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

### A. The prosecution was not prescribed by law because section 3(B) of the ODPA was not sufficiently precise

#### 1. There was no pressing social need to prosecute Peaps because his post did not unlawfully interfere with Kola’s right to private life

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

## II. TURTONIA VIOLATED SCOOPS’ FREEDOM OF EXPRESSION BY PROSECUTING IT UNDER THE ODPA

### A. The prosecution was not prescribed by law because section 1(A) of the ODPA was not sufficiently precise

### B. The prosecution was not necessary in a democratic society

#### 1. There was no pressing social need to prosecute Scoops because the obligation to determine the legality of Peaps’ post was unduly onerous
2. The prosecution was disproportionate because it was excessive pursuant to international standards.

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

A. The prosecution was not prescribed by law because section 1(B) of the IA was not sufficiently precise.

B. The prosecution was not necessary in a democratic society.

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

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

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

A. The prosecution was not prescribed by law because section 3(c) of the IA was not sufficiently precise.

B. The prosecution was not necessary in a democratic society.

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

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

RELIEFS SOUGHT
# LIST OF ABBREVIATIONS

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<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
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<td>ACHR</td>
<td>American Convention on Human Rights</td>
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<tr>
<td>ACommHPR</td>
<td>African Commission on Human and Peoples’ Rights</td>
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<tr>
<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>European Convention on Human Rights</td>
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<td>IACtHR</td>
<td>Inter-American Court of Human Rights</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>Information Act of 2006</td>
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<td>ODPA</td>
<td>Online Dignity Protection Act of 2015</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>OHCHR</td>
<td>United Nations Office of the High Commissioner for Human Rights</td>
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UNESCO United Nations Educational, Scientific and Cultural Organisation

UDHR Universal Declaration of Human Rights

UK United Kingdom

UN United Nations

UNGA United Nations General Assembly

UNHRC United Nations Human Rights Council

SCOTUS Supreme Court of the United States
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STATEMENT OF RELEVANT FACTS

Background of Turtonia

A. Turtonia is a democratic country with a population of 17 million. In the past three years, it has seen a significant influx of immigrants from the neighbouring country, Aquaria. The Turtonian Minister of Immigration, Kola, believes that Aquarian immigrants can contribute to Turtonian society. However, some Turtonians do not support her position and claim that the immigrants have disrupted the economy and diluted the culture. In particular, a nationalist group called Turton Power has been vocal in opposing Kola’s immigration policies.

B. Turtonia is also threatened by a religious extremist terror group called True Religion, which has been recognised as a terrorist organization in both Turtonia and Aquaria. True Religion’s leader is an Aquarian named Parkta.

The IA and the ODPA

C. In 2006, the Turtonian government enacted the IA, which criminalises the communication of false information that damages the reputation of another or disrupts public order. The IA exempts Online Service Providers from liability for storing content that is prohibited under the IA if they are able to “expeditiously” remove such content.

D. In 2015, the Turtonian government enacted the ODPA, which criminalises the distribution of images that expose an individual’s intimate parts without his or her consent. The ODPA exempts liability for any intimate images distributed in the “public
interest”. The ODPA also provides examples of matters that are of “public interest”, although such matters are “not limited to” the examples listed.

The publication of Peaps’ post on Scoops

E. Scoops is the most popular social media platform in Turtonia. It does not generate its own content, but instead stores content uploaded by its users. Scoops’ users have the option of improving the visibility of their posts by paying a fee to have their posts “boosted”.

F. Peaps is a Turton Power member who, on May 1, created a Scoops account with the name “XYZ News12”.

G. At noon on May 2, Peaps published a post on his Scoops account claiming that Kola may have been in a relationship with Parkta and had approved visas for True Religion members. The post also included an image depicting Kola in the nude. On May 3, TurtonTimes, a major newspaper affiliated to the political party that opposes Kola’s party, published an opinion article citing dissatisfaction with Kola and calling for her resignation. On May 4 and 5, protesters gathered outside Kola’s office calling for her resignation. Most of the protests signs held were unrelated to Peaps’ post. Kola resigned on May 10 without making any public statement.

H. At 7:00 p.m. on May 2, Kola’s staff submitted an online reporting form indicating that Peaps’ post contained a nude image of Kola shared without her consent. However, Kola’s staff did not verify the person depicted. At 11:00 a.m. on May 3, Kola’s legal counsel submitted a letter to Scoops, threatening a civil action for defamation and violation of
privacy. Scoops removed the post and all shares of the post at 1:00pm on May 5.

The prosecution of Peaps and Scoops

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

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

Peaps, Scoops, and the Federal Republic of Turtonia, which is a member of the UN, have submitted their differences to the Universal Freedom of Expression Court (‘this Court’), and hereby submit to this Court their dispute concerning Article 19 of the UDHR and the ICCPR.

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

1. Whether Turtonia violated Peaps’ right to freedom of expression by prosecuting him under the ODPA and sentencing him to two years’ imprisonment.

2. Whether Turtonia violated Scoops’ right to freedom of expression by prosecuting it under the ODPA and imposing a US$200,000 fine.

3. Whether Turtonia violated Peaps’ right to freedom of expression by prosecuting him under the IA and imposing a US$100,000 fine.

4. Whether Turtonia violated Scoops’ right to freedom of expression by prosecuting it under the IA and imposing a US$100,000 fine.
SUMMARY OF ARGUMENTS

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

A. Turtonia, in prosecuting Peaps under the ODPA, interfered with Peaps’ right to freedom of expression. This is because interferences with the right to freedom of expression are broadly defined and include prosecutions. This interference was unjustified as it was neither prescribed by law nor necessary in a democratic society.

B. The prosecution under the ODPA was not prescribed by law because sections 1 and 3(b) were insufficiently precise. Section 1 was imprecise because the phrase “whose intimate parts” was vague. Peaps could not have reasonably foreseen that section 1 would apply to fabricated intimate images. Further, section 3(b) was imprecise because the term “public interest” that exempts him from liability was vague. Given that information concerning the possible infiltration of terrorists are quintessential examples of matters of public interest, Peaps could not have reasonably foreseen that this exception would not apply.

C. There was also no pressing social need to prosecute Peaps because his post did not unlawfully interfere with Kola’s rights to privacy and reputation. First, the limits of acceptable publications are substantially wider where applied to public officials like Kola, who knowingly exposed herself to public scrutiny. Secondly, Peaps’ post raised the possibility of Kola’s involvement with True Religion, which could contribute to a matter of public debate as Kola oversaw Turtonia’s immigration policy. Thirdly, Peaps’
post did not depict Kola’s actual intimate body parts and thus did not result in severe consequences to Kola’s privacy. Further, there was an insufficient link between Peaps’ post and any subsequent harm to Kola’s reputation. Finally, there was a lesser need to prosecute Peaps as he did not intend to inflict harm on Kola.

D. The two-year imprisonment term was disproportionate because the nature of the punishment was excessive. Imprisonment is an undue punishment where the impugned publication does not amount to an incitement to discrimination, hostility or violence. Even then, imprisonment is only resorted to in exceptional circumstances. The prosecution of Peaps under the ODPA concerned the effect of his post on Kola’s privacy and reputation, and did not relate to any such incitement.

E. Turtonia cannot rely on the margin of appreciation doctrine because this doctrine undermines the protection of human rights according to common standards. Even if Turtonia is afforded a margin of appreciation, it must be narrow because Peaps’ post contributed to a debate of public interest.

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

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

G. The prosecution under the ODPA was not prescribed by law because section 1 was insufficiently precise. Section 1 was imprecise because the terms “knowingly” and
“knows or consciously disregards” were vague. Scoops could not have reasonably foreseen that knowledge would be imputed, particularly since Kola’s staff did not send a completed online reporting form.

H. There was also no pressing social need to prosecute Scoops because the obligation to determine the legality of Peaps’ post was unduly onerous. First, Scoops was a neutral intermediary that did not exercise substantial control over content published on its platform. Secondly, given that Kola’s staff did not complete the online reporting form, Scoops did not have sufficient knowledge of the illegality of Peaps’ post. Thirdly, Scoops cannot be expected to proactively remove Peaps’ post especially when Peaps’ post was not clearly illegal. Finally, requiring Scoops to take down posts at the mere request of a private party would pave the way for over-broad private censorship. This would inhibit political debate and democratic development in Turtonia.

I. The US$200,000 fine was disproportionate. First, as an intermediary, Scoops should not be subjected to the same liability provisions as content creators and should have had recourse to a safe harbour regime. Secondly, the US$200,000 fine was excessive in comparison to penalties imposed on intermediaries in other states.

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

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

K. The prosecution under the IA was not prescribed by law because section 1(b) was
insufficiently precise. Section 1(b) was imprecise because the phrase “incite civil unrest, hatred, or damage the national unity” was vague. The Turtonian authorities had undue discretion to find Peaps liable, without even clearly identifying the specific ground of liability.

L. There was also no pressing social need to prosecute Peaps because his post did not amount to an incitement to hostility. First, considering the high threshold for finding an intention to incite hostility, Peaps was principally motivated to maximise his popularity on Scoops and did not have the requisite intention. Secondly, Peaps’ post did not contain content that incited hostility against Aquarians. This is because the post contributed to a debate of public interest and only mentioned the True Religion terrorist group, instead of the Aquarian immigrant community. Thirdly, Peaps’ post was unlikely to be interpreted as a call to hostility as there was no such express call against Aquarians and the publication’s tone was not hostile. Finally, the self-correcting mechanisms of social media militates against the need to prosecute Peaps because not all users of social media will be swayed by the effects of false information.

M. The US$100,000 fine was disproportionate. States have generally issued warnings to individual who publish statements that incite hatred or issued judicial order for the prompt removal of such orders. Even if a fine was appropriate, a fine of US$100,000 was excessive in comparison to what was imposed in other states.

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

N. Turtonia’s prosecution of Scoops under the IA was unjustified as it was neither prescribed by law nor necessary in a democratic society.
O. The prosecution under the IA was not prescribed by law because section 3(c) was insufficiently precise. Section 3(c) was imprecise because the term “expeditiously” was vague. The usage of this term without a specific definition has generated much uncertainty as it is unclear how fast intermediaries must act to qualify for immunity. As such, Scoops could not have reasonably foreseen liability even though it had successfully removed all 21,000 shares of Peaps’ post within 50 hours.

P. There was also no pressing social need to prosecute Scoops. First, Scoops was a neutral intermediary and should not be held responsible for the dissemination of Peaps’ post. Secondly, Scoops had difficulties in determining whether Peaps’ post was illegal. This difficulty was compounded by the fact that the original fabricated image was removed before Scoops could conduct any checks. Thirdly, Scoops took sufficient steps by removing Peaps’ post within 50 hours of receiving the letter from Kola’s legal counsel. Finally, it is impractical to impose an obligation to remove posts at the mere behest of a private party, as that would require Scoops to trawl through an immense amount of content.

Q. The US$100,000 fine was disproportionate. The imposition of criminal liability was excessive, as Kola could have directly pursued a civil action against Scoops. Further, a fine was not the least restrictive measure that could have been adopted because states have often implemented co-monitoring regimes with intermediaries instead. Even if a fine was appropriate, the sum of US$100,000 was excessive in comparison to penalties imposed on intermediaries in other states.
ARGUMENTS

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

1.  The freedom of expression, enshrined in the UDHR,1 ICCPR,2 ECHR,3 ACHR4 and ACHPR,5 is the bedrock of a free and democratic society6 like Turtonia.7 This freedom provides an avenue for public discourse,8 and allows for the self-fulfilment of each individual.9

2.  While this freedom is not absolute,10 its significance for society’s progress mandates that any interferences with this freedom should only be imposed in exceptional

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1 UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 19.
3 ECHR (adopted 4 November 1950, entered into force 3 September 1953) art 10.
6 Bowman v UK App no 24839/94 (ECtHR, 19 February 1998) para 42; Claude-Reyes v Chile, Merits, Reparations and Costs Judgment (IACtHR, 19 September 2006) para 85; HRC, ‘General Comment 34’ (12 September 2011) UN Doc CCPR/C/GC/34 (‘General Comment 34’) para 2.
7 Para 1.1 of the Facts.
10 UDHR art 19(3); ECHR art 10(2); ACHR art 13(2); ACHPR art 10(2).
circumstances. Consequently, an interference may only be justified if it is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society. These three requirements have been applied by the UNHRC, IACtHR, ECtHR, and ACommHPR.

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

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


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


17 Para 12.2 of the Facts.

18 Para 12.1.1 of the Facts.
expression are broadly defined and include prosecutions,\textsuperscript{19} Turtonia’s measure was an interference with Peaps’ right.

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

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

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

\textsuperscript{19} Perinçek (n 15) para 117; Malcolm Ross (n 13) para 11.1; Guðmundur Alfreðsson and Ashjörn 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.

\textsuperscript{20} ICCPR art 17(2); ECHR art 8.


liability.\textsuperscript{23} The prosecution was not prescribed by law because sections 1 and 3(b) of the ODPA were insufficiently precise.

6. Section 1 was insufficiently precise because the phrase “whose intimate parts” was vague. Peaps had been prosecuted under the ODPA for distributing a photoshopped image of Kola.\textsuperscript{24} However, the ODPA only identified “[i]ntimate parts” as “the naked genitals, pubic area... of a person”, and did not specify whether this extended to fabricated images.\textsuperscript{25} Further, the ODPA was passed in response to the dissemination of actual nude photos\textsuperscript{26} and Peaps could not have reasonably foreseen that a photoshopped image would attract liability. Additionally, legislations similar to the ODPA in the US\textsuperscript{27} and the UK\textsuperscript{28} are designed only to protect truthful private information and not fabricated images.

7. Section 3(b) was also insufficiently precise because the term “public interest” that exempts liability for distributing intimate images was vague. Peaps was denied the


\textsuperscript{24} Para 12.1.1 of the Facts.

\textsuperscript{25} Para 10.2 of the Facts.

\textsuperscript{26} Para 10.1 of the Facts.


\textsuperscript{28} Kate Parker, “‘Revenge Porn’ Laws: A Year of Reflection’ (5PB, 7 June 2016) <http://www.5pb.co.uk/blog/2016/06/17/revenge_porn_law_a_years_reflection/> accessed 21 January 2018.
exception by the Turtonian courts, even though his post concerned the possible infiltration of True Religion terrorists into Turtonia. He could not have reasonably foreseen that section 3(b) would not apply to his post because terrorist activities are quintessential examples of matters of public interest. Additionally, although section 3(b) provides examples of “public interest”, these examples are non-exhaustive as the matters of “public interest” are “not limited to” the categories listed. Such vague wording affords an overly broad discretion for authorities, resulting in excessive censorship. Hence, the usage of this term in legislations prohibiting the distribution of false information or intimate images has also been cautioned for lacking a firm definition.

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

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29 Para 12.3.7 of the Facts.

30 Para 8.3 of the Facts.


32 Para 10.2 of the Facts.


B. THE PROSECUTION WAS NOT NECESSARY IN A DEMOCRATIC SOCIETY

9. An interference with the right to freedom of expression is necessary in a democratic society if it: (1) corresponds to a pressing social need; and (2) is proportionate to the legitimate aim pursued.35

1. There was no pressing social need to prosecute Peaps because his post did not unlawfully interfere with Kola’s right to private life.

10. The rights to privacy and reputation must not be unduly protected at the expense of undermining the right to freedom of expression, as these competing rights are of equal value.36 To determine whether a fair balance has been struck between these rights, the pertinent factors to consider include:37 the status of the affected individual; whether the publication contributed to a debate of public interest; and the content and consequences of the publication.

11. Applying these factors, there was no pressing social need to prosecute Peaps. First, the limits of acceptable publications are substantially wider where politicians are concerned,

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

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

37 Axel Springer (n 36) paras 90–95; Von Hannover v Germany (No 2) App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012) paras 109–113; Patushin v Ukraine App no 16882/03 (ECtHR, 21 February 2014) (‘Patushin’) para 40; Haldimann v Switzerland App no 21830/09 (ECtHR, 24 May 2015) (‘Haldimann’) para 50; Couderc and Hachette Filipacchi Associes v France App no 40454/47 (ECtHR, 10 November 2015) (‘Couderc’) para 93; Bestry v Poland App no 57675/10 (ECtHR, 3 February 2016) paras 59, 67; Ólafsson v Iceland App no 58493/13 (ECtHR, 16 June 2017) para 48; Egill Einarsson v Iceland App no 24703/15 (ECtHR, 7 November 2017) (‘Egill Einarsson’) paras 40, 42.
since they knowingly expose themselves to public scrutiny by virtue of their positions.\(^{38}\) Kola was still the Minister of Immigration at the time of Peaps’ post.\(^{39}\) In particular, she had used this position to champion for the entry of Aquarian immigrants, which was a controversial stance that generated much debate.\(^{40}\)

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

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

\(^{39}\) Para 4.1 of the Facts.

\(^{40}\) Para 4.1 of the Facts.

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

\(^{42}\) Para 8.3 of the Facts.

\(^{43}\) Para 12.3.2 of the Facts.

\(^{44}\) Mosley (n 36) para 127; Morice v France App no 29369/10 (ECtHR, 23 April 2015) paras 125–126; Steel and Morris v UK App no 68416/01 (ECtHR, 15 May 2015) para 89; Couderc (n 37) para 111; Egill Einarsson (n 37) para 45.
between Kola and True Religion remained a matter of social concern.\textsuperscript{45}

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

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

\textsuperscript{45} Para 4.1 of the Facts.

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

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


\textsuperscript{49} Para 12.3 of the Facts.

\textsuperscript{50} Para 9.1 of the Facts.

\textsuperscript{51} Axel Springer (n 36) para 83; Patistin (n 37) para 40; A (n 46) para 64; Egill Einarsson (n 37) para 52; Guide on Article 8 (n 46) para 112; Comparative Defamation and Privacy Law (n 46) 286–288.
controversial pro-Aquarian immigration stance. Although the May 4 and 5 protests had the largest turnout, they were mainly directed towards Kola’s immigration policies. In contrast, Peaps’ post had not directly targeted Kola’s immigration policies but instead focused on an alleged sexual relationship with Parkta. It was the publication by the TurtonTimes, a major newspaper affiliated with the political party opposing Kola’s, that had directly criticised Kola’s immigration policies and called for her resignation.

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

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52 Para 4.1 of the Facts.
53 Para 9.4 of the Facts.
54 Para 8.3 of the Facts.
55 Para 9.3 of the Facts.
57 Haldimann (n 37) para 44.
cause harm before liability is imposed.\textsuperscript{59} Here, Peaps’ principal goal was to “maximise his influence score on Scoops”,\textsuperscript{60} and use Kola’s image to better “illustrate” his story.\textsuperscript{61} Given the high threshold for inferring intention,\textsuperscript{62} it is likely that Peaps did not concurrently intend to cause harm to Kola.

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

2. \textit{The prosecution was disproportionate because imprisonment was an inappropriate punishment}

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

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

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

\textsuperscript{60} Para 12.2 of the Facts.

\textsuperscript{61} Para 12.2 of the Facts.


\textsuperscript{64} Ceylan (n 15) para 37; Tammer v Estonia App no 41205/98 (ECHR, 4 April 2001) (‘Tammer’) para 69; Skalka v Poland App no 43425/98 (ECHR, 27 May 2003) (‘Skalka’) paras 41–42; Cumpănă and Mazare v Romania App no 33348/96 (ECHR, 17 December 2004) (‘Cumpănă’) para 111.
have made allegations about public officials, the UNHRC, ECtHR and ACommHPR have found imprisonment sentences inappropriate unless such allegations amount to an incitement to discrimination, hostility, or violence. Even then, criminal imprisonment is still only reserved for the most severe cases of incitement. This is because imposing imprisonment sentences beyond these specific categories would create a “chilling effect” where citizens are discouraged from discussing the conduct of officials in fear of punishment. Here, the prosecution of Peaps under the ODPA concerned the effect of his post on Kola’s privacy and reputation, and did not relate to any such incitement.

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


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


70 Para 8.3 of the Facts.
universality of human rights.\textsuperscript{71} Even if a margin of appreciation could be accorded to Turtonia, it must be narrow where the impugned publication contributes to a debate of public interest.\textsuperscript{72} As argued above,\textsuperscript{73} given that Peaps’ post raised the possibility of Kola’s involvement with True Religion, Turtonia exceeded its margin in sentencing Peaps to two years’ imprisonment.

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


\textsuperscript{72} Wingrove (n 21) para 58; Ceylan (n 15) para 34; \textit{Animal Defenders International v UK} App no 48876/08 (ECtHR, 22 April 2013) para 102; Perincek (n 15) para 197.

\textsuperscript{73} See para 12 of this Memorial.
II. TURTONIA VIOLATED SCOOPS’ FREEDOM OF EXPRESSION BY PROSECUTING IT UNDER THE ODPA

21. The right to freedom of expression protects information regardless of the medium employed for dissemination.\(^{74}\) This includes internet-based modes of expression that serve as "one of the most powerful instruments of the 21\(^{st}\) century for … facilitating active citizen participation in building democratic societies."\(^{75}\) As such, attempts to "distort the workings of the internet and limit its democratizing potential … constitutes … a violation of [the] freedom of expression".\(^{76}\)

22. Scoops, the social media platform that had stored Peaps’ post, was prosecuted under the ODPA and fined US$200,000.\(^{77}\) This was done despite Scoops successfully removing all 21,000 shares of Peaps’ post after being informed by Kola’s legal counsel.\(^{78}\)

23. Although Turtonia may have acted in pursuance of the legitimate aim of protecting Kola’s rights to privacy and reputation,\(^{79}\) Turtonia’s prosecution of Scoops under the ODPA was unjustified because it was: (A) not prescribed by law; and (B) not necessary in a democratic society.

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

76 IACHR December 2013 Report (n 14) 503.

77 Para 12.1 of the Facts.

78 Para 9.2 of the Facts.

79 ICCPR art 17(2); ECHR art 8.
A. THE PROSECUTION WAS NOT PRESCRIBED BY LAW BECAUSE SECTION 1(A) OF
THE ODPA WAS NOT SUFFICIENTLY PRECISE

24. As stated above, a prosecution under a statute is prescribed by law if the statute is
sufficiently precise such that liability can be reasonably foreseen. The prosecution of
Scoops was not prescribed by law because section 1 of the ODPA was insufficiently
precise.

25. Section 1 was insufficiently precise because the terms “knowingly” and “knows or
consciously disregards” were vague. Scoops was prosecuted for knowingly distributing
an intimate image without Kola’s consent, despite the ODPA failing to define the
knowledge requirement. The usage of the knowledge requirement has generated
uncertainty for intermediaries as it is unclear when knowledge can be imputed on to
them. For example, in the context of the EU E-Commerce Directive, this requirement

80 See para 5 of this Memorial.
81 Sunday Times (n 15) para 49; Müller (n 21) para 29; Kokkinakis (n 21) para 40; Wingrove (n 21) para 40; Lindon
(n 21) para 41; Editorial Board (n 21) para 52; Siracusa Principles (n 21) principle 17; General Comment 16 (n 21)
para 3; UNHRC May 2011 Report (n 9) paras 31–32; General Comment 34 (n 6) paras 24–25.
82 Para 13.1 of the Facts.
83 European Commission, ‘Commission Staff Working Document: Online Services, Including E-Commerce, in the
has been interpreted by member states as being established in a myriad of ways, including by way of court order,\textsuperscript{85} user notice\textsuperscript{86} or general awareness of the illegality of a post by self-monitoring.\textsuperscript{87} Without a clear definition on this element of liability, intermediaries are left uncertain as to the preventive measures that can be undertaken. This results in over-censorship and a chilling effect on these intermediaries.\textsuperscript{88} Despite Kola’s staff failing to confirm the identity of the person depicted,\textsuperscript{89} knowledge had been imputed on to Scoops. This demonstrates an arbitrary application of a vague statute in a manner that Scoops could not reasonably have foreseen.

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

\textbf{B. THE PROSECUTION WAS NOT NECESSARY IN A DEMOCRATIC SOCIETY}

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

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


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


\textsuperscript{89} Para 9.2 of the Facts.

\textsuperscript{90} See para 9 of this Memorial.

\textsuperscript{91} \textit{Handyside} (n 15) para 48; \textit{Delfi June 2015} (n 35) para 131; \textit{Mac TV SRO} (n 35) para 39; General Comment 34 (n 6) paras 22, 33–34; UNHRC April 2013 Report (n 8) para 29.
1. There was no pressing social need to prosecute Scoops because the obligation to
determine the legality of Peap's post was unduly onerous

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

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

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

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

94 Google France, Google Inc v Louis Vuitton Malletier SA C–236/08 (CJEU, 23 March 2010) (‘Google France’)
para 114; L’Oreal SA v eBay C–324/09 (CJEU, 12 July 2011) (‘L’Oreal SA’) paras 111–113;

95 Delfi June 2015 (n 35) para 146.

96 Delfi June 2015 (n 35) paras 145–146; Google France (n 94) para 114; Eleonora Rabinovich, ‘Challenges
Facing Freedom of Expression: Intermediary Liability in Argentine Case-Law’ (Association for Civil Rights, 31

97 Delfi June 2015 (n 35) paras 144–146; Google France (n 94) para 114; Jaani Riordan, The Liability of Internet
Intermediaries (1st edn, Oxford University Publishing, 2016) (‘Liability of Internet Intermediaries’) paras 12.120,
12.123.
editorial control over the content stored on their platforms\textsuperscript{98} or restrict users from modifying stored content.\textsuperscript{99} Here, Scoops’ users have full discretion to create and upload content that immediately reaches their friends upon hitting the “send” button,\textsuperscript{100} save for limited categories of prohibited content.\textsuperscript{101} Further, while Scoops can increase the visibility of certain posts by way of a boosting mechanism,\textsuperscript{102} this mechanism was not involved in the dissemination of Peaps’ post.\textsuperscript{103}

30. Secondly, social media intermediaries generally lack the capacity to determine whether material stored on their platforms is illegal\textsuperscript{104} because the determination of illegality is “contextual and subjective”.\textsuperscript{105} As this task properly falls within the expertise of judicial or executive authorities, intermediaries should only be taken to know about the illegality

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


\textsuperscript{100} Para 5.3 of the Facts.

\textsuperscript{101} Para 9.2 of the Facts.

\textsuperscript{102} Para 5.3 of the Facts.

\textsuperscript{103} Para 7 of the Clarifications.


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

31. Thirdly, intermediaries should only be required to proactively remove their user content in exceptional situations, where the content is “on [its] face” manifestly illegal, amounting to incitement to hostility or direct threats to the physical integrity of individuals.\footnote{109}{Delfi June 2015 (n 35) para 114; Magyar Tartalomszolgáltatók Egyesülete v Hungary App no 22947/13 (ECtHR, 2 February 2016) (‘MTE’) para 63.} This recognises the pluralistic and self-regulating nature of social media,\footnote{110}{General Comment 34 (n 6) para 15; UNHRC, ‘Report of the Special Rapporteur on Minority Issues’ (5 January 2015) UN Doc A/HRC/28/64 (‘UNHRC January 2015 Report’) paras 60, 65, 94–100.} and it is thus sufficient for intermediaries to implement a notice-and-takedown
mechanism. Scoops had an online reporting system in place for users to provide notice to remove a post. Further, as Peaps’ post was not written in a hostile manner and did not contain any threats, there were no exceptional situations justifying the immediate removal of Peaps’ post.

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

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

112 Para 9.2 of the Facts.

113 Para 8.3 of the Facts.


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

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

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

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

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

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117 Para 5.1 of the Facts.

118 See para 17 of this Memorial.

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

120 Ceylan (n 15) para 47; Tammer (n 64) para 69; Skalka (n 64) paras 41–42; Cumpănă (n 64) para 111.
platforms, they should not be subjected to the same standards as content creators to prevent over-exposure to liability. Instead, such intermediaries are often afforded recourse to a safe harbour regime that exempts liability upon compliance with certain requirements. However, the ODPA did not provide for such a regime that distinguished between intermediaries and content creators. Scoops, the social media intermediary, had been fined under the statute and was therefore exposed to excessive liability.

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

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


124 Para 10.2 of the Facts.

125 Para 5.1 of the Facts.

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

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

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

38. Although states have a duty to curtail any “advocacy of national, racial or religious hatred that constitutes incitement to hostility, discrimination or violence”, the development of a tolerant, pluralist, and democratic society also requires states to refrain from excessively criminalising legitimate expression.

39. In response to Peaps’ attempt to publish information concerning a possible terrorist infiltration by True Religion members, who were distinct from the Aquarian immigrant community, Turtonia prosecuted Peaps under the IA and imposed a US$100,000 fine.

40. Although Turtonia may have acted in pursuance of the legitimate aim of protecting public order, Turtonia’s prosecution of Peaps under the IA was unjustified because it was: (A) not prescribed by law; and (B) not necessary in a democratic society.

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129 ICCPR art 20(2).


131 Para 12.1 of the Facts.
A. THE PROSECUTION WAS NOT PRESCRIBED BY LAW BECAUSE SECTION 1(B) OF THE IA WAS NOT SUFFICIENTLY PRECISE

41. As stated above, a prosecution under a statute is prescribed by law if the statute is sufficiently precise such that liability can reasonably be foreseen. The prosecution of Peaps was not prescribed by law because section 1(b) of the IA was insufficiently precise.

42. Section 1(b) of the IA was insufficiently precise because the phrase “civil unrest, hatred, or damage the national unity” was vague. Peaps was prosecuted under the IA even though these key terms were not defined. Legislations prohibiting incitement frequently prescribe heavy penalties and are susceptible to abuse for the purpose of suppressing dissenting voices if not clearly defined. Thus, states ought to define key terms such as “hatred”, “incitement”, “unrest”, and “national unity” in their legislations governing incitement. This has been noted by the United Nations, which has criticised

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132 See para 5 of this Memorial.

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

134 Para 12.1.2 of the Facts.

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


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

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

B. THE PROSECUTION WAS NOT NECESSARY IN A DEMOCRATIC SOCIETY

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

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

\textsuperscript{139} Para 11.2 of the Facts.

\textsuperscript{140} Para 3 of the Clarifications.

\textsuperscript{141} See para 9 of this Memorial.

\textsuperscript{142} Handyside (n\ 15) para 48; Delfi June 2015 (n\ 35) para 131; Mac TV SRO (n\ 35) para 39; General Comment 34 (n\ 6) paras 22, 33–34; UNHRC April 2013 Report (n\ 8) para 29.
1. There was no pressing social need to prosecute Peaps because Peaps' post did not amount to an incitement to hostility

45. The UN Rabat Plan provides a framework to determine whether publications amount to an incitement to hostility.143 The factors to consider include: the intention of the publisher; the context; the content of the publication; the likelihood of hostility, discrimination, or violence occurring; and the medium used.

46. Applying these factors, there was no pressing social need to prosecute Peaps. First, for an individual to be liable for incitement, there must be an intention for the publication to incite hostility.144 Such intention is objectively discerned from the publication’s content, read in light of its surrounding circumstances.145 Although Peaps deliberately chose to discuss the controversial topic of terrorist infiltration in Turtonia,146 this was done to boost his account’s viewership.147 Peaps’ lack of intent to incite hostility is further


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

146 Para 4.1 of the Facts.

147 Paras 12.2 of the Facts.
demonstrated by his online search, which was an attempt to ensure that he was the first to break the story.\textsuperscript{148} Further, the threshold for finding intention to incite hostility is high.\textsuperscript{149} Despite the fact that Peaps was a Turton Power member, his potential dissatisfaction with Kola’s immigration policies is insufficient to meet the requisite intention.

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

\textsuperscript{148} Para 12.2 of the Facts.

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

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

\textsuperscript{151} Para 2.1 of the Facts.

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

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

\textsuperscript{154} Para 8.3 of the Facts.

\textsuperscript{155} Para 3.2 of the Facts.
unwelcomed in both Turtonia and Aquaria alike.\footnote{Paras 3.1–3.2 of the Facts.}

48. Thirdly, the likelihood of hostility arising from a publication depends on whether the audience would interpret it as a call to hostility.\footnote{Alves Da Silva v Portugal App no 41665/07 (ECtHR, 20 October 2009) para 28; Susan Benesch, ‘Dangerous Speech: A Proposal to Prevent Group Violence’ (World Policy, 12 January 2012) <http://www.worldpolicy.org/sites/default/files/Dangerous%20Speech%20Guidelines%20Benesch%20January%202012.pdf> (‘Dangerous Speech’) accessed 21 January 2018, 4; Prohibiting Incitement (n 144) 39.} Such an interpretation would be less likely in the absence of an express call to hostility and where the publication’s tone is not hostile.\footnote{Arslan (n 145) para 45; Ergin v Turkey (No 6) App no 47533/99 (ECtHR, 4 May 2006) paras 32, 34; Gunduz (n 150) para 51; Ceylan (n 15) para 36; Tarlach McGonagle, ‘The Council of Europe against Online Hate Speech: Conundrums and Challenges’ (2013) <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c170f> (‘Conundrums and Challenges’) accessed 21 January 2018, 3, 13–14; Dangerous Speech (n 157) 2.} Peaps’ post was limited to an allegation of Kola’s sexual relationship with Parkta\footnote{Para 8.3 of the Facts.} and made no express reference to violence against the Aquarian immigrant community. Further, Peaps’ post included a revealing photoshopped image and an eye-catching title,\footnote{Para 8.3 of the Facts.} in a highly sensationalised manner. Peaps’ audience was thus likely to regard his post as an exposé about Kola, and not a call for violence against the Aquarian immigrant community.

49. Finally, users of social media are known for their tendency to fact-check rumours as they appear online.\footnote{Wouter Jong, ‘Self-Correcting Mechanisms and Echo-Effects in Social Media: An Analysis of the “Gunman in the Newsroom” Crisis’ (2016) 59 Computers in Human Behaviour 334; Hunt Allcott and Matthew Gentzkow, ‘Social Media and Fake News in the 2016 Election’ (2017) 31 Journal of Economic Perspectives 2, 223–231.} Peaps’ publication was posted on Scoops,\footnote{Para 8.1 of the Facts.} which operated as a two-way social media platform where users interacted by creating content, boosting and
forwarding posts to others.\textsuperscript{163} These response mechanisms stirred public discussion that would have facilitated the verification of Peaps’ post.\textsuperscript{164} Further, even though Peaps’ post garnered over 145,000 views on Scoops,\textsuperscript{165} few references were made to its content during the protests,\textsuperscript{166} underscoring a lack of belief in its accuracy.

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

2. \textit{The prosecution was disproportionate because it was excessive pursuant to international standards}

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

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

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\textsuperscript{163} Para 5.2 of the Facts.

\textsuperscript{164} Paras 8.4, 9.3 of the Facts.

\textsuperscript{165} Para 9.2 of the Facts.

\textsuperscript{166} Para 9.3 of the Facts.

\textsuperscript{167} See para 17 of this Memorial.

\textsuperscript{168} Malcolm Ross (n 13) para 11.6; UNHRC December 2009 Report (n 63) para 17.

\textsuperscript{169} Ceylan (n 15) para 47; Tammer (n 64) para 69; Skalka (n 64) paras 41–42; Cumpănă (n 64) para 111.
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published statements likely to incite hostility, states have generally issued warnings\textsuperscript{170} or court orders for the prompt removal of such publications,\textsuperscript{171} without imposing penalties. Even where a penalty was imposed, states such as Denmark,\textsuperscript{172} Germany,\textsuperscript{173} the Netherlands,\textsuperscript{174} Malta,\textsuperscript{175} Russia,\textsuperscript{176} and South Africa\textsuperscript{177} have only issued fines ranging from US$750–12,500 for the publication of speech that incite hostility on social media.

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


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


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

54. The universal nature of the right to freedom of expression means that “all forms of speech are protected … independently of their content.”\(^{178}\) Publications that may not be true are also entitled to protection\(^{179}\) because “the best test of truth is the power of the thought to get itself accepted in the competition of the market [of ideas]”.\(^{180}\)

55. The first direct suggestion that Peaps’ post was false only resulted from the letter from Kola’s legal counsel.\(^{181}\) Yet, Scoops was prosecuted under the IA and fined US$100,000 for communicating false information.\(^{182}\)

56. Although Turtonia might have acted in pursuance of the legitimate aim of protecting Kola’s right to reputation,\(^{183}\) Turtonia’s prosecution of Scoops under the IA was unjustified because it was: (A) not prescribed by law; and (B) not necessary in a democratic society.

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\(^{178}\) IACHR December 2009 Report (n 38) 220.

\(^{179}\) Handyside (n 15) para 49; Joint Declaration (n 74) para 2(a).


\(^{181}\) Para 9.2 of the Facts.

\(^{182}\) Para 13.2 of the Facts.

\(^{183}\) ICCPR art 17(2); ECHR art 8.
A. THE PROSECUTION WAS NOT PRESCRIBED BY LAW BECAUSE SECTION 3(C) OF THE IA WAS NOT SUFFICIENTLY PRECISE

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

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

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184 See para 5 of this Memorial.

185 Sunday Times (n 15) para 49; Müllner (n 21) para 23; Kokkinakis (n 21) para 40; Wingrove (n 21) para 40; Lindon (n 21) para 41; Editorial Board (n 21) para 52; Siracusa Principles (n 21) principle 17; General Comment 16 (n 21) para 3; UNHRC May 2011 Report (n 9) paras 31–32; General Comment 34 (n 6) paras 24–25.

186 Para 13.2 of the Facts.

187 Para 11.2 of the Facts.


189 Commission Staff Working Paper (n 83) 44.

190 Para 9.2 of the Facts.
a manner that it could not have reasonably foreseen.

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

B. THE PROSECUTION WAS NOT NECESSARY IN A DEMOCRATIC SOCIETY

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

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

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

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

191 See para 9 of this Memorial.

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

193 See para 28 of this Memorial.

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

195 See para 29 of this Memorial.
for the dissemination of Peaps’ post.

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

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

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196 See para 30 of this Memorial.

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

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

199 Para 11.2 of the Facts.

200 Paras 9.2, 12.3.4 of the Facts.

201 MTE (n 109) para 82.


203 Role and Responsibility (n 121) 10.
generally allow intermediaries between 2 to 7 days to remove illegal publications. Scoops’ successful removal of all 21,000 shares within 50 hours of receiving the letter from Kola’s legal counsel should thus be deemed sufficient.

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


205 Para 9.2 of the Facts.


209 Para 5.1 of the Facts.

210 Para 8.4 of the Facts.
become economically unsustainable and diminish their ability to facilitate public discussion.

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

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

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

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


213 See para 17 of this Memorial.

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

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

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

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


\textsuperscript{218} Para 9.2 of the Facts.


\textsuperscript{220} Para 5.1 of the Facts.
though it successfully removed Peaps’ post within 50 hours of being notified.²²¹ Turtonia could have resorted to other less restrictive measures in response to Scoops’ efforts.

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

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

²²¹ Para 9.7 of the Facts.

²²² See para 36 of this Memorial.
RELIEFS SOUGHT

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

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

Respectfully submitted 22 January 2018,

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Counsel for the Applicants