

2017/2018 PRICE MEDIA LAW MOOT COURT COMPETITION

PEAPS & SCOOPS

APPLICANTS

V

TURTONIA

RESPONDENT

MEMORIAL FOR RESPONDENT

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AComHPR	African Commission of Human and Peoples' Rights
App no	Application Number
App nos	Application Numbers
art	Article
arts	Articles
CEO	Chief Executive Officer
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUR	Euro
IA	Information Act of 2006
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ODPA	Online Dignity Protection Act of 2015
para	Paragraph
paras	Paragraphs
s	Section
ss	Sections
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly

URL	Uniform Resource Locator
US	United States
USD	United States Dollars
v	Versus

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STATEMENT OF RELEVANT FACTS

Political Situation in Turtonia

Turtonia is a small democratic country with ethnically homogeneous population. It is a member of the United Nations and has ratified the International Covenant on Civil and Political Rights. Turtonian highest source of law – the Basic Law for the Federal Republic of Turtonia – sets up the modern judiciary. All parties and their lawyers have the same rights and duties regarding presenting facts and evidence in support of their case without the assistance of the judge. The law adjudicated in court comes from the Turtonia Codes and is primarily codal in nature.

During the last three years, Turtonia faces a significant influx of immigrants from neighboring democratic country Aquaria, which in the majority shares the same ethnicity and religion. A particularly vocal group of Turtonian nationalists, who are completely dissatisfied with current migration policy, called themselves Turton Power and began publicly denouncing the Turtonian Minister of Immigration, Wani Kola. Their actions included several protests with a call to resignation, harassment and abuse online, and an attempt to assault her in a public place. Members of Turton Power, *inter alia*, claim that the immigrants have disrupted economy and diluted the culture of their native country.

Since 2015, a religious extremist group True Religion, widely regarded as terrorist organization in many countries, has intensified its activity in Aquaria. Its members have attacked mainstream religious institutions and schools, including murdering a dozen people on a university campus. Its leader, an Aquarian named Prinsov Parkta, is in hiding to avoid arrest and regularly appears on public videos calling to action.

Scoops and Its Presence in Turtonia

Scoops is the most popular social media platform, based in Turtonia. The user's profile consists of a screen name, topics of interests, and friends. Users can upload photos, videos and

up to 200 words of text, which will be seen by 20 others, who have listed a matching topic of interest. The viewer of the post can share it with his friends or dismiss it. The author can also pay for showing his posts to more other users. Scoops has created a publicly-visible “influencer score” for each profile, which indicates the number of readers, who have seen the content. The higher an “influencer score” is, the less users have to pay for showing their posts to a larger audience. Scoops CEO said, “An ‘influencer score’ is a fun way to see how many people you can influence. And it also creates an incentive for posters to create compelling content and for readers to keep sharing content when they see it, which is important to us, because whether people are sharing news, an opinion, or just the latest gossip, we want people to hear it first on Scoops.”

When users of Scoops sign up to the service they agree to Scoops’ Terms of Service that specify that they do not allow harmful and malicious content such as spam, non-consensual sharing of intimate images, hate speech or child exploitative imagery. The Scoops report form gives four options: “spam,” “threat of violence,” “child pornography,” and “a nude image of me shared without my consent.”

Post of Peaps

The post appeared on 2 May on the “XYZ News12” account, which was purposely created by the citizen of Turtonia, Niam Peaps. It contained an image showing Wani Kola's standing naked in a hotel room facing another person, whose right arm was on her left shoulder. The second individual appeared to be Prinsov Parkta. An image was accompanied by the text, accusing the Minister of Immigration of a ‘free handout’ of visas to terrorists. It also contained a spelling mistake in the Parkta’s name, naming him Princev. The post has reached more than 10,000 views on Scoops within the first hour of appearing.

Events after the Publication

XYZ Media – a popular TV news network, well-respected in Turtonia and neighboring countries – released a statement declaring that it had no role in the post and no connection to

the XYZ News12 Scoops account. Wani Kola's office has also released a statement calling the post "a horrific lie with no basis in fact," and reported to Scoops through Scoops' online reporting form about the violation of her rights. The staff selected "a nude image of me shared without my consent" as the reason to request removal of the post. On May 3 Wani 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 50 hours after the submission of the complaint. In the wake of the post, Wani Kola received harassment and death threats online and offline, including threatening phone calls at her office. The post has also led to ambiguous comments in Turtonia's major newspaper, TurtonTimes, which underlined the growing dissatisfaction with Wani Kola and alluded to her resignation.

On May 4 and May 5, protesters had a demonstration outside Wani Kola's office, which was by far the largest. A part of the signs, held by protesters, contained statements related to the post. On the evening of May 5, two Aquarian immigrants were beaten to death by an angry mob of at least 10 people that were yelling anti-Aquarian epithets. Wani Kola resigned from office on May 10 without public statement.

Adoption of the Online Dignity Protection Act of 2015

The Online Dignity Protection Act of 2015 was enacted by the Turtonian government in response to a growing problem of Non Consensual Sharing of Intimate Images. This Act prohibits the distribution of an image of another person whose intimate parts are exposed, which includes photographs, films, videotapes or other reproduction. The conduct of an individual, organization or other publisher would constitute an offence in case the actor knows or consciously disregards a risk of refusal of the depicted person to disseminate private information. The Online Dignity Protection Act does not apply to images involving voluntary exposure in public or commercial settings, and disclosures made in the public interest. A violation of this Act shall be punishable by a term of imprisonment not to exceed 5 years, a fine of up to 3 million units of Turtonian currency, or both.

Adoption of the Information Act of 2006

The Information Act of 2006 was passed after the distribution of fake documents, which purported to be real, ahead of the 2005 Turtonian General Elections. The government enacted this law in order to preserve the integrity of democracy and safeguard the peace.

This Act in Section 1.a implies the prohibition of communication to any person, by any means with information that the publisher knows to be false, in case it exposes another person to public hatred, contempt or ridicule, deprives such person of the benefits of public confidence and social acceptance, injures the reputation of any person, corporation or association in their business or occupation. Under its Section 1.b, it is also prohibited to knowingly or recklessly communicate false information with the intent to incite civil unrest, hatred, or damage the national unity. An online service provider is immune from liability for transmitting, caching or storing material in case it does not receive a financial benefit from the infringing activity, does not know the material or activity is infringing, expeditiously removes or disables access to such material, provides users with information about terminating repeat infringer`s subscriptions and accounts. A violation of Section 1.a of this act shall be punishable by a fine of up to 2 million units of Turtonian currency. A violation of Section 1.b of this act shall be punishable by a term of imprisonment not to exceed one year and a fine of up to 3 million units of Turtonian currency, or both.

Proceedings before Turtonian courts

The trial court has found that the image of Minister had been created by a member of Turton Power, who had taken a nude image from a free pornography site, photoshopped Wani Kola's head on to the body, and then photoshopped in an image of Parkta from a video of him speaking to True Religion followers. This image appeared on the Turton Power website in mid-April, but was removed on May 3.

Niam Peaps was identified through a Turtonian criminal search, which warrant asked for the subscriber information of the person who created and owned the “XYZ News12”

Scoops account. The court has stated that by publishing the image on Scoops, Niam Peaps, who was not entitled to protection under section 3.b of the ODPa, distributed an image of Wani Kola appearing to show her intimate parts, knowing or consciously disregarding a substantial and unjustified risk that she had not consented to the disclosure. Thereafter, for distributing a nude image of Wani Kola Niam Peaps was sentenced to two years' imprisonment under the ODPa. The court also convicted Niam Peaps to a fine equivalent of 100,000 USD for inciting violence, or being reckless as to whether violence was incited, through false information in violation of the IA.

According to the additional findings of the trial court, after receiving the report from Minister's staff and submitting a defamation claim by her legal counsel, Scoops knew or consciously disregarded a substantial and unjustified risk that Wani Kola had not consented to the disclosure, and failed to remove the post within a reasonable time. The court sentenced Scoops to a fine equivalent to 200,000 USD for distributing an image of Kola in violation of the ODPa, and to a fine equivalent of 100,000 USD for knowingly communicating false information in violation of the IA.

The Supreme Court of Turtonia declined to consider Niam Peaps' and Scoops' appeals, thereby exhausting their domestic remedies. Peaps and Scoops applied to the Universal Court of Free Expression. The Court has certified their appeals on four discrete issues:

Issue 1A: Whether Turtonia's prosecution of Peaps under the ODPa violates Article 19 of the ICCPR.

Issue 1B: Whether Turtonia's prosecution of Scoops under the ODPa violates this same international principle.

Issue 2A: Whether Turtonia's prosecution of Peaps under the IA violates Article 19 of the ICCPR

Issue 2B: Whether Turtonia's prosecution of Scoops under the IA violates this same international principle.

STATEMENT OF JURISDICTION

The Universal Court of Human Rights has jurisdiction to hear cases arising under the International Covenant on Civil and Political Rights ('ICCPR').¹ Since Turtonia has ratified the ICCPR,² the citizens of Turtonia enjoy the rights guaranteed by it. The parties, Peaps and Scoops (Applicants) and Turtonia (Respondent), have submitted their differences to the Universal Freedom of Expression Court,³ special chamber of the Universal Court of Human Rights.⁴ The issues arising from the differences relate to the right of freedom of expression under Article 19 of the ICCPR.⁵ Since the Applicants have exhausted all the domestic remedies within the Turtonian legal system,⁶ the Universal Freedom of Expression Court has the authority to act as the final adjudicator.

The State of Turtonia requests this Honorable Court to adjudge the dispute in accordance with the relevant rules and principles of international law.

¹ Price Media Law Moot Court Competition Rules, 2017-2018, para 5.4.a

² Competition case, para 1.1

³ Competition case, para 14.3

⁴ Price Media Law Moot Court Competition Rules, 2017-2018, paras 5.4.b-5.4.c

⁵ Competition case, para 14.3

⁶ Competition case, para 14.2

QUESTIONS PRESENTED

I. Whether Turtonia's prosecution of Peaps under the ODPa for dissemination of Kola's nude images complied with Article 19 of the ICCPR?

II. Whether Turtonia's prosecution of Scoops under the ODPa for dissemination of Kola's nude images complied with Article 19 of the ICCPR?

III. Whether Turtonia's prosecution of Peaps under the IA for inciting violence through false information complied with Article 19 of the ICCPR?

IV. Whether Turtonia's prosecution of Scoops under the IA for knowingly communicating false information complied with Article 19 of the ICCPR?

SUMMARY OF ARGUMENTS

I. Prosecution of Peaps under the ODPa complied with Article 19 of the ICCPR since it was provided by law, pursued a legitimate aim, and was necessary in a democratic society.

Firstly, the prosecution was provided by law, as Peaps' conduct was not covered by the public interest exception of the ODPa. Kola's image depicting her nude in front of Parkta and implying their sexual relationship merely satisfied the public curiosity, which cannot contribute to any debate of general interest.

Secondly, Turtonia's duty to protect Kola from the interference into her intimate life and ruining her reputation required Peaps' prosecution.

Thirdly, proper balance between freedom of expression and right to privacy was struck. Main goal of Peaps was to illustrate the sexual relationship between depicted people, which did not relate to Kola's official functions. An image was found by Peaps, a member of Turton Power, through a quick online search on the Turton Power website, critical of Kola. Furthermore, given the more powerful effect of the Internet, 21,000 shares and 145,000 views within 73 hours after publication caused significant damage to Kola's reputation.

Finally, penalty of two years imprisonment was in line with sentencing practices of other states, given harsh consequences for Kola including her resignation, and, thus, constituted a proportionate penalty.

II. Prosecution of Scoops was in line with Article 19 of the ICCPR as it was provided by law, pursued a legitimate aim, and was necessary in a democratic society.

Firstly, Scoops is a publisher, whose prosecution is provided by the ODPa. Scoops' ability to control and remove posts, combined with human review used for the selection of readers, deprived it of a 'passive intermediary' status. Alternatively, Scoops became liable as publisher of the material after the notification. In any event, being the biggest social platform in

Turtonia acting for commercial purposes, Scoops could have sought legal advice to foresee that its activities might fall under the ODPAs.

Secondly, given the wide dissemination of the post, accusations against Kola and her resignation, the prosecution of Scoops was aimed at protecting Kola's rights and reputation.

Finally, the prosecution of Scoops was necessary in a democratic society. The image depicted the most intimate part of Kola's private life and led to unprecedented accusations of her facilitating Aquarian terrorists in getting into Turtonia. In such cases, it is not excessive to prosecute both the author and the intermediary, since this is what the protection of victims of a crime requires. Accordingly, the fine imposed on Scoops was a fair response to the nature of offence and since it only amounted to 0,2% of Scoops' revenues, it was not excessive.

III. Prosecution of Peaps under the IA did not breach Article 19 of the ICCPR as it was provided by law, pursued a legitimate aim, and was necessary in a democratic society.

Firstly, the interference was adequately provided by the IA, which was clear, precise, and foreseeable. Moreover, Section 1(b) of the IA, prohibiting dissemination of false information, is consistent with the legislation in other jurisdictions.

Secondly, the prosecution of Peaps was required for the protection of public order, as due to Peaps' post effective and peaceful functioning of Turtonia was threatened.

Thirdly, at the time of the restriction there existed a '*pressing social need*' to prosecute Peaps. As Peaps pretended to have connection to "XYZ News" the most trustworthy and reliable media in Turtonia, he had necessary standing and influence. The post itself did not deserve protection, due to dissemination of false information, which exceeded the permitted degree of provocation. Moreover, the post led to violent consequences. The prosecution is also justified given the migration crisis and turbulent situation in Turtonia. Lastly, Turtonian court provided '*relevant and sufficient*' reasoning for the sentence, duly assessing the facts and compliance with international principles on freedom of expression.

Finally, the fine of 100,000 USD imposed on Peaps was stipulated in the lowest amount applicable, and was lesser in comparison to the practice of other states.

IV. Prosecution of Scoops under the IA did not violate Article 19 of the ICCPR since it was provided by law, pursued a legitimate aim, and was necessary in a democratic society.

Firstly, the restriction was appropriately provided by the IA, which was, *inter alia*, foreseeable. There was no need to specify an express time limit regarding the term ‘*expeditiously*’ in the IA due to the possible risk of over-regulation. However, since the domestic court’s interpretation of enactments in force is a part of domestic law, Scoops was supposed to know the relevant judicial practice or seek legal advice on the matter.

Secondly, given that publication of Peaps’ post became the reason Kola was deprived of the benefits of public confidence and subjected to harassment and death threats, the prosecution of Scoops under the IA pursued a legitimate aim of respect of Kola’s rights and reputation.

Thirdly, there was a pressing social need to prosecute Scoops for its failure to remove Peaps’ post because an immediate removal was required, while a 50 hours delay justifiably led to Scoops’ prosecution. Since Kola’s legal counsel letter constitutes a proper notification, Scoops was in a position to promptly conclude on the unlawfulness of the post. Further, the speed at which Scoops operates is high enough to require the same day removal.

Finally, the prosecution was proportionate since the fine of 100,000 USD was a moderate one comparing to sentencing practices of other states.

ARGUMENTS

I. TURTONIA'S PROSECUTION OF PEAPS UNDER THE ODPA COMPLIED WITH ARTICLE 19 OF THE ICCPR

Freedom of expression is one of the basic principles of democracy,⁷ representing an ability of every individual 'to express and disseminate'⁸ one's thoughts without 'pressure or interference by public authority'.⁹ This right, however, is not absolute.¹⁰ The state can protect society by taking special measures, which are justified in case they are provided by law, pursue a legitimate aim, and are necessary in a democratic society.¹¹ Turtonia argues that it met all the aforementioned criteria.

A. Turtonia's prosecution was provided by law

'Provided by law' criterion demands accuracy and predictability of a particular legal act.¹² Respondent submits that these requirements are satisfied in this case.

The law is precise and foreseeable if it makes possible to determine the responsibility for inadmissible behaviour¹³ and predict the consequences of non-compliance.¹⁴ The ODPA is

⁷ General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 21; Recommendation CM/Rec(2014)6 of the CM to Member States on a Guide to Human Rights for Internet Users (adopted 16 April 2014), para 1

⁸ African Charter on Human and Peoples' Rights ('ACHPR') (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 9

⁹ European Convention on Human Rights ('ECHR') (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 10 (1); Universal Declaration of Human Rights ('UDHR') (adopted 10 December 1948) UNGA Res 217A (III) art 19 (1); American Convention of Human Rights ('ACHR') (adopted 22 November 1969, entered into force 18 July 1978) art 13 (1); International Covenant on Civil and Political Rights ('ICCPR') (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19 (1)

¹⁰ General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 21; Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users (adopted 16 April 2014), para 2

¹¹ *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 45; *Interights and Others v Mauritania* Communication no 242/01 (ACoMHRP, 4 June 2004), paras 78-79; *Claude-Reyes and Others v Chile* (IACtHR, 19 September 2006), para 75; *Velichkin v Belarus* Communication no 1022/2001 UN Doc CCPR/C/85/D/1022/2001 (20 October 2005), para 7.3

¹² *Silver and Others v The United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75 (ECtHR, 24 October 1983), paras 86-87; *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984), paras 67-68

sufficiently accurate, as it clearly identifies the content prohibited for posting, and defines the amount of punishment for violation.¹⁵ It also provides the list of exceptions from liability.¹⁶ As to the public interest exception, Turtonia claims that Peaps' expression did not fall within its ambit.¹⁷

Individuals may expect the protection against the propagation of unfounded rumours relating to their private life,¹⁸ including its intimate aspects.¹⁹ Moreover, the purpose of satisfying the prurient curiosity of a particular readership regarding the details of a public figure's private life could not be deemed to contribute to any debate of general interest.²⁰

At hand, unreliable information illustrating the intimate life of Kola was disseminated to break the sex-for-visa story first to maximize Peaps' influence score on Scoops.²¹ Similarly to *Campmany Y Diez De Revenga and Lopez-Galiacho Perona v Spain*,²² where disseminated information about Applicant's romantic encounters was admitted very intimate to contribute to a public discussion, Kola's image depicting her nude in front of Parkta and implying their sexual

¹³ *Tammer v Estonia* App no 41205/98 (ECtHR, 6 February 2001), para 37; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 September 2004), para 43; *Goodwin v The United Kingdom* App no 17488/90 (ECtHR, 27 March 1996), para 31

¹⁴ *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988), para 29

¹⁵ Competition case, paras 10.2-10.3

¹⁶ Competition case, para 10.2.3.b

¹⁷ *ibid*

¹⁸ *Standard Verlags GmbH v Austria* App no 21277/05 (ECtHR, 4 June 2009), para 53; *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 109

¹⁹ *Lillo-Stenberg and Sæther v Norway* App no 13258/09 (ECtHR, 16 January 2014), para 30; *Mosley v The United Kingdom* App no 48009/08 (ECtHR, 10 May 2011), paras 109, 115; *Dudgeon v The United Kingdom* App no 7525/76 (ECtHR, 22 October 1981), para 52; *PJS v News Group Newspapers Ltd* [2016] EWCA Civ 393, para 18

²⁰ *MGN Limited v The United Kingdom* App no 39401/04, (ECtHR, 18 January 2011), para 143; *Standard Verlags GmbH v Austria* App no 21277/05 (ECtHR, 4 June 2009), para 52; *Biriuk v Lithuania* App no 23373/03 (ECtHR, 25 November 2008), paras 39-42; *Alkaya v Turkey* App no 42811/06 (ECtHR, 9 October 2012), para 35; *Société Prisma Presse v France* App nos 66910/01 and 71612/01 (ECtHR, 1 July 2003)

²¹ Competition case, para 8

²² *Campmany Y Diez De Revenga and Lopez-Galiacho Perona v Spain* App no 54224/00 (ECtHR, 12 December 2000)

relationship also merely satisfied the public curiosity. Therefore, distribution of her image pursued the goal of discussing merely her private life, which cannot be a matter of general interest.²³

B. Turtonia's prosecution of Peaps protected Kola's rights and reputation

Safeguarding the rights and reputation of targeted individuals²⁴ is a legitimate aim for the restriction, explicitly provided by international law.²⁵ ECtHR admitted that such protection also extends to politicians.²⁶ Furthermore, contrary to *Janowski v Poland*,²⁷ Minister was not acting in her official capacity. Consequently, Turtonia's duty to protect Kola from the interference into her private life and ruining her reputation required Peaps' prosecution.

C. Peaps' prosecution was necessary in a democratic society

The necessity of restriction in a democratic society implies its proportionality to the legitimate aim, and the relevant and sufficient reasons adduced by the national authorities to justify it.²⁸ In *Axel Springer AG v Germany*, ECtHR set out six criteria for balancing exercise between the freedom of expression and privacy.²⁹ Turtonia claims that all these criteria taken cumulatively justified Peaps' prosecution.

²³ *Armonienė v Lithuania* App no 36919/02 (ECtHR, 25 November 2008), para 39; *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 109; *Hachette Filipacchi Associés (ICI PARIS) v France* App no 12268/03 (ECtHR, 23 July 2009), para 40

²⁴ *Kurski v Poland* App no 26115/10 (ECtHR, 5 October 2016), para 48

²⁵ ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19 (3); ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 art 10 (2); UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 19; ACHR (adopted 22 November 1969, entered into force 18 July 1978) art 13(2) (a)

²⁶ *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986), para 42; *Keller v Hungary* App no 33352/02 (ECtHR, 4 April 2006)

²⁷ *Janowski v Poland* App no 25716/94 (ECtHR, 21 January 1999), para 33

²⁸ *Hertel v Switzerland* App no 25181/94 (ECtHR, 25 August 1998), para 46; *The Sunday Times v The United Kingdom (no 2)* App no 13166/87 (ECtHR, 26 November 1991), para 50

²⁹ *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012), para 89

a. The contribution of publication to a debate of general interest

An initial essential criterion is the contribution made by photos to a debate of general interest.³⁰ As was mentioned beforehand, Peaps' post was not covered by the 'public interest' exception from the ODPA,³¹ as it contained unreliable information highlighting features of Kola's intimate life.³²

b. The notoriety of Kola and the subject matter of the publication

Political figures are subject to the meticulous attention of one's fellow citizens, including areas that come within their private lives.³³ It was repeatedly stressed that even if someone is known to the general public, this person may rely on a legitimate expectation of privacy,³⁴ albeit a lesser one than private individuals.³⁵ Therefore, Turtonia submits that Kola, being the Minister of Immigration,³⁶ may face only such interference into the right of protection of her image, which relates to her official functions. However, according to Peaps, his main goal was to illustrate the relationship between Kola and Parkta³⁷ rather than to raise a discussion on migration issues.

³⁰ *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 109; *Leempoel & SA ED Ciné Revue v Belgium* App no 64772/01 (ECtHR, 9 November 2006), para 68; *Standard Verlags GmbH v Austria* App no 21277/05 (ECtHR, 4 June 2009), para 46

³¹ see Section I.A of the Memorial

³² Competition case, para 8

³³ *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015), para 120

³⁴ *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 44; *Katz v United States* 389 US 347 (1967); *United States v Jacobsen* 466 US 109 (1984)

³⁵ *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986), para 21; *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 110; *Ruusunen v Finland* App no 73579/10 (ECtHR, 14 January 2014), para 41

³⁶ Competition case, para 4.1

³⁷ Competition case, para 12.2

c. The prior conduct of Kola

ECtHR stated that an individual's conduct towards the previous publications touching one's private life³⁸ as well as the fact of cooperation with the press on those occasions³⁹ must be taken into consideration. However, both of these points cannot serve as an argument for depriving a person of all protection.⁴⁰

d. Method of obtaining the information and its veracity

The veracity⁴¹ and methods of obtaining⁴² of the disseminated information have repeatedly been recognized considerable factors. Right to divulge information on issues of general interest is safeguarded subject to the proviso that it is 'reliable and precise', containing an accurate factual basis.⁴³ In *Flinkkilä and Others v Finland*, the importance of permission of the depicted person on taking and disseminating private photos was underlined.⁴⁴

Here, an image was both artificially created and distributed without Kola's consent.⁴⁵ Peaps has found it doing a quick online search on the Turton Power website,⁴⁶ critical of Kola,

³⁸ *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015), para 130; *Sapan v Turkey* App no 36075/03 (ECtHR, 3 May 2007), para 34; *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), paras 111

³⁹ *Egeland and Hanseid v Norway* App no 34438/04 (ECtHR, 16 April 2009), para 62

⁴⁰ *ibid*

⁴¹ *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015), para 134; *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 113; *Flinkkilä and Others v Finland* App no 25576/04 (ECtHR, 6 April 2010), para 81; *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007), para 152

⁴² *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999), para 54; *Mosley v The United Kingdom* App no 48009/08 (ECtHR, 10 May 2011), para 115; *MGN Limited v The United Kingdom* App no 39401/04 (ECtHR, 18 January 2011), para 143

⁴³ *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004), para 78; *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994), para 31; *MGN Limited v The United Kingdom* App no 39401/04, (ECtHR, 18 January 2011), para 141; *Stoll v Switzerland* App no 69698/01 (ECtHR, 10 December 2007), para 103

⁴⁴ *Flinkkilä and Others v Finland* App no 25576/04 (ECtHR, 6 April 2010), para 81

⁴⁵ Competition case, paras 12.2.2-12.2.4

⁴⁶ Competition case, para 12.2

and has not checked its credibility. Being the member of Turton Power,⁴⁷ he used an image, found on the portal of his organization, to publicly denounce Kola, in line with the similar denunciations in the past.⁴⁸ In any way, it appeared to be obtained through fraudulent or clandestine operations,⁴⁹ i.e. taking photos from outside the hotel room window with neither person being aware of the camera.⁵⁰

e. Content, form and consequences of the publication

The way of dissemination and the manner of depicting the person in the photo are of paramount importance.⁵¹ In *Egeland and Hanseid v Norway*, distribution of the pejorative photo was recognized a severe violation.⁵² The extent of dissemination also plays significant role,⁵³ given that publication in the Internet⁵⁴ has more immediate and powerful effect than the print media.⁵⁵

In Peaps' case, the image of Kola, depicting her nude in front of the leader of terrorist organization,⁵⁶ gained 21,000 shares and 145,000 views within 73 hours after publication.⁵⁷

⁴⁷ Competition case, para 7.1

⁴⁸ Competition case, para 4.1

⁴⁹ *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015), para 123; *Von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004), para 68

⁵⁰ Competition case, para 8.1

⁵¹ *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 112; *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft mbH v Austria (no 3)* App nos 66298/01 and 15653/02 (ECtHR, 13 December 2005), para 47; *Reklos and Davourlis v Greece* App no 1234/05 (ECtHR, 15 January 2009), para 42; *Jokitaipale and Others v Finland* App no 43349/05 (ECtHR, 6 April 2010), para 68

⁵² *Egeland and Hanseid v Norway* App no 34438/04 (ECtHR, 16 April 2009), para 61

⁵³ *Von Hannover v Germany (no 2)* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 112; *Karhuvaara and Iltalehti v Finland* App no 53678/00 (ECtHR, 16 November 2004), para 47; *Gurgenidze v Georgia* App no 71678/01 (ECtHR, 17 October 2006), para 55

⁵⁴ Competition case, paras 12.2.2-12.2.4

⁵⁵ *Egill Einarsson v Iceland* App no 24703/15 (ECtHR, 7 November 2017), para 46; *Animal Defenders International v The United Kingdom* App no 48876/08 (ECtHR, 22 April 2013), paras 119, 124; *Fatullayev v Azerbaijan* App no 40984/07 (ECtHR, 22 April 2010), para 95

⁵⁶ Competition case, para 8

⁵⁷ Competition case, para 9.2

Moreover, the post led to several harassment, online and offline death threats to Kola⁵⁸ and her resignation.⁵⁹

f. Severity of the sanction imposed

Proportionality requires application of the ‘*least intrusive measure to achieve the intended legitimate objective*’,⁶⁰ which is reasonable in the particular circumstances of the case.⁶¹ Turtonia claims that two years imprisonment was a proportionate sanction for Peaps.

Firstly, the nature and severity of the penalty were relevant.⁶² Dozens of democratic states have established revenge porn laws, including the US states,⁶³ Australia,⁶⁴ Israel,⁶⁵ India,⁶⁶ England,⁶⁷ and Scotland,⁶⁸ with the punishment varying between 2-10 years of imprisonment. As to the prosecution of Peaps, the criminal offences under the ODPa are punishable up to 5 years imprisonment. Turtonia sentenced Peaps to less than a half of the maximum term,⁶⁹ which indicates the fairness and consideration in the court’s judgement.⁷⁰

⁵⁸ *ibid*

⁵⁹ Competition case, para 9.6

⁶⁰ General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 34

⁶¹ *Van Hulst v The Netherlands* Communication no 903/1999 UN Doc CCPR/C/82/D/903/1999 (15 November 2004), para 7.10

⁶² *Yarar v Turkey* App no 57258/00 (ECtHR, 19 December 2006), para 41; *Kwiecień v Poland* App no 51744/99 (ECtHR, 9 January 2007), para 56

⁶³ Alabama Senate Bill 301 2017; House File 526 of Iowa 2017; Senate Bill S2725A of the State of New York 2017; House Bill 2250 of the State of Washington 2014; House Bill 399 of the State of North Carolina 2017; House Bill 1750 of the State of Hawaii 2014; Senate Bill S F 2713 of the State of Minnesota 2016, s 9(2); House Bill of the State of Georgia 2014, s 1(3(c))

⁶⁴ New South Wales' Crimes Amendment (Intimate Images) Bill 2017, ss 91P-91R

⁶⁵ Israeli Amendment to the Prevention of Sexual Harassment Law 2014, s 3(A)

⁶⁶ Indian Information Technology Amendment Act 2008, s 67-A

⁶⁷ UK Criminal Justice and Courts Act 2015, ss 33-35

⁶⁸ Scottish Abusive Behaviour and Sexual Harm Bill 2016, s 2(7)

⁶⁹ Competition case, para 12.1.1

⁷⁰ *Curet-Velazquez v ACEMLA de Puerto Rico Inc* No 10-CV-01587 (1st Cir 29 August 2011)

Secondly, the proportionality of the sanctions is to be considered in light of the actual impact of the expression on the protected interest.⁷¹ At present, Kola received harassment and death threats,⁷² and faced a demonstration accompanied by offensive slogans, which were partly related to the disseminated image.⁷³ All of the above led to her resignation.⁷⁴ Given the substantial damage to Kola's rights and reputation, the imprisonment was justified.

Hence, Turtonia complied with Article 19 of the ICCPR.

II. TURTONIA'S PROSECUTION OF SCOOPS UNDER THE ODPa COMPLIED WITH ARTICLE 19 OF THE ICCPR

A. Scoops' prosecution was provided by law

Under Turtonia's view, the ODPa is foreseeable enough.⁷⁵ It defines the offence of nude photos distribution, provides all essential notions and clearly prescribes the punishment for the violation.⁷⁶ However, the issue may arise as to the definition of 'publisher'. In the case at hand, Respondent argues that (a) Scoops qualifies as publisher under the ODPa, or (b) that Scoops could have understood it may qualify as one.⁷⁷

a. Scoops shall be classified as publisher

It is well-accepted that an intermediary of 'a mere technical, automatic and passive nature' shall not be subject to any form of liability.⁷⁸ In *Delfi AS v Estonia* ECtHR was satisfied that

⁷¹ *Herrera-Ulloa v Costa Rica* (IACtHR, 2 July 2004), para 129

⁷² Competition case, para 9.2

⁷³ Competition case, para 9.4

⁷⁴ Competition case, para 9.6

⁷⁵ *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990), para 27

⁷⁶ Competition case, para 10.2

⁷⁷ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 129; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 51

⁷⁸ Joined Cases C-236/08 to C-238/08 *Google France SARL and Google Inc v Louis Vuitton Malletier SA and Others* [2010] OJ C134/2, paras 114, 120; C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2010] OJ C269/3, para 115

Delfi's activity in making comments available to the public '*went beyond that of a passive, purely technical service provider*'.⁷⁹ There, Delfi regulated its comments environment by prohibiting the publication of certain comments and having an ability to remove them.⁸⁰ In *Lafesse v MySpace*, MySpace qualified as publisher, since it offered a presentation structure via frames to its users and displayed banners from which it drew profits.⁸¹ In any event, in *Davison v Habeeb* it was held that upon receiving a notification about hosting unlawful content, the intermediary can become liable for continued publication of the material complained of.⁸²

In this case, Scoops created its terms of service that prohibited the posts with harmful and malicious content.⁸³ Scoops was in a position to remove posts, which breached those terms.⁸⁴ Importantly, it could select the receiver of its news, since it used human review in assisting the content to reach users who are interested in it.⁸⁵ In any event, on May 2 Scoops received the notification of illegal image being distributed through its platform⁸⁶ and since became a publisher for the purposes of the ODP.

It is, thus, established that Turtonian courts did not err in applying the ODP.

b. Scoops could have foreseen that it qualified as publisher

In *Delfi*, ECtHR accepted that applicant could have foreseen its liability as a publisher.⁸⁷ Regard was given to the size of Delfi, the economic nature of its activities and its possibility to

⁷⁹ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 146

⁸⁰ *ibid* para 145

⁸¹ *Lafesse v MySpace* [2007] No 07/03141

⁸² *Davison v Habeeb and Others* [2011] EWHC 3031

⁸³ Competition case, para 9.2

⁸⁴ *ibid*

⁸⁵ Competition case, para 5.1

⁸⁶ Competition case, para 13.2

⁸⁷ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 129

obtain legal advice in the respective field.⁸⁸ Accordingly, it was concluded that Delfi ‘*was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail*’.⁸⁹

This case concerns the liability of the most popular media platform with large revenues amounting to 100,000,000 USD.⁹⁰ Scoops has interest in news being spread through the portal: its CEO admitted that they implemented ‘*influence score*’ function to incite users to create and share content.⁹¹ Hence, Scoops wants people to discover all news, opinions, and gossips through the portal.⁹²

Consequently, such platforms as Scoops can ‘*be expected to take special care in assessing the risks that [their] activity entails*’.⁹³ Hence, the ODPa was foreseeable and Scoops’ prosecution was provided by law.

B. Scoops’ prosecution pursued a legitimate aim

The nude picture of Kola seen by 145,000 users led to her being publicly denounced, accused of an affair with the leader of Aquarian terrorists and to her resignation. Thus, Respondent claims that the prosecution of Scoops was aimed at the protection of Kola’s rights and reputation.⁹⁴

⁸⁸ *ibid*

⁸⁹ *ibid*

⁹⁰ Competition case, para 5.1

⁹¹ Competition case, para 5.3

⁹² *ibid*

⁹³ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 49

⁹⁴ ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19 (3) (b); UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 29 (2); ECHR (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 132 art 10 (2); ACHR (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 art 13 (2) (a)

C. Scoops' prosecution was necessary in a democratic society

As to the necessity of the interference, assessment shall be made as to the criteria, established in *Delfi* and modified in *MTE and Index.hu v Hungary*, with regard to the liability of protagonists playing an intermediary role on the Internet.⁹⁵

a. Context and content of Peaps' publication

ECtHR held that it is significant that applicants were large companies pursuing an economic purpose when assessing the necessity of their prosecution.⁹⁶ The fact that intermediary was actively calling for comments on its news items was also considered.⁹⁷ As to the content of the post, in *Ruusunen v Finland* it was concluded that the mere descriptions of the Finnish prime minister's sex life does not enjoy protection.⁹⁸

Respondent argued earlier that Scoops is the largest social platform in Turtonia with 100,000,000 USD revenue,⁹⁹ which is interested in news, opinions and gossips being posted on it.¹⁰⁰ Unlike in *Kucharczyk v Poland*, the post in this case was related to Kola's intimate rather than professional life.¹⁰¹ It depicted Kola naked and involved in sexual relations.¹⁰² This did not prove the accusations against her, but simply illustrated the most intimate part of her private life.

⁹⁵ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 69

⁹⁶ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 144; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 73

⁹⁷ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 144

⁹⁸ *Ruusunen v Finland* App no 73579/10 (ECtHR, 14 January 2014), paras 51-52

⁹⁹ Competition case, para 5.1

¹⁰⁰ *ibid* para 5.3

¹⁰¹ *Kucharczyk v Poland* App no 3464/06 (ECtHR, 8 December 2009), para 35

¹⁰² Competition case, paras 8.1-8.2

b. Liability of Peaps as the author

Even though ECtHR agreed that the prosecution of the actual author of comments ‘*could serve as a sensible alternative*’ to the liability of intermediary,¹⁰³ in *K.U. v Finland* it rejected Finland’s argument that in the context of criminal proceedings it is enough to obtain justice only from one actor.¹⁰⁴ It was not considered excessive to prosecute both the author and the intermediary, since it is what ‘*the public interest and the protection of the interests of victims of crimes committed against their physical or psychological well-being require*’.¹⁰⁵

c. Measures taken by Scoops and Kola’s conduct

Furthermore, conduct of Scoops and the means at its disposal aimed at preventing the use of the portal for illegal purposes are to be considered.¹⁰⁶ Delfi had some filtering mechanisms in place, a team of moderators, notice-and-take-down system and a disclaimer that only the writers of the comments are accountable for them.¹⁰⁷ In *MTE* an important factor was that the injured party never requested removal of comments, but went directly to court.¹⁰⁸

The case of Scoops differs in that it was requested to remove unlawful image before any intention to file a suit was proclaimed.¹⁰⁹ Unlike Delfi or Index.hu, Scoops had only the notice-and-take down procedure in place, which was ineffective for 66 hours in Kola’s case.¹¹⁰ No other means of protection are provided to persons, whose images were shared without consent. For example, Facebook is fighting revenge porn by setting a team of qualified professionals, who

¹⁰³ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 147

¹⁰⁴ *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008), para 47; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 149

¹⁰⁵ *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008), para 47

¹⁰⁶ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 154

¹⁰⁷ *ibid* paras 154-159

¹⁰⁸ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016), para 83

¹⁰⁹ Competition case, para 9.2

¹¹⁰ *ibid*

review the reported image, disable the account of the offender and implement photo-matching technologies to help thwart further attempts to share the image.¹¹¹ None of these were available to Kola, as Scoops failed to take necessary care to protect her rights and reputation.

d. Consequences of the publication for Kola

There was a compelling need to prosecute Scoops for distribution of Kola's images, since it caused adverse effects for her as an injured party. Even though the debates over her suitability for the ministerial post were ongoing,¹¹² it is only after the post she had been accused of facilitating Aquarian terrorists in getting into Turtonia. She was criticized for allowing immigrants who, as Turton Power claimed, disrupted economy or diluted the culture.¹¹³ After the post, the largest protest against her took place accusing her of sleeping with Parkta and handing visas for terrorists,¹¹⁴ which made her resign on May 10.¹¹⁵

e. Consequences for Scoops

When assessing the consequences for the applicant, in *Delfi* attention was paid to the fact that the fine imposed did not lead to the change of Delfi's business model.¹¹⁶ Scoops remains the most popular social media in Turtonia,¹¹⁷ with annual revenues equalling 100,000,000 USD.¹¹⁸ Thus, a fine of 200,000 USD amounts to 0,2% of its revenues and could not adversely influence the operation of its activities or compel Scoops to change its business model.

Hence, Turtonia complied with Article 19 of the ICCPR.

¹¹¹ Antigone Davis, *Using Technology to Protect Intimate Images and Help Build a Safe Community* <<https://newsroom.fb.com/news/2017/04/using-technology-to-protect-intimate-images-and-help-build-a-safe-community/>> accessed 12 November 2017

¹¹² Competition case, para 4.1

¹¹³ *ibid*

¹¹⁴ Competition case, para 9.4

¹¹⁵ Competition case, para 9.6

¹¹⁶ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), para 161

¹¹⁷ Competition case, para 5.1

¹¹⁸ *ibid*

III. TURTONIA'S PROSECUTION OF PEAPS UNDER THE IA COMPLIED WITH ARTICLE 19 OF THE ICCPR

Turtonia submits that Peaps' prosecution was (A) provided by law, (B) pursued a legitimate aim, and (C) was necessary in a democratic society.¹¹⁹

A. Peaps' prosecution was provided by law

The law must be sufficiently precise to allow an individual to behave accordingly.¹²⁰ The consequences of individual's actions should be foreseeable, but not with absolute certainty.¹²¹

In our case, the IA is clear and precise, prescribing the actions that are prohibited, the intent for them, and consequences.¹²² The prohibition of communication of false information that injures individual, business or public order is similar to the legislation of, in particular, Canada,¹²³ the UK,¹²⁴ Norway,¹²⁵ Malaysia,¹²⁶ Uganda,¹²⁷ some states of Mexico¹²⁸ and the US.¹²⁹ Thus, the restriction was lawful.

¹¹⁹ ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19

¹²⁰ *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 49; General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 25

¹²¹ *Handyside v The United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 48; *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 49; *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990), paras 27-36

¹²² Competition case, para 11.2.1

¹²³ Canadian Criminal Code 1985, s 181

¹²⁴ UK Malicious Communications Act 1988, s 1

¹²⁵ Norwegian Civil Penal Code 1902, s 135(a)

¹²⁶ Malaysian Penal Code, s 177

¹²⁷ Ugandan Penal Code Act, s 50

¹²⁸ Committee to Protect Journalists, 'Critics are not Criminals – Comparative Study of Criminal Defamation Laws in the Americas' (2016) Thomson Reuters Foundation and Debevoise and Plimpton LLP <https://cpj.org/reports/critics_are_not_criminals-english.pdf> accessed 16 November 2017

¹²⁹ *ibid*

B. Peaps' prosecution was required to protect public order

The restriction must be required by a compelling public interest, which outweighs the enjoyment of freedom of expression.¹³⁰ Respondent submits that Peaps' prosecution pursued legitimate aim of the public order protection,¹³¹ which embodies the set of rules that ensure society's effectiveness and peacefulness.¹³² It refers both to the physical order, and to the full enjoyment of the individuals' rights.¹³³ Here, the consequences of Peaps' post were opposite to effective and peaceful functioning of society, as protests occurred, Kola received harassment and death threats, and two Aquarians were murdered.¹³⁴ Consequently, Peaps' prosecution was designed to safeguard physical order of citizens.

C. Peaps' prosecution was necessary in a democratic society

While States enjoy margin of appreciation in evaluating the necessity,¹³⁵ Turtonia claims that there was (a) a '*pressing social need*', and (b) Peaps' prosecution was proportionate.

¹³⁰ *Ricardo Canese v Paraguay* (IACtHR, 31 August 2004), para 81

¹³¹ ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 art 19

¹³² *Scanlen and Holderness v Zimbabwe* Communication no 297/05 (AComHPR, 3 April 2009), para 109

¹³³ *Engel and Others v Netherlands* App nos 5100/71, 5101/71, 5102/71 and 5354/72 (ECtHR, 23 November 1976), para 98; Toby Mendel, '*Restricting Freedom of Expression: Standards and Principles*' (Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression) (2010) <<http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>> accessed 16 November 2017

¹³⁴ Competition case, paras 9.1, 9.4, 9.5

¹³⁵ General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 36; *Länsman et al v Finland* Communication no 511/1992 UN Doc CCPR/C/52D/511/1992 (1993), para 7.13; *Barfod v Denmark* App no 11508/85 (ECtHR, 22 February 1989), para 28

a. *Peaps' prosecution corresponded to a 'pressing social need'*

In accordance with the criteria articulated in *Perinçek v Switzerland*¹³⁶ and modified recently in *Dmitriyevskiy v Russia*, the test for establishing a 'pressing social need' in cases involving incitements is four-fold.¹³⁷

i. Peaps' status as speaker

The crucial factor is speaker's position and influence.¹³⁸ When the speaker has standing and influence, prosecution is justifiable.¹³⁹ In the present case, Peaps, although being a private individual,¹⁴⁰ used XYZ News12 account, created one day prior to the publication.¹⁴¹ Thus, he pretended to be connected to XYZ News,¹⁴² the most objective and reliable media.¹⁴³ Peaps even selected XYZ News as a topic of interest.¹⁴⁴

ii. Nature and wording of Peaps' post

Turtonia claims that Peaps' post shall not deserve protection, since it was false, constituted gratuitous attack on Kola, and incited violence. Had the post referred to the matter of public concern, the freedom of political debate is nevertheless not unrestricted.¹⁴⁵

¹³⁶ *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), paras 205-208

¹³⁷ *Dmitriyevskiy v Russia* App no 42168/06 (ECtHR, 3 October 2017), para 102

¹³⁸ 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), para 29 <http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf> accessed 13 October 2017

¹³⁹ *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997), para 50

¹⁴⁰ Competition case, para 7.1

¹⁴¹ Competition case, para 7.1

¹⁴² Competition case, para 8.3

¹⁴³ Competition case, para 6.1

¹⁴⁴ Competition case, para 8.3

¹⁴⁵ *Karataş v Turkey* App no 23168/94 (ECtHR, 8 July 1999), para 50; *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004), para 73; *Castells v Spain* App no 11798/85 (ECtHR, 23 April 1992), para 56; *Mémoli v Argentina* (IACtHR, 22 August 2013), para 122; *Schwabe v Austria* App no 13704/88 (ECtHR, 28 August 1992), para 34; *Busuioc v Moldova* App no 61513/00 (ECtHR, 21 December 2004), para 59; *Kimel v Argentina* (IACtHR, 2 May 2008), para 79

Firstly, it is widely recognized that the speaker is subject to the proviso to act in good faith, on accurate factual basis, providing ‘*reliable and precise*’ information.¹⁴⁶ As follows from *Mémoli v Argentina*, this implies the right of the audience not to receive a manipulated version of the facts.¹⁴⁷ Even though false statements are generally protected, they should be substantially correct, made without the intention to imply a falsehood,¹⁴⁸ particularly if accusations are serious.¹⁴⁹ The reader of ‘*ordinary intelligence*’, that is one who exercises care, but not omniscience,¹⁵⁰ must understand that statements do not state the actual fact.¹⁵¹

In this case, Peaps’ post constituted incontestable defamation devoid of any foundation,¹⁵² with the name of Parkta spelled inaccurately.¹⁵³ Even if Peaps thought that XYZ News would break the story,¹⁵⁴ this did not prove its truthfulness. Instead of proper verification of information, Peaps merely made a ‘*quick online search*’ just to ensure that he was the first to post the news.¹⁵⁵ Further, XYZ News had its own Scoops account,¹⁵⁶ and immediately denied any connection to the post.¹⁵⁷ Peaps pretended to represent the most trusted media, as well as

¹⁴⁶ *Bédat v Switzerland* App no 56925/08 (ECtHR, 29 March 2016), para 58; *Mémoli v Argentina* (IACtHR, 22 August 2013), para 122

¹⁴⁷ *Mémoli v Argentina* (IACtHR, 22 August 2013), para 122

¹⁴⁸ *Schwabe v Austria* App no 13704/88 (ECtHR, 28 August 1992), para 34; *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004), paras 72, 76; *Le Pen v France* App no 18788/09 (ECtHR, 20 April 2010)

¹⁴⁹ *Perna v Italy* App no 48898/99 (ECtHR, 6 May 2003), para 44

¹⁵⁰ *New Times Inc v Isaacks* 146 SW 3d 144 (2004), para 65

¹⁵¹ *Europapress Holding Doo v Croatia* App no 25333/06 (ECtHR, 22 October 2009), para 60; *Barfod v Denmark* App no 11508/85 (ECtHR, 22 February 1989), para 33; *Turner v Ktrk Television, Inc and Wayne Dolcefino* 38 SW 3d 103 (2000); *Trustco Group International Ltd and Others v Shikongo SA* 8/2009 (NaSC, 7 July 2010), para 66

¹⁵² Competition case, para 12

¹⁵³ Competition case, para 8.3; Clarification Questions and Answers, 12

¹⁵⁴ Competition case, para 12.2

¹⁵⁵ Competition case, para 12.2

¹⁵⁶ Competition case, para 6

¹⁵⁷ Competition case, para 9.1

provided citations from Kola's surrounding and attached the photo.¹⁵⁸ Consequently, Peaps deliberately implied falsehood in a cruel and calculative manner, leaving readers in no doubt as to the truthfulness of the information.

Secondly, notwithstanding that the degree of provocation is allowed,¹⁵⁹ this is inapplicable to gratuitous personal attack, unless an objective explanation is provided.¹⁶⁰ Turtonia argues that Peaps' post is nothing but gratuitous personal attack on Kola. It was presented without objective explanation, constituting unsubstantiated accusations solely of Kola, particularly 'tryst', 'free handout', 'ordering the destruction of documents'.¹⁶¹ The use of Scoops posed particular danger, as the risk of harm posed by the content on the Internet to the exercise of human rights is certainly higher than that posed by the press.¹⁶²

Thirdly, States enjoy a wider margin of appreciation where remarks incite violence against a public official or a sector of the population.¹⁶³ A direct and immediate connection is required between the expression and violence.¹⁶⁴

Turtonia submits that the events of May 4-5 occurred as a direct consequence of the post. Two protests against Kola and Aquarians were held, being bigger than previously.¹⁶⁵ Some of

¹⁵⁸ Competition case, para 8.3

¹⁵⁹ *Prager and Oberschlick v Austria* App no 15974/90 (ECtHR, 26 April 1995), para 38; *Perna v Italy* App no 48898/99 (ECtHR, 6 May 2003), para 38; *Ormanni v Italy* App no 30278/04 (ECtHR, 17 July 2007), para 59

¹⁶⁰ *Mamère v France* App no 12697/03 (ECtHR, 7 November 2006), para 25; *Gaunt v The United Kingdom* App no 26448/12 (ECtHR, 6 September 2016), para 59; *Oberschlick v Austria* App no 11662/85 (ECtHR, 23 May 1991), para 33

¹⁶¹ Competition case, para 8.3

¹⁶² *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011), para 63; *Annen v Germany* App no 3690/10 (ECtHR, 26 November 2015), para 66

¹⁶³ *Başkaya and Okçuoğlu v Turkey* App nos 23536/94 and 24408/94 (ECtHR, 8 July 1999), para 62; *Karataş v Turkey* App no 23168/94 (ECtHR, 8 July 1999), para 50

¹⁶⁴ General comment no 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34, para 35; *Hak-Chul Shin v Republic of Korea* Communication no 926/2000 UN Doc CCPR/C/80/D/926/2000 (16 March 2004), para 7.3; *Brandenburg v Ohio* 395 US 444 (1969)

¹⁶⁵ Competition case, para 9.4

the slogans were directly connected to the post such as ‘*sleeping with the enemy*’.¹⁶⁶ Others expressed not just dissatisfaction with Kola, but also hatred towards the Aquarians, people were yelling anti-Aquarian epithets, chanting ‘*no more Aquarians!*’.¹⁶⁷ At the wake of the post, Kola received harassment and death threats.¹⁶⁸ Lastly, two Aquarian immigrants were beaten to death by an angry mob of at least 10 people.¹⁶⁹

iii. Context of Peaps’ publication

Tense political or social background legitimizes the restriction of freedom of expression.¹⁷⁰ ECtHR recognized problems relating to the integration of immigrants in their host-countries as constituting a tense background to the expression.¹⁷¹ Further, it shall be analyzed whether the words ‘*had a special significance in the circumstances*’, and ‘*stirred up primal instincts and reinforced already anchored prejudices that expressed themselves with a deadly violence*’.¹⁷² Likewise, Peaps’ post concerned the issue of immigration from Aquaria,¹⁷³ where there is an active terrorist activity.¹⁷⁴ The fact that Turtonia had a significant influx of immigrants from Aquaria¹⁷⁵ led to great dissatisfaction among some citizens.¹⁷⁶ As a result, protests against the immigration policy were ongoing, while the proponents of this policy received harassment and

¹⁶⁶ *ibid*

¹⁶⁷ *ibid*

¹⁶⁸ Competition case, para 9.2

¹⁶⁹ Competition case, para 9.5

¹⁷⁰ *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), para 205; *Zana v Turkey* App no 69/1996/688/880 (ECtHR, 25 November 1997), para 59

¹⁷¹ *Perinçek v Switzerland* App no 27510/08 (ECtHR, 15 October 2015), para 205

¹⁷² *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997), para 59; *Halis Doğan v Turkey (no 3)* App no 4119/02 (ECtHR, 10 October 2006), para 35

¹⁷³ Competition case, para 8.3

¹⁷⁴ Competition case, para 3.1

¹⁷⁵ Competition case, para 2.1

¹⁷⁶ Competition case, para 4.1

death threats.¹⁷⁷ Given that Turton Power was generally demonstrating aggressive attitude towards Aquarians,¹⁷⁸ such post stirred up aggression even more.

iv. Approach of Turtonian courts towards the justification of interference

The reasons of the domestic court must be ‘*relevant and sufficient*’, with assessment of the facts, and compliance with the principles of freedom of expression.¹⁷⁹ At hand, Turtonian courts examined all relevant circumstances of the case.¹⁸⁰ As shown in the foregoing, the decision fully complied with the principles of freedom of expression. Accordingly, pressing social need for the restriction of Peaps’ rights existed.

b. Peaps’ prosecution was proportionate

As to the proportionality, the pursuit of public order protection has to be weighed against the value of public interest.¹⁸¹ For that, the nature and severity of the penalties imposed are taken into account.¹⁸² In *Ricardo Canese v Paraguay*, it was stated that the sanction that restricts the right the least should be imposed.¹⁸³ ECtHR considers that the sanction can be proportionate, although being not insignificant in itself, where it was either stipulated at the lower end of the applicable scale¹⁸⁴ or if the person was liable to imprisonment.¹⁸⁵

¹⁷⁷ *ibid*

¹⁷⁸ *ibid*

¹⁷⁹ *Dmitriyevskiy v Russia* App no 42168/06 (ECtHR, 3 October 2017), para 111; *Zhechev v Bulgaria* App no 57045/00 (ECtHR, 21 June 2007), para 44; *Sidiropoulos and Others v Greece* App no 26695/95 (ECtHR, 10 July 1998), para 40; *The United Macedonian Organisation Ilinden and Others v Bulgaria* App no 59491/00 (ECtHR, 19 January 2006), para 62; *Tsonev v Bulgaria* App no 45963/99 (ECtHR, 13 April 2006), para 52

¹⁸⁰ Competition case, para 12.2

¹⁸¹ *Barfod v Denmark* App no 11508/85 (ECtHR, 22 February 1989), para 29; *Lingens v Austria* App no 9815/81 (ECtHR, 8 July 1986), para 42

¹⁸² *Karataş v Turkey* App no 21168/94 (ECtHR, 8 July 1999), para 53

¹⁸³ *Ricardo Canese v Paraguay* (IACtHR, 31 August 2004), para 81

¹⁸⁴ *Lesnik v Slovakia* App no 35640/97 (ECtHR, 11 March 2003), para 63

¹⁸⁵ *Soulas and Others v France* App no 15948/03 (ECtHR, 10 July 2008), para 46

In the instant case, the possible penalties under the IA are a term of imprisonment up to one year and fine of 300,000 USD.¹⁸⁶ Yet, Peaps, whose post led to violence, was sentenced to a third of this fine, equivalent of 100,000 USD.¹⁸⁷ This is less than 150,000 USD, ordered by the Supreme Court of Singapore to pay for accusing the Prime Minister of criminal conduct. While making its ruling, the court emphasized, *inter alia*, on the likelihood that defamation was cynically published to increase the viewership of the blog,¹⁸⁸ which is similar to Peaps' desire to '*maximize his influence on Scoops*'.¹⁸⁹ Therefore, the restriction was proportionate.

In conclusion, the prosecution of Peaps under the IA complied with Article 19 of the ICCPR.

IV. TURTONIA'S PROSECUTION OF SCOOPS UNDER THE IA COMPLIED WITH ARTICLE 19 OF THE ICCPR

Turtonia submits that prosecution of Scoops for failure to expeditiously remove Peaps' post (A) was provided by law, (B) pursued a legitimate aim, and (C) was necessary in a democratic society.

A. The interference was provided by law

The restriction on Scoops' freedom of expression was appropriately provided by the IA. Further, Scoops, for the same reasons as under the ODP, is to be classified as publisher.¹⁹⁰ Since the only issue that may arise is whether the term '*expeditiously*' is foreseeable enough, Respondent will demonstrate below that the IA complies with this standard.

¹⁸⁶ Competition case, para 11.2.2

¹⁸⁷ Competition case, para 12.1.2

¹⁸⁸ *Lee Hsien Loong v Roy Ngerng Yi Lim* (7 November 2014) SGHC 230, paras 74, 116

¹⁸⁹ Competition case, para 12.2

¹⁹⁰ see Section II.A.a of the Memorial

a. *The term ‘expeditiously’ was foreseeable*

Respondent claims that there was no need to specify an express time limit in the IA. For instance, the Network Enforcement Act of Germany established that manifestly unlawful content must be taken down within 24 hours, while for other types of illegal content time limit is extended to seven days.¹⁹¹ Due to such strict limits, the European Commissioner for the Single Digital Market expressed concerns at the bill’s over-regulation, while the flexible self-regulatory regime was encouraged.¹⁹² Similarly, Google argues that it is ‘*unworkable*’ to specify strict limits due to the wide variety of existing and potentially developed intermediaries, while the flexible approach chosen by the majority of EU Member States regarding the term ‘*expeditiously*’ in E-Commerce Directive was recognised as the most favourable one.¹⁹³

Finally, the term ‘*expeditiously*’ is widely used across jurisdictions. Apart from EU,¹⁹⁴ it is found in the legislation of the US,¹⁹⁵ South Africa,¹⁹⁶ South Korea,¹⁹⁷ Egypt,¹⁹⁸ and Australia.¹⁹⁹ Consequently, it is for the domestic courts to consider the issue of expedition on a case-by-case

¹⁹¹ German Act to Improve Enforcement of the Law in Social Networks 2017 (Network Enforcement Act), s 3(2)

¹⁹² European Commissioner for the Single Digital Market, Act improving law enforcement on social networks (2017) <<http://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2017&num=127>> accessed 9 November 2017; David Kaye, Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, OL DEU 1/2017 (1 June 2017); Article 19, *Germany: The Act to Improve Enforcement of the Law in Social Networks* (2017) <<https://www.article19.org/data/files/medialibrary/38723/170426-Germany-Hate-Speech-Law-Draft-Analysis.pdf>> accessed 10 October 2017

¹⁹³ Google, *Google contribution to the public consultation on the future of electronic commerce in the internal market and the implementation of the on electronic commerce (2000/31/EC)* (2010), <<https://circabc.europa.eu/d/d/workspace/SpacesStore/316395ec-5caf-4684-8538-fdfb207464de/EU%20GOOGLE%20ENTR%20%28th%201-2%264-5%29%20808590.pdf>> accessed 4 November 2017

¹⁹⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce or the e-Commerce Directive) [2000] OJ L178/1, art 14 (1)

¹⁹⁵ US Digital Millennium Copyright Act 1998, s 512

¹⁹⁶ South African Electronic Communications and Transactions Act 2002, ss 75-76

¹⁹⁷ South Korean Copyright Act 1957, s 133bis, arts 102, 133-3

¹⁹⁸ Egyptian Protection of Intellectual Property Rights Act 2002, arts 147, 171(9)

¹⁹⁹ Australian Copyright Act 1968, s 116AH

basis depending on the business model of an intermediary rather than an abstract legal categorisation.²⁰⁰ These findings are consistent with ECtHR case-law, according to which ‘*the law must be able to keep pace with changing circumstances*’, while its ‘*interpretation and application are questions of practice*’.²⁰¹ Since the domestic court’s interpretation of enactments in force is a part of domestic law,²⁰² Scoops was supposed to know the relevant judicial practice or seek legal advice on the matter. Therefore, the term ‘*expeditiously*’ was foreseeable enough.

B. The interference pursued a legitimate aim

As the publication of Peaps’ post became the reason Kola was deprived of the benefits of public confidence and subjected to harassment and death threats,²⁰³ Respondent claims that prosecution of Scoops under the IA pursued a legitimate aim of respect of Kola’s rights and reputation.

C. The interference was necessary in a democratic society

Respondent submits that the interference with Scoops’ freedom of expression (a) answered pressing social need and (b) was proportionate.

²⁰⁰ Jan Oster, ‘Liability of Internet Intermediaries for Defamatory Speech – An Inquiry into the Concepts of ‘Publication’ and ‘Innocent Dissemination’ (2013) <<http://www.archive.legalscholars.ac.uk/edinburgh/restricted/download.cfm?id=336>> accessed 9 November 2017

²⁰¹ *Müller v Switzerland* App no 10737/84 (ECtHR, 24 May 1988), para 29; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993), para 40; *Lindon, Otchakovsky-Laurens and July v France* App no 21275/02 (ECtHR, 22 October 2007), para 41

²⁰² *Robathin v Austria* App no 30457/06 (ECtHR, 3 July 2015), para 39

²⁰³ Competition case, paras 9.2, 9.4, 9.6

a. *There was a pressing social need to prosecute Scoops for its failure to remove Peaps' post immediately*

Turtonia acknowledges that since incitement to violence was not obvious from the wording of Peaps' post,²⁰⁴ assessment of his mental state and context of the dissemination was necessary for further legal qualification.²⁰⁵ As such assessment goes beyond capabilities of any intermediary,²⁰⁶ Scoops was not required to qualify the text of Peaps' post as '*inciting violence*' to fall within the scope of the IA, while only awareness of false information being stored sufficed.²⁰⁷ In this regard, Respondent argues that Scoops, although being properly notified by Kola's legal counsel, failed to remove unlawful content immediately.

Firstly, intermediaries are held liable only if upon receiving adequately substantiated notification of illegal activity²⁰⁸ they fail to act expeditiously while taking down the impugned content.²⁰⁹ For the notification to be adequately substantiated, it should contain a description of the litigious facts, the precise location of the information, and the grounds for the withdrawal request, including the indication of the legal provisions and factual justifications.²¹⁰ In the present case, Scoops was put on notice of Peaps' post not by a mere notification alleging the infringing nature of the content, but by a legal counsel's letter threatening a civil action for

²⁰⁴ Competition case, para 8.3

²⁰⁵ Competition case, para 11.2

²⁰⁶ Article 19, *Germany: The Act to Improve Enforcement of the Law in Social Networks* (2017) <<https://www.article19.org/data/files/medialibrary/38723/170426-Germany-Hate-Speech-Law-Draft-Analysis.pdf>> accessed 10 October 2017

²⁰⁷ Competition case, para 11.2.3.c

²⁰⁸ C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2010] OJ C269/3, para 122

²⁰⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce or the e-Commerce Directive) [2000] OJ L178/1 art 14(1); C-70/10 *Scarlet Extended SA v Sabam* [2011] OJ C25/6, para 36; *Rubens Barrichello v Google* [2014] No 1.377.990-SP (2011/0276539-8); *Capitol Records, Inc v MP3tunes, LLC* 821 F Supp 2d 627 (22 August 2011); *Godfrey v Demon Internet Service* [2001] QB 201, para 20

²¹⁰ *Les Arnaques v Editions Régionales de France* [2007] No 07/01120; *R Magdane and R Mezrahi v YouTube and Dailymotion* [2008] No 08/01323; *Lafesse v Google* [2007] No 07/02740; *Lafesse v Dailymotion* [2007] No 07/05784

defamation and violation of privacy.²¹¹ Upon this letter, Scoops implemented ultimate removal.²¹² Hence, it apparently contained the description of relevant facts, legal qualification of relevant facts from the perspective of the IA provisions, as well as URL to the post.²¹³ Consequently, the letter constituted a proper notification that provided Scoops with actual knowledge of infringing nature of the text of Peaps' post, thereby eliminating the need for additional investigation.

Furthermore, the post constituted incontestable defamation,²¹⁴ i.e. statement that is obviously defamatory without the need for further research.²¹⁵ Since no such research was required, Scoops was in a position to promptly conclude on the unlawfulness of the content and implement immediate removal, preferably on the day the notification was delivered.²¹⁶ For instance, in *Karim v Newquest*, a case concerning defamatory article alleging mishandling of client funds by a solicitor, the defendant removed the impugned content on the day defamation claim was received, and, subsequently, was excluded from liability.²¹⁷ Similarly, in case of Anas Modamani, a Syrian refugee subjected to incontestable defamation²¹⁸ accusing him of terrorist events,²¹⁹ Facebook blocked access to the postings once reported by Modamani's lawyer.²²⁰

²¹¹ Competition case, para 9.2

²¹² *ibid*

²¹³ Clarification Questions and Answers, 4

²¹⁴ see Section III.C.a.ii of the Memorial

²¹⁵ Aleksandra Kuczerawy and Jef Ausloos, 'From notice-and-takedown to notice-and-delist: implementing Google Spain' (2016) 14(2) CTLJ <<http://ctlj.colorado.edu/wp-content/uploads/2016/06/v2.final-Kuczerawy-and-Ausloos-4.5.16-JRD.pdf>> accessed 10 November 2017

²¹⁶ *Krim K v Pierre G and Amen* [2008] No 252

²¹⁷ *Karim v Newquest Media Group Ltd* [2009] EWHC 3205 (QB)

²¹⁸ Andreas Frischholz, 'Gerichtsurteil: Facebook muss Hassbeiträge nicht vorab löschen' *Computer Base* (7 March 2017) <<https://www.computerbase.de/2017-03/gerichtsurteil-facebook-hassbeitraege/>> accessed 10 November 2017; Eric Auchard, 'German Court Rejects Injunction for Facebook in Syrian Selfie Case' *Reuters* (7 March 2017) <<http://www.reuters.com/article/us-germany-facebook-fake/german-court-rejects-injunction-for-facebook-in-syrian-selfie-case-idUSKBN16E1N0>> accessed 5 November 2017

²¹⁹ Derek Scally, 'Syrian refugee in Germany sues Facebook over fake news report' *The Irish Times* (10 January 2017) <<https://www.irishtimes.com/news/world/europe/syrian-refugee-in-germany-sues-facebook-over-fake-news-report-1.2933274>> accessed 6 November 2017

The requirement of immediate removal is particularly applicable in cases concerning large social media²²¹ as the speed at which they operate can facilitate dissemination of defamatory and other types of clearly unlawful expression ‘*as never before, worldwide, in a matter of seconds*’.²²² For instance, in *Pihl v Sweden* applicant’s claim was rejected because, *inter alia*, intermediary at stake was a small non-profit association, unknown to the wider public, whose web-site would unlikely attract large number of comments or wide viewership of such comments.²²³ In contrast, likewise in *Delfi*,²²⁴ Scoops is the most popular social media platform attracting considerable amount of users.²²⁵ Because of this, Peaps’ post went viral reaching more than 10,000 views within the first hour of appearing and spreading to other websites and social media.²²⁶ Accordingly, the speed at which Scoops operates is high enough to require the same day removal, especially given that Scoops did not face Peaps’ conflicting claim attempting to substantiate his allegations, as it occurred in *Davison v Habeeb*.²²⁷ Consequently, an immediate removal of Peaps’ post was required, while a 50 hours delay²²⁸ justifiably led to Scoops’ prosecution.

²²⁰ Eric Auchard, ‘German Court Rejects Injunction for Facebook in Syrian Selfie Case’ *Reuters* (7 March 2017) <<http://www.reuters.com/article/us-germany-facebook-fake/german-court-rejects-injunction-for-facebook-in-syrian-selfie-case-idUSKBN16E1N0>> accessed 5 November 2017

²²¹ *CG v Facebook Ireland Ltd & McCloskey* [2015] NIQB 11

²²² *Annen v Germany* App no 3690/10 (ECtHR, 26 November 2015), para 67

²²³ *Pihl v Sweden* App no 74742/14 (ECtHR, 7 February 2017), paras 31, 37

²²⁴ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), paras 115-117, 162; see Section II.A.b of the Memorial

²²⁵ Competition case, para 5.1

²²⁶ Competition case, para 8.4

²²⁷ *Davison v Habeeb and Others* [2011] EWHC 3031

²²⁸ Competition case, para 9.2

b. The prosecution was proportionate since the fine of 100,000 USD was moderate

Respondent submits that the fine of 100,000 USD²²⁹ was moderate comparing to sentencing practices of other states.²³⁰ For instance, the Network Enforcement Act of Germany imposes on social networks a fine of up to 5,000,000 EUR, potentially raising to 50,000,000 EUR for failure to remove hate speech and false information.²³¹ Since in the present case the fine imposed on Scoops is not the strictest one provided by the IA,²³² is only 0,1% of its revenues,²³³ and is ten times less than an average fine provided by abovementioned Act,²³⁴ it should be recognized as a proportionate one. Further, it is not evident that the fine in any way impacted business operations of Scoops as the most popular social media platform.

Moreover, other States also practice arrests of intermediaries' executives. For instance, in *Avnish Bajaj v State of Delhi* CEO of eBay's Indian subsidiary Baazee.com was arrested after user-generated pornography video was uploaded on the website.²³⁵ Similarly, in Brazil Google executive was arrested after the refusal to remove an anti-Islam video from YouTube.²³⁶ Unlike in the above situations, intermediary may be punished only by a fine under the IA provisions.²³⁷

²²⁹ Competition case, para 13.1.2

²³⁰ *Herrera-Ulloa v Costa Rica* (IACtHR, 2 July 2004), para 123; *Ross v Canada* Communication no 736/1997 UN Doc CCPR/C/70/D/736/1997 (18 October 2000), para 11.6; *Kudrevičius and Others v Lithuania* App no 37553/05 (ECtHR, 10 October 2015), para 144

²³¹ German Act to Improve Enforcement of the Law in Social Networks 2017 (Network Enforcement Act), s 4

²³² Competition case, para 11.2.2

²³³ Competition case, para 5.1

²³⁴ Competition case, para 13.1.2; see also German Act to Improve Enforcement of the Law in Social Networks 2017 (Network Enforcement Act), s 4

²³⁵ *Avnish Bajaj v State of Delhi* [2005] 3 CompLJ 364 Del

²³⁶ Sorcha Pollak, 'Google Executive Arrested as Brazil Bans Anti-Muslim Film' *Time* (27 September 2012) <<http://newsfeed.time.com/2012/09/27/google-executive-arrested-as-brazil-bans-anti-muslim-film/>> accessed 10 November 2017; TC Sottek 'Google executive arrested in Brazil as the company resists orders to freeze political speech on YouTube' *The Verge* (26 September 2012) <<https://www.theverge.com/2012/9/26/3413476/google-brazil-you-tube-arrest>> accessed 3 November 2017

²³⁷ Competition case, para 11.2.2

Consequently, the prosecution was proportionate and necessary for Scoops' further compliance with Turtonian domestic law.

Hence, Turtonia's prosecution of Scoops complied with Article 19 of the ICCPR.

PRAYER FOR RELIEF

For the foregoing reasons, Respondent respectfully requests this Honorable Court to adjudge and declare as follows:

1. Turtonia's prosecution of Peaps under the ODPA for dissemination of Kola's nude images complied with Article 19 of the ICCPR.
2. Turtonia's prosecution of Scoops under the ODPA for dissemination of Kola's nude images complied with Article 19 of the ICCPR.
3. Turtonia's prosecution of Peaps under the IA for inciting violence through false information complied with Article 19 of the ICCPR.
4. Turtonia's prosecution of Scoops under the IA for knowingly communicating false information complied with Article 19 of the ICCPR.

On behalf of Turtonia
Agents for Respondent