTIONS 5 AND 6 DO NOT CONTAIN ADEQUATE SAFEGUARDS**

36. As stated above,<sup>119</sup> a statute is prescribed by law if it is sufficiently precise.<sup>120</sup> It must also contain adequate safeguards.<sup>121</sup>

37. The prosecution was not prescribed by law. First, Section 3 is insufficiently precise as the term ‘indirectly encouraged’ is overly vague. The same term can also be found in the widely criticised UK Terrorism Act.<sup>122</sup> This term has been noted to be unduly wide.<sup>123</sup> ‘[I]t may be understood to apply to nearly every expression of support, sympathy with or even understanding of terrorism, or to statements that address the need for dialogue with terrorist[s]’.<sup>124</sup> Such widely drafted restrictions on speech have historically been abused by state authorities and have a chilling effect on constructive debate.<sup>125</sup>

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<sup>119</sup> See para 9 of this Memorial.

<sup>120</sup> General Comment 16 (n 23) paras 3 and 8; *Müller* (n 23) para 29; *Kokkinakis* (n 23) para 40; *Lindon* (n 23) para 41; *Editorial Board* (n 23) para 52. See also UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR’ (n 23) principle 17; General Comment 34 (n 3) paras 24–25; UNHRC May 2015 Report (n 5) paras 31–32.

<sup>121</sup> *Pinkney v Canada* UN Doc CCPR/C/OP/1 (HRC, 29 October 1981) para 34; *Al-Nashif v Bulgaria* App no 50963/99 (ECtHR, 20 June 2002) para 119; *Sanoma Uitgevers BV v The Netherlands* App no 38224/03 (ECtHR, 14 September 2010) para 82; *Liu v Russia (No 2)* App no 29157/09 (ECtHR, 26 July 2011) para 88.

<sup>122</sup> Terrorism Act 2006 (United Kingdom) s 1(2).

<sup>123</sup> Article 19, ‘The Impact of UK Anti-Terror Laws on Freedom of Expression’ (2006) <<https://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>> accessed 17 January 2016, 7; General Comment 34 (n 3) para 46. See also UNGA August 2011 Report (n 10) para 34.

<sup>124</sup> Article 19, ‘Statement on the ‘Encouragement’ of Terrorism: Clause 1 of the UK Terrorism Bill’ (2005) <<https://www.article19.org/data/files/pdfs/analysis/encouragement-of-terrorism.pdf>> accessed 17 January 2016, 5.

<sup>125</sup> International Court of Justice, ‘Response to the European Commission Consultation on Inciting, Aiding or Abetting Terrorist Offences’ (2007) <<http://www.un.org/en/sc/ctc/specialmeetings/2011/docs/icj/icj-2007-ec-questionnaire.pdf>> accessed 17 January 2016, 1. See also General Comment 34 (n 3) para 46.

38. Secondly, Section 5 is insufficiently precise as no maximum punishment is prescribed. Laws must be sufficiently precise to enable individuals to foresee penalties for conduct.<sup>126</sup> Section 5 merely states that the judging body may impose any criminal or civil punishment and does not prescribe a maximum punishment.<sup>127</sup> The lack of a maximum punishment in Section 5 also affects the adequacy of its safeguards. This is because stipulating a maximum punishment or providing guidelines on sentencing are safeguards against unfettered discretion.<sup>128</sup>

39. Finally, Section 6 does not contain adequate safeguards against unfettered discretion as there is no fetter on emergency orders that a court may issue. One safeguard is to ensure interferences are ‘applied only for those purposes for which they were prescribed’.<sup>129</sup> This is especially crucial in the context of *ex parte* applications.<sup>130</sup> Section 6 court orders are granted *ex parte*.<sup>131</sup> As stated above,<sup>132</sup> Omeria applied the information collected pursuant to the Section 6 court order beyond its prescribed purpose. This demonstrates the inadequacy of safeguards in Section 6.

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<sup>126</sup> *Editorial Board* (n 23) para 52. See also *Kafkaris v Cyprus* App no 21906/04 (ECtHR, 12 February 2008) para 140.

<sup>127</sup> Para 4(e) of the facts.

<sup>128</sup> *Tolstoy Miloslavsky v UK* App no 18139/91 (ECtHR, 13 July 1995) paras 50–51; *Independent News and Media and Independent Newspapers Ireland Ltd v Ireland* App no 55120/00 (ECtHR, 18 June 2005) para 115; *Krone Verlag v Austria* App no 27306/07 (ECtHR, 19 June 2012) para 61.

<sup>129</sup> General Comment 34 (n 3) para 22. See also General Comment 16 (n 23) para 10.

<sup>130</sup> *Funke v France* App no 10828/84 (ECtHR, 25 February 1993) paras 56–57; *Tamosius* (n 79) para 9.

<sup>131</sup> Para 17 of the facts.

<sup>132</sup> See para 11 of this Memorial.

## B. THE PROSECUTION WAS NOT NECESSARY IN A DEMOCRATIC SOCIETY

40. As stated above,<sup>133</sup> an interference is necessary in a democratic society if it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aim pursued.<sup>134</sup>

### 1. There was no pressing social need to prosecute Umani as posts #4–6 were not extremist speech

41. The Johannesburg Principles<sup>135</sup> establish that the following factors must be satisfied in distinguishing between extremist speech and legitimate expression: the intention of the speaker to incite imminent violence; the likelihood of inciting violence; and the degree of connection between the expression and the likelihood, or occurrence of such violence.<sup>136</sup> The Johannesburg Principles have been endorsed by multiple UN Special Rapporteurs.<sup>137</sup> Additionally, the Council of Europe,<sup>138</sup> the SCOTUS,<sup>139</sup> and the IACtHR<sup>140</sup> have similarly

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<sup>133</sup> See para 13 of this Memorial.

<sup>134</sup> *Handyside* (n 12) para 48; General Comment 34 (n 3) paras 22, 33–34; UNHRC April 2013 Report (n 4) para 29; *Delfi June 2015* (n 8) para 131.

<sup>135</sup> Article 19, ‘The Johannesburg Principles on National Security, Freedom of Expression and Access to Information’ (1996) <<https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>> (‘Johannesburg Principles’) accessed 17 January 2016, 9; Sandra Coliver, ‘Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information’ (1998) 20 *Human Rights Quarterly* 12, 38.

<sup>136</sup> Johannesburg Principles (n 135) 9.

<sup>137</sup> UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (22 March 1996) UN Doc E/CN 4/1996/39 para 154; UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (28 January 1998) UN Doc E/CN 4/1998/40 para 48; UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (29 January 1999) UN Doc E/CN 4/1999/64 para 23; UNHRC May 2011 Report (n 36) para 36.

<sup>138</sup> Council of Europe, ‘Council of Europe Convention on the Prevention of Terrorism’ CETS no 196 (entered into force 1 June 2007) art 5(1); Official Journal of the EU, ‘Council Framework Decision 2008/919/JHA’ (2008) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:330:0021:0023:EN:PDF>> accessed 17 January 2016.

recognised that there is only a pressing social need where the speaker intended to incite imminent violence and was likely to incite such violence. According to the above factors, there was no pressing social need to prosecute Umani as posts #4–6 were not extremist speech.

42. Umani did not intend posts #4–6 to incite imminent violence. Instead, posts #4–6 are satirical statements involving social commentary and political speech. An individual’s intention may be derived from the context of the speech.<sup>141</sup> @TheVigilanteInsider is styled as a ‘[p]olitical poet telling the truth from the corridors of power’.<sup>142</sup> This purpose is reflected in @TheVigilanteInsider’s posts, which mock the Omerian government.<sup>143</sup> While posts #4–6 may seem to encourage violence against Brinnans, these posts were meant to satirise the anti-Brinnan stance of certain Omerian officials,<sup>144</sup> such as Tavarini.<sup>145</sup> This satirisation even led Omeria’s leading newspaper to discuss the anti-Brinnan stance of Omerian officials.<sup>146</sup>

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<sup>139</sup> *Brandenburg v Ohio* (1969) 95 US 444, 447; *Hess v Indiana* (1973) 414 US 105, 108; *NAACP v Claiborne Hardware Co* (1982) 458 US 886, 928; Michael Curtis, *Free Speech, ‘The People’s Darling Privilege’* (Michael Kent Curtis 2000) 394–397; James Weinstein, *Extreme Speech and Democracy* (OUP 2010) 41; Susan Gilles, ‘*Brandenburg v State of Ohio: An “Accidental”, “Too Easy”, and “Incomplete” Landmark Case*’ (2010) 38 *Capital University Law Review* 517, 522–525; Lucas Powe, ‘*Brandenburg: Then and Now*’ (2011) 44 *Texas Tech Law Review* 69, 75–77.

<sup>140</sup> IACtHR, ‘Annual Report of the Inter-American Commission on Human Rights 1994’ (17 February 1995) OEA/SerL/V/V 211 Doc 9; Coliver (n 135) 40.

<sup>141</sup> *Arslan v Turkey* App no 23462/94 (ECtHR, 8 July 1999) (*Arslan*) para 48; *Karatas* (n 42) paras 48–49; *Jersild* (n 56) para 31.

<sup>142</sup> Para 13 of the facts.

<sup>143</sup> Paras 13–14 of the facts.

<sup>144</sup> Para 16 of the facts.

<sup>145</sup> Para 11 of the facts.

<sup>146</sup> Para 16 of the facts.

43. Additionally, posts #4–6 are unlikely to incite imminent violence. Where speech is exposed to counter-narratives, it is less likely to incite violence.<sup>147</sup> Social media, in particular, allows for public debate on controversial statements.<sup>148</sup> Chatter operates as a two-way platform where users may respond to each other.<sup>149</sup> With many news outlets using Chatter,<sup>150</sup> coupled with the strong presence of Omeria’s Prime Minister and Justice Minister on Chatter,<sup>151</sup> the online Chatter community is well-placed to engage with the issues Umani raised in posts #4–6. Furthermore, Omeria’s citizens were sufficiently mature to disapprove of posts #4–6.<sup>152</sup> As opposed to violence,<sup>153</sup> Omerians engaged in a public debate over the issues that the posts surfaced.<sup>154</sup>

44. While Umani has a large following on Chatter,<sup>155</sup> it cannot be argued that this exacerbated the nature of post #4–6. @TheVigilanteInsider’s popularity does not necessarily

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<sup>147</sup> *Arslan* (n 141) Concurring Opinion of Judge Bonello 24; UNGA, ‘Global Counter-Terrorism Strategy’ (2006) <<http://www.un.org/en/terrorism/strategy-counter-terrorism.shtml#plan>> accessed 17 January 2016, para II(12)(b); UN, ‘Report of the Durban Review Conference’ (2009) UN Doc A/CONF 211/8 chap I, para 54; National Coordinator for Counterterrorism, ‘Countering Violent Extremist Narratives’ (2010) <<https://www.washingtoninstitute.org/uploads/Documents/opeds/4b7aaf56ca52e.pdf>> accessed 17 January 2016, 73; Freedom House, ‘Despite Pushback, Internet Freedom Deteriorates’ (2013) <[https://www.freedomhouse.org/sites/default/files/resources/FOTN%202013\\_OVERVIEW%20ESSAY.pdf](https://www.freedomhouse.org/sites/default/files/resources/FOTN%202013_OVERVIEW%20ESSAY.pdf)> accessed 17 January 2016, 13; Ghaffar Hussain, ‘Challenge Radicals Loudly and Clearly’ (*The New York Times* (29 August 2014) <<http://www.nytimes.com/roomfordebate/2014/08/28/how-to-stop-radicalization-in-the-west/challenge-radicals-loudly-and-clearly>> accessed 17 January 2016. See also UNHRC January 2015 Report (n 8) paras 84–100.

<sup>148</sup> Lauren Orsini, ‘10 Social Media Moments that Shaped the Gun Control Debate’ *Mediashift* (20 February 2013) <<http://mediashift.org/2013/02/10-social-media-moments-that-shaped-the-gun-control-debate051/>> accessed 17 January 2016; UNHRC May 2014 Report (n 105) paras 55–63. See also UNGA, ‘Global Counter-Terrorism Strategy’ (n 147) para II(12)(b).

<sup>149</sup> Para 7 of the facts.

<sup>150</sup> Para 8 of the facts.

<sup>151</sup> Para 12 of the facts.

<sup>152</sup> Para 16 of the facts.

<sup>153</sup> Para 18 of the facts.

<sup>154</sup> Para 16 of the facts.

<sup>155</sup> Para 13 of the facts.

mean that his posts are more likely to incite violence. While popular online figures may be influential, controversial posts by such figures do not necessarily incite violence.<sup>156</sup> This is because an individual's sphere of influence depends on the reasons for his popularity.<sup>157</sup> Here, Umani's popularity arose from spreading gossip about political figures, cracking satirical jokes, and writing witty poems at many public figures' expense.<sup>158</sup> His influence is therefore likely to extend to individuals who are anti-establishment as opposed to anti-Brinnan sympathisers.

45. Moreover, posts #4–6 are unlikely to incite imminent violence despite Umani's correspondence with @Nightwatcher00. @Nightwatcher00's comment is unlikely to be a serious response to post #5. There is no suggestion that @Nightwatcher00 is a true terrorist account, as there is no indication that the Omerian government has sought to investigate the account. Furthermore, most individuals would not declare their association with terrorist groups for fear of being caught by government authorities.<sup>159</sup> Despite posts #4–6 being made near the anniversary of the Armistice<sup>160</sup> and Umani's correspondence with

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<sup>156</sup> Leigh Holmwood, 'Ali G: US Judge Throws Out Woman's \$800,000 Libel Claim' *The Guardian* (22 April 2009) <<http://www.theguardian.com/media/2009/apr/22/ali-g-libel-win>> accessed 17 January 2016; *Paul Chambers v Director of Public Prosecutions* [2012] EWHC 2157 ('*Paul Chambers*') paras 31–32; Marilyn Johnson, 'Why Do We Still Hear People Joke About Hitting Cyclists?' (18 September 2014) <<http://monash.edu/news/show/why-do-we-still-hear-people-joke-about-hitting-cyclists>> accessed 17 January 2016.

<sup>157</sup> *Paul Chambers* (n 156) para 31; Priyal Bhirad, 'Influencers: How Trends and Creativity become Contagious' (17 August 2015) <<https://www.linkedin.com/pulse/impact-social-media-influencers-brands-priyal-bhirad>> accessed 17 January 2016.

<sup>158</sup> Para 13 of the facts.

<sup>159</sup> Miriam Berger, 'Twitter has Suspended an ISIS Account that Live-Tweeted its Advance in Iraq' *BuzzFeed News* (14 June 2014) <<http://www.buzzfeed.com/miriamberger/twitter-has-suspended-an-isis-account-that-live-tweeted-its#wgWwr037l>> accessed 17 January 2016; Jonathon Morgan, 'The ISIS Twitter Census' (2015) <[http://www.brookings.edu/~media/research/files/papers/2015/03/isis-twitter-census-berger-morgan/isis\\_twitter\\_census\\_berger\\_morgan.pdf](http://www.brookings.edu/~media/research/files/papers/2015/03/isis-twitter-census-berger-morgan/isis_twitter_census_berger_morgan.pdf)> accessed 17 January 2016, 15; Anthony Cuthbertson, 'ISIS: 25,000 Islamic State-related Twitter Accounts Details Released Online' *International Business Times* (31 March 2015) <<http://www.ibtimes.co.uk/isis-25000-islamic-state-related-twitter-account-details-released-online-1494216>> accessed 17 January 2016.

<sup>160</sup> Paras 14(d)–(e) of the facts.



@NightWatcher00,<sup>161</sup> no violence occurred on the anniversary of the Armistice.<sup>162</sup> This is particularly significant because violent flare-ups often occur around the anniversary of the Armistice.<sup>163</sup>

46. Ultimately, posts #4–6 should be protected as they are social commentary and political speech that encourage discourse. Satire is a ‘form of artistic expression and social commentary’<sup>164</sup> which ‘play[s] a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society’.<sup>165</sup> So important is satire that in response to the Charlie Hebdo attack, the UN Special Rapporteur stated that ‘[t]here will be voices urging satirists... to exercise caution in their expression. I urge the opposite’.<sup>166</sup> Accordingly, any interference with satire ‘should be examined with particular care’.<sup>167</sup> Furthermore, in ‘circumstances of public debate concerning public figures in the political domain... the value placed... upon uninhibited expression is particularly high’.<sup>168</sup>

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<sup>161</sup> Para 14(e) of the facts.

<sup>162</sup> Para 18 of the facts.

<sup>163</sup> Para 3 of the facts.

<sup>164</sup> *Kunstler* (n 42) para 33; *Alves Da Silva* (n 51) para 27; *Tusalo v Turkey* App nos 32131/08, 41617/08 (ECtHR, 21 February 2012) (*Tusalo*) para 48; *Eon v France* App no 26118/10 (ECtHR, 14 March 2013) (*Eon*) para 60.

<sup>165</sup> *Alves Da Silva* (n 51) para 29; *Eon* (n 164) para 61. See also *Kunstler* (n 42) para 26; *Murat Vural* (n 12) para 45.

<sup>166</sup> David Kaye, ‘UN Special Rapporteur on Freedom of Expression Condemns Attack on Journalists in Paris’ (7 January 2015) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15467>> accessed 17 January 2016.

<sup>167</sup> *Kunstler* (n 42) para 33; *Alves Da Silva* (n 51) para 27; *Tusalo* (n 164) para 48; *Eon* (n 164) para 60.

<sup>168</sup> General Comment 34 (n 3) para 38. See also *Arslan* (n 141) para 46; *Baskaya and Okcuoglu v Turkey* App no 23536/94, 24408/96 (ECtHR, 8 July 1999) para 62; *Eon* (n 164) para 59.

## 2. The prosecution was disproportionate

47. Both the (a) disclosure of Umani's identity and (b) imprisonment of Umani were disproportionate.

*a. The disclosure of Umani's identity to media outlets was disproportionate as the identity of an individual under investigations should not be publicised prior to court proceedings*

48. Omeria's disclosure of Umani's identity to media outlets<sup>169</sup> was disproportionate. The right to privacy includes the right to reputation.<sup>170</sup> These rights, though not inviolable, should be upheld as far as possible.<sup>171</sup> The identity of an individual under investigations should not be publicised until the allegation has been substantiated, to protect him from harassment, and to avoid unnecessarily putting his reputation at risk.<sup>172</sup> Omeria should have stopped at obtaining the court order<sup>173</sup> to procure Umani's identity.<sup>174</sup> In disclosing Umani's identity to media outlets,<sup>175</sup> Omeria disproportionately interfered with Umani's right to privacy.

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<sup>169</sup> Para 18 of the facts.

<sup>170</sup> ICCPR 17(1).

<sup>171</sup> UNHRC February 2008 Report (n 7) para 71; UNHRC May 2011 Report (n 36) para 59; UNHRC April 2013 Report (n 4) para 29.

<sup>172</sup> *Bellevue John Does v Bellevue School District* 164 Wn 2d 199 (2008) para 35; Association of Chief Police Officers, 'Communication Advisory Group Guidance 2010' (2010) <<http://news.npcc.police.uk/Clients/NPCC/ACPO%20CAG%20guidance.pdf>> accessed 17 January 2016, 6; Lord Justice Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press Report' (2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/270941/0780\\_ii.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270941/0780_ii.pdf)> accessed 17 January 2016, 791; Lord Justice Treacy and Justice Tugendhat, 'A Judicial Response to Law Commission Consultation Paper no 209' (4 March 2013) <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Consultations/sen-judiciary-response-to-law-comm-on-contempt-court.pdf>> accessed 17 January 2016, 5.

<sup>173</sup> Para 17 of the facts.

b. *The two-year jail term was disproportionate as it was excessive compared to the sentencing practice of other states*

49. Umani's two-year jail term was disproportionate. Imprisonment can 'rarely be justified as a proportionate measure'.<sup>176</sup> International courts and tribunals therefore undertake greater scrutiny where imprisonment is involved.<sup>177</sup> In Russia, an individual was fined US\$ 37 for spreading extremist statements.<sup>178</sup> Similarly, in the ECtHR case of *Leroy v France*, a mere fine of 1,500 euros was imposed for the publication of a cartoon glorifying the 9/11 attacks just two days after.<sup>179</sup> Criminal imprisonment is typically reserved for the most severe cases of extremist speech.<sup>180</sup> States have thus generally resorted to merely issuing warnings to

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<sup>174</sup> *Delfi October 2013* (n 78) para 29. See also LaRue and others (n 116); Tarlach McGonagle, 'The Council of Europe against Online Hate Speech: Conundrums and Challenges' (2013) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c170f>> accessed 17 January 2016, 29–30; Article 19, 'Internet Intermediaries: Dilemma of Liability' (2013) <[http://www.article19.org/data/files/Intermediaries\\_ENGLISH.pdf](http://www.article19.org/data/files/Intermediaries_ENGLISH.pdf)> accessed 17 January 2016, 16.

<sup>175</sup> Para 17 of the facts.

<sup>176</sup> UNHRC May 2011 Report (n 6) para 36. See also *Karatas* (n 42) paras 50–52; *Şener v Turkey* App no 26680/95 (ECtHR, 18 July 2000) paras 40, 42.

<sup>177</sup> *Lehideux* (n 69) para 57; *Perincek* (n 12) para 272.

<sup>178</sup> The Moscow Times, 'Russian Businessman Fined for Distributing "Extremist" Mickey Mouse Jesus Leaflets' *The Moscow Times* (19 June 2015) <<http://www.themoscowtimes.com/news/article/russian-businessman-fined-for-distributing-extremist-mickey-mouse-jesus-leaflets/524000.html>> accessed 17 January 2016.

<sup>179</sup> *Leroy* (n 64) para 47. See also ECtHR, 'Factsheet – Hate Speech' (2015) <[http://www.echr.coe.int/Documents/FS\\_Hate\\_speech\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Hate_speech_ENG.pdf)> accessed 17 January 2016, 6.

<sup>180</sup> Law Commission of Canada, *What is a Crime? Defining Criminal Conduct in Contemporary Society* (UBC Press 2014) 9. See also Pitmans LLP, 'Tweet and be #Damned?' (21 September 2012) <<http://www.pitmans.com/news/article/tweet-and-be-damned>> accessed 17 January 2016; Susanna Rustin, 'Is It Right to Jail Someone for Being Offensive on Facebook or Twitter?' *The Guardian* (13 June 2014) <<http://www.theguardian.com/law/2014/jun/13/jail-someone-for-being-offensive-twitter-facebook>> accessed 17 January 2016; *Elonis v US* No 13–983 (135 S Ct 2015, 1 June 2015) 13.

individuals who make extremist statements.<sup>181</sup> Here, Umani only posted three posts which were said to be extremist, and furthermore no violence even occurred.<sup>182</sup>

#### **IV. OMERIA VIOLATED CHATTER’S RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY BY PROSECUTING CHATTER UNDER THE ATEL FOR POSTS #4–6**

50. Intermediaries ‘play a fundamental role in enabling Internet users to enjoy their right[s] to freedom of expression and access to information.’<sup>183</sup> Although social media intermediaries shoulder some responsibilities in regulating extremist content, governments bear the primary responsibility.<sup>184</sup>

51. The prosecution interfered with Chatter’s freedom of expression and derivative right to privacy.<sup>185</sup> The prosecution of Chatter under the ATEL was unjustified. This is because, as stated above, posts #4–6 were not extremist speech, accordingly Chatter should not be held

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<sup>181</sup> Raymond Tham, ‘Calvin Cheng’s “Killing Children” Remarks “Insensitive and Inappropriate”: MLC Chairman’ *CNA* (28 November 2015) <<http://www.channelnewsasia.com/news/singapore/calvin-cheng-s-killing/2299992.html>> accessed 17 January 2016; IFEX, ‘Peruvian Journalist Gets Death Threat After Politician Incites Violence Against Him’ *IFEX* (1 December 2015) <[https://www.ifex.org/peru/2015/12/01/tuanama\\_danger/](https://www.ifex.org/peru/2015/12/01/tuanama_danger/)> accessed 17 January 2016; Jamaica Observer, ‘Dwayne Vaz’ *Jamaica Observer* (16 December 2015) <[http://www.jamaicaobserver.com/news/Dwayne-Vaz-apologises\\_45847](http://www.jamaicaobserver.com/news/Dwayne-Vaz-apologises_45847)> accessed 17 January 2016.

<sup>182</sup> Para 18 of the facts.

<sup>183</sup> UNHRC May 2011 Report (n 6) para 74. See also Etienne Montero and Quentin Enis, ‘Enabling Freedom of Expression in Light of Filtering Measures Imposed on Internet Intermediaries: Squaring the Circle?’ (2011) 27 *Computer Law and Security Review* 21, 22; Council of Europe Parliamentary Assembly, ‘Internet and Politics: The Impact of New Information and Communication Technology on Democracy’ (13 January 2014) <<http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20329&lang=en>> accessed 15 January 2015, para 87.

<sup>184</sup> UNHRC May 2011 Report (n 36) para 43. See also Article 19, ‘Internet Intermediaries: Dilemma of Liability’ (2013) <[http://www.article19.org/data/files/Intermediaries\\_ENGLISH.pdf](http://www.article19.org/data/files/Intermediaries_ENGLISH.pdf)> accessed 17 January 2016, 14.

<sup>185</sup> See para 25 of this Memorial.

liable under the ATEL for reckless monitoring and control of extremist statements.<sup>186</sup> Even if posts #4–6 were extremist statements, the prosecution was unjustified as it: (A) did not correspond to a pressing social need; and (B) was not proportionate to the legitimate aims pursued.

**A. THERE WAS NO PRESSING SOCIAL NEED TO PROSECUTE CHATTER AS THE OBLIGATION TO DETERMINE THE LEGALITY OF POSTS #4–6 IS UNDULY ONEROUS**

52. There was no pressing social need to prosecute Chatter for recklessness monitoring and control of posts #4–6. As stated above,<sup>187</sup> the following factors are to be considered in determining the existence of a pressing social need to impose liability on intermediaries: the nature of the intermediary; notice of its user content; and the nature of the content.<sup>188</sup>

53. There was no pressing social need to prosecute Chatter. First, as stated above, Chatter is a passive intermediary.<sup>189</sup>

54. Secondly, although Chatter may have received user notifications regarding the controversial nature of posts #4–6, it does not follow that Chatter should be liable for them.<sup>190</sup> This is because of the difficulty in distinguishing extremist speech from legitimate satirical

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<sup>186</sup> See paras 41–46 of this Memorial.

<sup>187</sup> See para 27 of this Memorial.

<sup>188</sup> *Delfi October 2013* (n 78) para 85; *Delfi June 2015* (n 8) paras 142–143. See also *Google France* (n 90) para 114; *L’Oreal SA* (n 90) paras 111–113; *Comminos* (n 90) 11–12; *Payam Tamiz* (n 89) paras 7–8, 13–14, 23–25.

<sup>189</sup> See para 28 of this Memorial.

<sup>190</sup> Para 16 of the facts.

speech.<sup>191</sup> In acknowledging this difficulty, states have thus assisted intermediaries in regulating content.<sup>192</sup> Some states therefore only hold intermediaries liable for refusing to remove content upon a government request or court order.<sup>193</sup> Furthermore, social media posts often attract debate and counter-narratives, thereby making it more difficult for intermediaries to determine the legality of such posts.<sup>194</sup>

55. Thirdly, as stated above,<sup>195</sup> intermediary regulation may result in over-broad private censorship, often without the due process of the law.<sup>196</sup> This would diminish the ability of the internet to perform its function, as the key means by which individuals exercise their freedom of expression.<sup>197</sup>

56. Fourthly, while intermediaries may have a wide variety of technical tools to identify questionable content, these tools offer little guidance in determining the legality of such

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<sup>191</sup> UN Durban Declaration Report (n 98) para 47; Akdeniz (n 98) 143–44; Leaffer (n 98) 273; Lipton (n 98) 1354; Article 19, ‘Internet Intermediaries: Dilemma of Liability’ (n 174) 14; The Guardian, ‘Spotting Terrorist Behaviour Online is Harder than Finding Child Abuse Images’ *The Guardian* (4 December 2014) <<http://www.theguardian.com/technology/2014/dec/04/terrorist-communications-internet-companies-isc-child-abuse-images-different-technical-undertakings>> accessed 17 January 2016.

<sup>192</sup> Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce in the Internal Market OJ L178/1, art 15; Benoit Frydman, ‘Regulating Internet Content Through Intermediaries in Europe and the USA’ (2002) 23 *Zeitschrift für Rechtssoziologie* 41, 51; *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH* C-557/07 (CJEU, 19 February 2009) para 77; Cynthia Wong, ‘Mapping Digital Media: The Media and Liability for Content on the Internet’ (2011) Open Society Foundations Reference Series no 12, 16; Elizabeth Macdonald, ‘Exclusive: FBI Says Twitter Needs to Do More to Combat Terrorism’ *Fox Business* (29 July 2015).

<sup>193</sup> Cooper (n 99) 23; Marco Civil da Internet, Law no 12.965 (23 April 2014) (Brazil) art 19; Yasmine Saleh (n 99); Adi Kamdar (n 99); *Shreya Singhal* (n 98) para 117. See also UNHRC May 2011 Report (n 36) 43.

<sup>194</sup> Lauren Orsini (n 148); UNHRC May 2014 Report (n 105) paras 55–63. See also UNGA, ‘Global Counter-Terrorism Strategy’ (n 147) para II(12)(b).

<sup>195</sup> See para 31 of this Memorial.

<sup>196</sup> UNHRC May 2014 Report (n 105) para 40. See also Wong (n 192) 16; African Declaration (n 105).

<sup>197</sup> UNHRC February 2008 Report (n 7) para 23; Center for Democracy and Technology, ‘Regardless of Frontiers: The International Right to Freedom of Expression in the Digital Age’ (n 116) 2; UNHRC May 2011 Report (n 36) paras 2, 20; UNHRC April 2013 Report (n 4) para 13.

content. Tools such as word filters or user notification are merely technical means of identifying questionable content.<sup>198</sup> The intermediary is left to decide the content's legality. This is a task which governments and courts are better placed to engage in as the 'determination of illegality is contextual and subjective'.<sup>199</sup>

57. Finally, an obligation to remove content before receiving a court order requires intermediaries to trawl through an immense amount of content. Twitter, a platform similar to Chatter, hosts 140 million tweets per day.<sup>200</sup> Chatter would have to filter an immense amount of content since it is the most popular social media platform in Omeria.<sup>201</sup> This is notable as Omeria has a population of 25 million<sup>202</sup> and is one of the heaviest users of internet bandwidth per capita in the world.<sup>203</sup> Post #3 alone was re-chatted several thousand times in just four minutes.<sup>204</sup> Such an obligation may cause social media to become expensive or economically

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<sup>198</sup> Katie Cohen and Lisa Kaati, 'Detecting Linguistic Markers for Radical Violence in Social Media' (2014) 26 *Terrorism and Political Violence* 246, 253. See also David Clarke, *Technology and Terrorism* (Transaction Publisher 2004) 179; Feyyaz Aydogdu, *Technological Dimensions of Defence against Terrorism* (IOS Press 2013) 98.

<sup>199</sup> *Scarlet Extended SA v SABAM* C-70/10 (CJEU, 24 November 2011) paras 49-53; *SABAM v Netlog NV* C-360/10 (CJEU, 16 February 2012) paras 47-51. See also Emerald Smith, 'Lord of the Files: International Secondary Liability for Internet Service Providers' (2011) 68 *Washington and Lee Law Review* 1555, 1583-84; Wong (n 192) 14; Raphael Cohen-Almagor, 'Freedom of Expression, Internet Responsibility, and Business Ethics: The Yahoo! Saga and Its Implications' (2012) 106 *Business & Professional Ethics Journal* 353, 361-62; Macdonald (n 192); Internet Bill of Rights 2015 (Brazil), art 19; Reuters, 'Indonesia Blocks Radical Websites After Deadly Militant Attack in Capital' *Asiaone* (16 January 2016) <<http://news.asiaone.com/news/asia/indonesia-blocks-radical-websites-after-deadly-militant-attack-capital>> accessed 17 January 2016.

<sup>200</sup> Twitter, '#numbers' (2011) <<https://blog.twitter.com/2011/numbers>> accessed 17 January 2016.

<sup>201</sup> Para 5 of the facts.

<sup>202</sup> Para 1 of the facts.

<sup>203</sup> Para 5 of the facts.

<sup>204</sup> Para 14 of the facts.

unviable,<sup>205</sup> thus diminishing the ability of the internet to perform its function as the key means by which individuals exercise their freedom of expression.<sup>206</sup>

**B. THE PROSECUTION WAS DISPROPORTIONATE AS THE QUANTUM OF THE FINE WAS EXCESSIVE COMPARED TO THE SENTENCING PRACTICE OF OTHER STATES**

58. The US\$ 5.07 million fine imposed on Chatter<sup>207</sup> was manifestly disproportionate. As stated above,<sup>208</sup> in the ECtHR case of *Delfi v Estonia*, the intermediary was fined only 320 euros,<sup>209</sup> despite being an active producer of content.<sup>210</sup> In contrast, Chatter is a mere passive intermediary. Similarly, in Turkey, Twitter, an international social media platform, was merely fined US\$ 51,000 for failing to remove content even after the government informed Twitter that the content was ‘terrorist propaganda’.<sup>211</sup> In comparison, Chatter immediately removed posts #4–6 once Omeria requested for their take down.<sup>212</sup>

59. Further, states have been hesitant to impose fines of a huge quantum on intermediaries for inadequate monitoring. Instead, states have encouraged co-monitoring between

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<sup>205</sup> Wong (n 192) 14. See also Cohen-Almagor (n 199) 361–62.

<sup>206</sup> UNHRC February 2008 Report (n 7) para 23; Center for Democracy and Technology, ‘Regardless of Frontiers: The International Right to Freedom of Expression in the Digital Age’ (n 116) 2; UNHRC May 2011 Report (n 36) paras 2, 20; UNHRC April 2013 Report (n 4) para 13.

<sup>207</sup> Para 20 of the facts.

<sup>208</sup> See para 32 of this Memorial.

<sup>209</sup> *Delfi June 2015* (n 8) para 160.

<sup>210</sup> *Delfi June 2015* (n 8) para 11.

<sup>211</sup> The Hill, ‘Turkey Fines Twitter for Refusing to Take Down Content’ (11 December 2015) <<http://thehill.com/policy/technology/262910-turkey-said-to-fine-twitter-for-not-taking-content-down>> accessed 17 January 2016.

<sup>212</sup> Para 17 of the facts.



intermediaries and governments.<sup>213</sup> These measures reflect a more proportionate approach to fulfilling the aim of preventing terrorism, as opposed to solely pinning the blame on intermediaries.

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<sup>213</sup> See para 56 of this Memorial.

## **PRAYERS FOR RELIEF**

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

1. Omeria violated Umani's rights to freedom of expression and privacy by prosecuting him for posts #1–3 under the NHA.
2. Omeria violated Chatter's rights to freedom of expression and privacy by prosecuting it for posts #1 and #3 under the NHA.
3. Omeria violated Umani's rights to freedom of expression and privacy by prosecuting him for posts #4–6 under the ATEL.
4. Omeria violated Chatter's rights to freedom of expression and privacy by prosecuting it for posts #4–6 under the ATEL.

Respectfully submitted 18 January 2016,

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Counsel for the Applicants