

THE 2018-2019 PRICE MEDIA LAW MOOT COURT COMPETITION

**RAS & UCONNECT
(APPLICANTS)**

V

**STATE OF MAGENTONIA
(RESPONDENT)**

MEMORIAL FOR RESPONDENT

Word Count: 4996

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LIST OF ABBREVIATIONS

ACHR	American Convention of Human Rights
CJEU	Court of Justice of the European Union
CT	Cyanisian Times
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GDPR	General Data Protection Regulation
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
IDPC	Information and Data Protection Commission of Magentonia
MPF	Magentonia Popular Front
OECD	Organisation for Economic Co-operation and Development
PIDPA	Public Information and Data Protection Act 2016
TBM	Take Back Magentonia
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UMP	United Magentonia Party
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHRC	United Nations Human Rights Council

LIST OF AUTHORITIES

International Declaration, Treaties, and Conventions

African Charter on Human and Peoples' Right (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (ACHPR)	18
American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978).....	18
Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 IHRR 893 (ArCHR)	18
European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953)	1
International Covenant on Civil and Political Right (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.....	1, 5, 7, 9, 18, 20
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<i>Jobe v the United Kingdom (dec.)</i> App no. 48278/09 (ECtHR, 14 June 2011).....	20
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<i>X and Y v the Netherlands</i> App no. 8978/80 (ECtHR, 26 March 1985).....	2, 6
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HRC cases	
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<i>Mavlonov and Sa'di v Uzbekistan</i> Communication No. 1334/2004 U.N. Doc. CCPR/C/95/D/1334/2004.....	10
<i>Mukong v Cameroon</i> Communication no. 458/1991 U.N. Doc. CCPR/C/51/D/458/1991 (1994)	18

<i>Tae-Hoon Park v Republic of Korea</i> Communication No 628/1995 U.N. Doc CCPR/C/57/D/628/1995 (1998)	18
<i>Toonen v Australia</i> Communication No. 488/1992 U.N. Doc CCPR/C/50/D/488/1992	7
<i>Van Hulst v The Netherlands</i> Communication No. 903/1999 U.N. Doc. CCPR/C/82/D/903/1999 (2004)	7, 10
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Cases from other jurisdictions	
<i>Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers,</i> <i>Local 401</i> [2013] 3 SCR 733.....	4
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<i>CG v Facebook Ireland Limited</i> [2016] NICA 54	33

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<i>Google Inc v Equustek Solutions Inc</i> , 2017 SCC 34.....	4
<i>Google LLC v Equustek Solutions Inc</i> , Case No 5:17-cv-04207-EJD (2017, US, Calif, N Dist) ..	4
<i>Holt v Hobbs</i> 135 S.Ct. 853 (2015).....	15
<i>Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)</i> , Judgment, I.C.J. Reports 2012	5
<i>Justice K.S. Puttaswamy (Retd.) and Anr. v Union of India and Ors</i> , Writ Petition (Civil) No.494 of 2012.....	2
<i>Landmark Communications, Inc. v Virginia</i> 435 US 829 (1978).....	3
<i>McCutcheon v Federal Election Commission</i> 572 U.S._ 2014	15
<i>Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)</i> , Merits, Judgment, I.C.J. Reports 1986.....	5
No. 1.593.873 <i>SMS v Google</i> (2016/0079618-1).....	4
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<i>NT1 and NT2 v Google LLC</i> [2018] EWHC 799 (QB) [33].....	15
<i>Oklahoma Pub. Co. v Distr. Court</i> 430 US 308 (1977).....	3
<i>Schneider v Smith</i> , 390 U.S. 17 (1968).....	15
<i>Shelton v Tucker</i> 364 U.S. 479 (1960).....	15
<i>Smith v Daily Mail Publishing Co.</i> 443 US 97 (1979)	3
Superior Court of Justice, decision No. REsp. 1.335.153. 20 October 2013.....	13
Supreme Court in <i>Decision 2014Da235080</i> , August 17, 2016	4
Supreme Court in ruling No. 76.421-2016 of November 22 2016	4

Supreme Court No. 11.746-2017 of 9 August 2017	4
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<i>United States v Playboy Entertainment Group, Inc.</i> 529 U.S. 803 (2000).....	15
<i>United States v Robel</i> 389 U.S. 258 (1967)	15
<i>Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council</i> 425 U.S. 748 (1976)	15

Books

Edwards, L and Waelde, C, (eds), <i>Law and the Internet</i> (3rd edn Hart Publishing, Oregon 2009)	32
Kilkelly Ursulla, ‘The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention of Human Rights’, Human Rights Handbook No. 1, 2001	1

Articles

Daphne Keller, ‘The Right Tools: Europe’s Intermediary Liability Laws and the EU 2016 General Data Protection Regulation’ (2018) 3 Berkley Technology Law Journal 305 .. 3, 14, 16	
Dennis F. Hernandez, ‘Litigating the Right to Privacy: A Survey of Current Issues’ (1996) 446 PLI/PAT 425	2
James Q. Whitman, ‘The Two Western Cultures of Privacy: Dignity Versus Liberty’ (2004) 113 YALE L.J. 1151	3
Paul M. Schwartz & Daniel J. Solove, ‘Reconciling Personal Information in the United States and European Union’ (2014) 102 CALIF. L. REV. 877	3

W. Gregory Voss and Céline Castets-Renard, ‘Proposal for an International Taxonomy on the Various Forms of the ‘Right to Be Forgotten’: A Study on the Convergence of Norms’ (2016) 14.2 Colorado Technology Law Journal 284	2
Warren and Brandeis, ‘The Right to Privacy’ (1890) 4(5) Harvard Law Review 193.....	2
Will Thomas DeVries, ‘Protecting Privacy in the Digital Age’ (2003) 18 Berkeley Tech. LJ 2832	

Internet Materials

‘How Search Algorithms Work’ < https://www.google.com/search/howsearchworks/algorithms/ > accessed 5 November 2018.....	15
Alessandro B and Emilio F, ‘Social bots distort the 2016 U.S. Presidential election online discussion’ (<i>First Monday</i> , 7 November 2016) < https://firstmonday.org/ojs/index.php/fm/article/view/7090 > accessed 1 November 2019.....	26
Andrew Hutchinson, ‘Twitter introduces New Measures to Tackle Trolls and Bots on the Platform’ (<i>SocialMediaToday</i> , 27 June 2018) < https://www.socialmediatoday.com/news/twitter-introduces-new-measures-to-tackle-trolls-and-bots-on-the-platform/526609/ > accessed 1 November 2019	26
Caitlin Dickerson, ‘How Fake News Turned a Small Town Upside Down’ The New York Times Magazine (26 September 2017) < https://www.nytimes.com/2017/09/26/magazine/how-fake-news-turned-a-small-town-upside-down.html > accessed 7 November 2018	21
Corte di Cassazione, sez. III Penale, sentenza 17 December 2013 – 3 February 2014, n. 5107 (It.), < http://www.dirittoegiustizia.it/allegati/15/0000063913/Corte_di_Cassazione_sez_III_Penale_sentenza_n_5107_14_depositata_il_3_febbraio > accessed 5 November 2018.....	14

Evan Selinger & Woodrow Hartzog, ‘Google Can’t Forget You, But It Should Make You Hard To Find’, 20 May 2014,< https://www.wired.com/2014/05/google-cant-forget-you-but-it-should-make-you-hard-to-find/ > accessed 4 November 2018	13
Francis Chan, ‘Indonesian Police Uncover “Fake News Factory”’ The Straits Times (17 September 2017) < http://www.straitstimes.com/asia/se-asia/indonesian-police-uncover-fake-news-factory > accessed 7 November 2018	21
Hunton & Williams LLP, European Parliament Adopts Draft General Data Protection Regulation; Calls for Suspension of Safe Harbor, PRIVACY & INFO. SECURITY L. BLOG (Mar. 12, 2014), < https://www.huntonprivacyblog.com/2014/03/articles/european-parliament-adopts-draft-general-data-protection-regulation-calls-suspension-safe-harbor/. > accessed 7 November 2018	3
Larry Greenemeier, ‘When Hatred Goes Viral: Inside Social Media’s Efforts to Combat Terrorism’ Scientific American (24 May 2017) < https://www.scientificamerican.com/article/when-hatred-goes-viral-inside-social-medias-efforts-to-combat-terrorism/ > accessed 7 November 2018.....	21
Letter from Gerald Leitner, Secretary General., International Federationn of Library Associations & Institutions, ‘Application of Right to be Forgotten Rulings: The Library Viewpoint’ (Oct. 24, 2016), < https://www.ifla.org/files/assets/faife/statements/161024_ifla_on_rtbf_case_in_france.pdf > accessed 5 November 2018.....	16
Minhui Xue., Gabriel Magno., Evandro Cunha, Virgilio Almeida. & Keith W. Ross, ‘The Right to be Forgotten in the Media: A Data-Driven Study, Proceedings on Privacy Enhancing Technologies (2016) no.4, p. 2; Daniel Solove, ‘What Google Must Forget: The EU Ruling on	

the Right to Be Forgotten’ 14 May 2014, < <https://www.linkedin.com/pulse/20140513230300-2259773-what-google-must-forget-the-eu-ruling-on-the-right-to-be-forgotten/> > accessed 5 November 2018..... 13

Miquel Peguera, *Spain: The Right to Be Forgotten Does Not Apply to Blogger*, STAN. L. SCH. CTR. FOR INTERNET & SOC’Y (Mar. 4, 2015, 9:01 AM), <http://cyberlaw.stanford.edu/blog/2015/03/spain-right-be-forgotten-does-not-apply-blogger> accessed 7 November 2018..... 14

Naja Bentzen, ‘“Fake News” and the EU’s Response’ (EP Think Tank, 2 April 2017) <<https://epthinktank.eu/2017/04/02/fake-news-and-the-eus-response/>> accessed 7 November 2018..... 21

Roheeni Saxena, ‘The Social Media “Echo Chamber” Is Real’ (ArsTechnica, 14 March 2017) <<https://arstechnica.com/science/2017/03/the-social-media-echo-chamber-is-real/>> accessed 21 January 2018 31

The Economist Staff, ‘Yes, I’d Lie To You’ Economist (10 September 2016) <<https://www.economist.com/news/briefing/21706498-dishonesty-politics-nothing-new-manner-which-some-politicians-now-lie-and>> accessed 21 January 2018..... 31

Toby Mendel, ‘Hate Speech Rules Under International Law’ (Centre for Law and Democracy, February 2010) <<http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf>> accessed 21 January 2018..... 23

Zaynep Tufekci, ‘Mark Zuckerberg is in Denial’ *The New York Times* (15 November 2016) <<https://www.nytimes.com/2016/11/15/opinion/mark-zuckerberg-is-in-denial.html>> accessed 21 January 2018 31

International Documents

<i>CCPR General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant</i> , 26 May 2004, CCPR/C/21/Rev.1/Add.13	5
Charter of Fundamental Rights of the European Union [2000] OJ C364/01	3
Council Directive 2000/31/EC of European Parliament and Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1 ('Directive On Electronic Commerce').....	29, 31
Directive 95/46/EC of The European Parliament and of The Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31	3
<i>Observer and Guardian v The United Kingdom</i> App no. 13585/88 (ECtHR, 26 November 1991)	9
Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, <i>Standards for a Free, Open and Inclusive Internet</i> (15 March 2017)	4
Regulation (EU) 2016/679 of The European Parliament and Of The Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1	3
The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization Of American States (OAS), Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR), Special Rapporteur on Freedom of Expression and Access to Information, Article 19, Global	

Campaign for Free Expression, and the Centre for Law and Democracy, “ <i>Joint Declaration on Freedom of Expression and the Internet</i> ,” June 1, 2011.....	31
U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (2013)	5, 7, 18, 21
UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR’ (1984) UN Doc E/CN 4/1984/4, principle 17	8
UN Human Rights Committee (HRC) <i>CCPR</i> , ‘ <i>General comment No 34</i> ’ on ‘ <i>Article 19 (Freedom of Opinion and Expression)</i> ’ (2011) UN Doc CCPR/C/GC/34	15, 18, 19, 22, 25, 26
UN Human Rights Committee (HRC), <i>CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation</i> , 8 April 1988	1, 7, 9, 10
UN Human Rights Committee (HRC), <i>CCPR General Comment No. 27: Article 12 (Freedom of Movement)</i> , 2 November 1999, CCPR/C/21/Rev.1/Add.9	9
UNHRC, ‘Annual Report of the United Nations High Commissioner for Human Rights’ (11 January 2013) UN Doc A/HRC/22/17/Add.4, 42; UNHRC, ‘Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda’ (3 March 2017) FOM GAL/3/17 preamble.....	22
Miscellaneous	
California Senate Bill No. 568, S.B. 568, 2013 Leg., 2013–14 Sess. (Cal. 2013), available at < http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568 > accessed 5 November 2018	4

Case C-507/17: Request for a preliminary ruling from the Conseil d'État (France) lodged on 21 August 2017 — <i>Google Inc. v Commission nationale de l'informatique et des libertés (CNIL)</i> (2017) OJ C 347	17
European Commission, 'Code of Conduct on Countering Illegal Hate Speech Online', 19 January 2018	32
Johanna Tuohino, 'Liability of Intermediary Service Providers in the EU: Review of current developments' (Masters, University of Lapland, 2013).....	29, 33
Manila Principles on Intermediary Liability < https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf > accessed 5 November 2018.....	15, 22, 25, 31
Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), [51]-[53], COM (2012) 011 final (Jan. 25, 2012) [hereinafter General Data Protection Regulation], available at http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012PC0011	3
Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, [29] (annexed to the Annual Report of the United Nations High Commissioner of Human Rights, A/HRC/22/17/Add.4, 11 January 2013)	22
Reference for a preliminary ruling from High Court of Justice (England and Wales), Chancery Division, made on 12 August 2009 — <i>L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Limited v eBay International AG, eBay</i>	

<i>Europe SARL, eBay (UK) Limited, Stephan Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi</i> [2009] OJ C267/40	33
Research Department of the Council of Europe, ‘Internet: case-law of the European Court of Human Rights’, June 2015	29
Singapore Ministry of Communications and Information and the Ministry of Law, ‘Deliberate Online Falsehoods: Challenges and Implications’, 5 January 2018.....	21, 22
Supreme Court ruled in a case decided on 31 January 2017 (cited in the Written Observations of Article 19 and others, <i>Google Inc v Commission nationale de l’informatique et des libertés (CNIL)</i> , Case C-507/17, 29 November 2017.....	4, 5
Tomáš Elbert, ‘Notice and Take Down, On Certain Aspects of Liability of Online Intermediaries’, (Masters, Charles University in Prague,2011)	33
UK House of Commons, Digital, Culture, Media and Sports Committee, ‘Disinformation and ‘fake news’: Interim Report”, Fifth Report of Session 2017-2019	21
Věra Jourová, ‘Code of Conduct on Countering Illegal Hate Speech Online: First Results on Implementation’, December 2016.....	32
Working Party, art 29, Guidelines on the Implementation of the Court of Justice of the European Union Judgment on ‘Google Spain and Inc v <i>Agencia Española de Protección de Datos (AEPD)</i> , <i>Mario Costeja González</i> ’ C-131/12 26 November 2014.....	14, 15

STATEMENT OF RELEVANT FACTS

Cyanisia and Magentonia

1. Cyanisia and Magentonia are two neighbouring democratic countries. However, Cyanisia's political landscape is particularly volatile and toxic. The systematic persecution and violence of political dissidents led to a mass exodus of members from the Celadon tribe to Magentonia, who eventually were stripped off their citizenships by law.
2. Magentonia's economy is heavily reliant on the industry of natural gas which regularly employs Cyanisian refugees. In February 2018, global prices of natural gas fell, invoking fears of an economic recession and social backlash against the Cyanisian refugees widely perceived as a threat to Magentonians' job security. Such deep-seated anti-immigration resentment formed the backdrop of the Magentonian parliamentary elections in June 2018.

Unger Ras

3. Unger Ras was a former professor at the State University of Cyanisia and founder of the main opposition party in Cyanisia. In February 2001, *The Cyanisian Times* published an article reporting that an arrest warrant had been issued against Ras for alleged misappropriation of university funds. His university issued a public statement clarifying that he had been accused and investigated of misconduct in 1995, but eventually cleared.
4. Ras fled to Magentonia and obtained citizenship in 2011. He joined the United Magentonia Party (UMP), the political party of the incumbent government. He is a strong champion for the rights of refugees, especially Cyanisian refugees living in Magentonia.

UConnect

5. Uconnect is the most popular social media platform among Cyanisians and Magentonians with over 100 million active users worldwide. UConnect offers two main functions. *First*, it enables users to post, comment and share personal stories and news. *Second*, the platform provides a search functionality.
6. Content is displayed based on users' preference and behavior. There is a feature allowing users to boost their post to appear in the 'trending' and 'promoted' feed. The Complaints Portal enables users to lodge complaints against posts in violation of its Community Standards. Human reviewers would process such complaints within 72 hours.

Magentonian Mail Article

7. An article was published on 1st April 2018 by *The Magentonian Mail*, a private owned news website, claiming that Ras fled Cyanisia due to a corruption scandal in his former university, as collaborated by the 2001 CT Story. Ras immediately issued a statement to clarify that the story was false and reproduced his former university's statement. *The Magentonian Mail* also carried his statement.
8. Upon Ras' request, the article was removed by *Magentonian Mail* in 15th April 2018. But by then, the article had already been 'trending' on UConnect, highly viewed and shared among Magentonian users with a penchant for Magentonian politics. Public posts linked to the article also appeared high on the search results when terms related to 'Ras' and 'Magentonia' are entered.
9. On 25th April 2018, *TakeBackMag200*, an anonymous user, posted a web link of the 2001 story with the caption 'you can't erase history'. It was later promoted and trended. On 29th April

2018, Ras wrote a letter requesting for the removal of the post and for the 2001 CT Story to be blocked or removed. UConnect agreed to remove the post, but refused to remove the search results unless ordered by the IDPC of Magentonia.

10. On 5th May 2018, Ras filed a petition to the IDPC to compel UConnect to remove all search results that depicts the 2001 CT Story pursuant to Section 22 of the PIDPA and Article 7 of the Magentonian Constitution. On 10th May 2018, the IDPC rejected Ras' request on the basis of 'public interest' considering that he was a public figure and a candidate for the upcoming election. Ras appealed to the Magentonian High Court against such decision.

Anti-Refugee Posts

11. In early May 2018, TBM began actively posting content on UConnect against Ras and Cyanisians. An article published on 26 May 2018 described Cyanisians in derogatory terms and trended on UConnect for 4 days before its removal on 30th May 2018.
12. On 30th May 2016, TBM posted another article which cited a study by the University of Magentonia claiming that Cynasian refugees would outnumber native Magentonians by 2025. The post trended for 3 days until 1st June 2018. No user reported against it.
13. On 2nd June 2018, the Magentonian prosecution charged UConnect under Section 3 and 5 of the PIDPA relating to these two posts. An interim injunction was issued ordering UConnect to suspend all its operations in Magentonia pending trial.
14. On 4th June 2018, the UMP won the parliamentary election, albeit with a reduced majority. Ras failed to win a seat. The *Magentonian Watch*, an independent organization, attributed their failure to the effective campaign ran by TBM on UConnect.

Magentonian Judiciary Decision

15. On 1st July 2018, the Magentonian High Court dismissed Ras' appeal.
16. On 10th July 2018, the High Court found UConnect guilty under Section 3 of the PIDPA for failing to swiftly remove the 26th May post, and under section 5 of PIDPA for recklessly disseminating false propaganda. A fine of USD 100,000 was imposed.

STATEMENT OF JURISDICTION

Unger Ras, UConnect and the state of Magentonia, which is a party to the International Covenant on Civil and Political Rights (ICCPR), have submitted their differences to the Universal Court of Human Rights ('this Court'), and hereby submit to this Court their dispute concerning Articles 17 and 19 of the ICCPR.

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

QUESTIONS PRESENTED

- I. Whether Magentonia's decision not to grant Ras any rectification, erasure or blocking of search results depicting *The Cyanisian Times* story of 2001 violated Article 17 of the ICCPR?
- II. Whether Magentonia's suspension of UConnect's operations violates Article 19 of the ICCPR?
- III. Whether Magentonia's prosecution and conviction of UConnect under the PIDPA violates Article 19 of the ICCPR?

SUMMARY OF ARGUMENTS

- I. Magentonia’s decision not to grant Unger Ras any rectification, erasure or blocking of search results depicting the 2001 CT Story did not violate Article 17 of the ICCPR. *First*, Ras’ application is inadmissible under Article 17 as the right to privacy does not incorporate the right to be forgotten; and alternatively, Magentonia has sufficiently discharged its positive obligation under Article 17 to protect Ras’ right to be forgotten. *In any event*, Magentonia’s interference with Ras’ right to privacy was lawful and non-arbitrary. *First*, the decision by the Magentonian High Court was provided by law since it was foreseeable that Ras cannot avail to the right to erasure under the PIDPA in light of the 2001 CT Story being a matter of public interest. *Second*, the decision pursued a legitimate aim *i.e.* to protect the right of freedom of expression of Magentonian citizens to impart and receive information and ideas. *Third*, the decision was reasonable in the circumstances because (i) the 2001 CT Story was a matter of public interest, (ii) Ras actively stayed in the public limelight, (iii) UConnect is not a ‘data controller’ in respect of its search functionality; and (iv) the deletion of all search results is not proportionate.
- II. Magentonia’s decision to suspend UConnect’s operations under the PIDPA did not violate Article 19 of the ICCPR. *First*, the suspension was provided by law as the PIDPA is accessible to the general public of Magentonia and formulated with sufficient precision. *Second*, the suspension pursued a legitimate aim, which was to prevent the victimization of the Cyanisian refugees due to the proliferation anti-refugees posts in UConnect. *Third*, the suspension was necessary in a democratic society as (i) there was a rising resentment against the Cyanisian refugees, (ii) the content on UConnect can be

disseminated rapidly and widely, and also persistently remain online, (iii) the suspension was enforced under a court order with a limited geographical and temporal scope; and (iv) the suspension was the only viable way of curbing the threat of public disorder.

III. Magentonia's prosecution and conviction of UConnect under the PIDPA did not violate Article 19 of the ICCPR. *First*, it was provided by law under Sections 3 and 5 of the PIDPA. *Second*, it pursued a legitimate aim, which was to prevent the victimization of the Cyanisian refugees due to the proliferation anti-refugees posts in UConnect. *Third*, it was necessary in a democratic society as (i) the publications were able to incite hostility and discrimination, (ii) UConnect was an active intermediary, (iii) UConnect did not expeditiously remove the **26 May 2018** post which amounted to hate speech, nor took any action to remove or verify the **30 May 2018** post which amounted to false propaganda; and (iv) the fine imposed on UConnect was proportiona

ARGUMENTS

I. MAGENTONIA’S DECISION NOT TO GRANT RAS ANY RECTIFICATION, ERASURE OR BLOCKING OF SEARCH RESULTS DEPICTING THE 2001 CT STORY DID NOT VIOLATE ARTICLE 17 OF THE ICCPR

1. Magentonia’s objection against Ras’ application on the rectification, erasure or blocking of search results depicting the 2001 CT Story is two-fold:¹ (A) *first*, such application is inadmissible under Article 17 of the ICCPR; and alternatively, even if admissible, (B) Magentonia’s interference with Ras’ right to privacy was lawful and non-arbitrary.

A. Ras’ application is inadmissible under Article 17 of the ICCPR

2. UConnect’s search results depicting the 2001 CT Story does not interfere with Ras’ right to privacy enshrined under Article 17 of the ICCPR² because (i) the right to be forgotten is not a protected right; and alternatively, (ii) Magentonia has discharged its positive obligation to ensure its protection.

(i) The right to privacy does not incorporate the right to be forgotten

3. Privacy is a broad term not susceptible to exhaustive definition.³ Such right is commonly

¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988 [4]; Kilkelly Ursulla, ‘The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention of Human Rights’, Human Rights Handbook No. 1, 2001, 8.

² International Covenant on Civil and Political Right (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; European Convention on Human Rights (ECtHR) (adopted 4 November 1950, entered into force 3 September 1953) art 8.

³ *S. and Marper v the United Kingdom* [GC] App nos. 30562/04 and 30566/04 (ECtHR, 4 December 2008) [66]; *Vukota-Bojić v Switzerland* App no. 61838/10 (ECtHR, 18 October 2016) [52]; *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 21 July 2015) [129]; Will Thomas DeVries, ‘Protecting Privacy in the Digital Age’ (2003) 18 Berkeley Tech. LJ 283, 284; Dennis F. Hernandez, ‘Litigating the Right to Privacy: A

referred as the right to live privately away from unwanted attention⁴ or the “*right to be left alone*”.⁵ Private life encompasses the physical and psychological integrity of a person,⁶ and also activities of a professional or business nature.⁷

4. The issue that arises is whether the right to privacy incorporates the right to be forgotten.
5. This emerging right first entered into international consciousness flowing from the Court of Justice of the European Union’s (CJEU) 2014 decision of *Google Spain v Costeja* affirming that individuals have the right to ask search engine to de-list links to third-party web pages containing their personal data “*which are inaccurate, inadequate, irrelevant or excessive in relation to the purpose of processing*”.⁸
6. However, the decision arose in the peculiar context of EU jurisprudence. First, the CJEU was strictly applying the European Parliament’s Directive 95/46⁹ – the repealed predecessor of the

Survey of Current Issues’ (1996) 446 PLI/PAT 425, 429.

⁴ *Satakunnan* (n 3) [130]; *Smirnova v Russia* Application App nos. 46133/99 and 48183/99 (ECtHR, 24 July 2003) [95].

⁵ *Justice K.S. Puttaswamy (Retd.) and Anr. v Union of India and Ors*, Writ Petition (Civil) No.494 of 2012 [2], [25] & [177]. Warren and Brandeis, ‘The Right to Privacy’ (1890) 4(5) *Harvard Law Review* 193; W. Gregory Voss and Céline Castets-Renard, ‘Proposal for an International Taxonomy on the Various Forms of the ‘Right to Be Forgotten’: A Study on the Convergence of Norms’ (2016) 14.2 *Colorado Technology Law Journal* 284; *Von Hannover v Germany* (Von Hannover No.1) App no. 59320/00 (ECtHR, 24 June 2004) [33]; *Von Hannover v Germany* (No.2) App no. 40660/08 & 60641/08 (ECtHR, 7 February 2012).

⁶ *Satakunnan* (n 3) [130]; *X and Y v the Netherlands* App no. 8978/80 (ECtHR, 26 March 1985) [22].

⁷ *Satakunnan* (n 3) [130]; *Niemietz v Germany* App no. 13710/88 (ECtHR, 16 December 1992) [29].

⁸ Case C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* ECLI:EU:C:2014:317 [92]-[94].

⁹ Directive 95/46/EC of The European Parliament and of The Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, art 12 & art 14; *Google Spain* (n 8) [3].

EU General Data Protection Regulation (GDPR).¹⁰ *Second*, Article 8 of the Charter of Fundamental Rights of the European Union explicitly provides the ‘right to the protection of personal data’ *in addition* to the right to privacy under Article 7.¹¹ Hence, the EU recognizes personal data protection as a separate and distinct fundamental right.¹²

7. EU data protection laws are starkly distinct from the American conception of privacy.¹³ The US Courts have consistently rejected the notion of the right to be forgotten.¹⁴ California is the only US state that has enacted legislation recognising such right – even then, such ‘Eraser Law’ is limited to only protecting minors, especially victims of pornography.¹⁵

¹⁰ Regulation (EU) 2016/679 of The European Parliament and Of The Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1, art 17 & art 21.

¹¹ *Google Spain* (n 8) [1], [69], [74], [81], [97] & [99]; Charter of Fundamental Rights of the European Union [2000] OJ C364/01, art 7 & art 8.

¹² Daphne Keller, ‘The Right Tools: Europe’s Intermediary Liability Laws and the EU 2016 General Data Protection Regulation’ (2018) 3 Berkley Technology Law Journal 305; Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), [51]-[53], COM (2012) 011 final (Jan. 25, 2012) [hereinafter General Data Protection Regulation], available at <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012PC0011>; Hunton & Williams LLP, European Parliament Adopts Draft General Data Protection Regulation; Calls for Suspension of Safe Harbor, PRIVACY & INFO. SECURITY L. BLOG (Mar. 12, 2014), < <https://www.huntonprivacyblog.com/2014/03/articles/european-parliament-adopts-draft-general-data-protection-regulation-calls-suspension-safe-harbor/>> accessed 7 November 2018.

¹³ Paul M. Schwartz & Daniel J. Solove, ‘Reconciling Personal Information in the United States and European Union’ (2014) 102 CALIF. L. REV. 877; James Q. Whitman, ‘The Two Western Cultures of Privacy: Dignity Versus Liberty’ (2004) 113 YALE L.J. 1151.

¹⁴ *Smith v Daily Mail Publishing Co.* 443 US 97 (1979); *Oklahoma Pub. Co. v Distr. Court* 430 US 308 (1977); *Landmark Communications, Inc. v Virginia* 435 US 829 (1978); *Bartnicki v Vopper* 532 US 514 (2001); *Gates v Discovery Communications Inc* 34 Cal.4th 679, 21 Cal.Rptr.3d 663.

¹⁵ California Senate Bill No. 568, S.B. 568, 2013 Leg., 2013–14 Sess. (Cal. 2013), available at < http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB568 > accessed 5 November 2018

8. Furthermore, the ‘right to be forgotten’ has been rejected in numerous jurisdictions, including Canada,¹⁶ Brazil,¹⁷ Chile,¹⁸ Columbia,¹⁹ South Korea²⁰ and Japan.²¹
9. As recent as March 2017, the Special Rapporteur for Freedom of Expression for the Inter-American Commission of Human Rights concluded that ‘*international human rights law does not protect or recognise the so-called ‘right to be forgotten’ in the terms outlined by the CJEU in the Costeja case*’.²² In light of years of conflict, authoritarian regimes and gross human rights violations, “*people want to remember and not forget*”.²³
10. Indeed, until today, no regional human rights court – the Inter-American Court of Human Rights, the African Court of Human and People's Rights, nor even the European Court of Human Rights (ECtHR) – has recognized the right to be forgotten.²⁴

¹⁶ *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401* [2013] 3 SCR 733, [20]; *Douez v Facebook Inc*, 2017 SCC 33, [58]-[60]; *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, [45]-[46]; *Google LLC v Equustek Solutions Inc*, Case No 5:17-cv-04207-EJD (2017, US, Calif, N Dist), [5].

¹⁷ No. 1.593.873 *SMS v Google* (2016/0079618-1).

¹⁸ Supreme Court in ruling No. 76.421-2016 of November 22 2016; Supreme Court No. 11.746-2017 of 9 August 2017 [7].

¹⁹ T-4296509 Acción de tutela instaurada por Gloria contra la Casa Editorial El Tiempo [9.5].

²⁰ Supreme Court in *Decision 2014Da235080*, August 17, 2016.

²¹ Supreme Court ruled in a case decided on 31 January 2017 (cited in the Written Observations of Article 19 and others, *Google Inc v Commission nationale de l’informatique et des libertés (CNIL)*, Case C-507/17, 29 November 2017 [28].

²² Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, *Standards for a Free, Open and Inclusive Internet* (15 March 2017) [132].

²³ Special Rapporteur for Freedom of Expression (n 22) [34].

²⁴ Written Observations of Article 19 (n 21) 29 November 2017, [29]

11. Hence, due to the paucity of consistent state practice,²⁵ the right to be forgotten is not a protected right falling within the ambit of Article 17 of the ICCPR.

(ii) Alternatively, Magentonia had discharged its positive obligation to protect Ras' right to be forgotten

12. Article 17 construed in tandem of Article 2(1) of the ICCPR imposes upon Magentonia both negative and positive obligations.²⁶ Positive obligation necessitate the adoption of an adjudicatory and enforcement framework to secure respect for privacy even in the sphere of the relations of individuals between themselves from unlawful private actions.²⁷

13. In discharging positive obligations, States enjoy a wider 'margin of appreciation' where there is no international consensus as to the relative importance of the interest at stake,²⁸ and where they are required to strike a balance between competing private and public interests.²⁹

²⁵ *North Sea Continental Shelf*, Judgment I.C.J. Reports 1969 [77]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, I.C.J. Reports 1986 [109]; *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012 [55].

²⁶ ICCPR, (n 2) art 2; UN Human Rights Committee (HRC), *CCPR General comment no. 31, The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13 [8]; *General Comment No. 16* (n 1) [1]; U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (2013) [24] – [25].

²⁷ *General comment no. 31* (n 26) [6] & [80]; *Hämäläinen v Finland* [GC] App no. 37359/09 (ECtHR, 16 July 2014) [63]; *Airey v Ireland* App no. 6289/73 (ECtHR, 9 October 1979) [33]; *Marckx v Belgium*, App no. 6833/74 (ECtHR, 13 June 1979) [31]; *X and Y* (n 6) [23]; *Söderman v Sweden*, Application no. 5786/08 (ECtHR, 12 November 2013) [78]; *Von Hannover No.1* (n 5) [57]; *Stubbings and Others v the United Kingdom*, App no. 22083/93; 22095/93 (ECtHR, 22 October 1996) [61]-[62]; *Mosley v The United Kingdom* App no. 48009/08 (ECtHR, 10 May 2011) [105]; *Von Hannover No.2* (n 5) [98].

²⁸ *Hämäläinen v Finland* (n 27) [67], [75]; *X and Y* (n 6) [44]; *Christine Goodwin v the United Kingdom*, App no. 28957/95 (ECtHR, 11 July 2002) [85]; *Von Hannover No.1* (n 5) [82]; *A. v Norway* App no. 28070/06 (ECtHR, 9 April 2009) [66]; *Armonienė v Lithuania* App no. 36919/02 (ECtHR, 25 November 2008) [38].

²⁹ *Hämäläinen v Finland* (n 27) [67]; *Fretté v France*, App no. 36515/97, (ECtHR, 26 February 2002) [41]; *Evans v the United Kingdom*, App no. 6339/05 (ECtHR, 7 March 2006) [77]; *Odièvre v France*, App no. 42326/98 (ECtHR, 13 February 2003) [44]-[49]; *S.H. and Others v Austria* [GC] Application no. 57813/00 (ECtHR, 3 November 2011) [94]; *Dickson v The United Kingdom* App no. 44362/04 (ECtHR, 4 December 2007) [78]; *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* Judgement of the Court of 12 June 2003, C-112/00

14. Since there is no international consensus on the ‘right to be forgotten’³⁰ and the subject matter of the 2001 CT Story involves elements of public interest,³¹ the Magentonian authorities are best positioned to decide whether the search results should be rectified, erased or blocked from UConnect under Section 22 of the PIDPA and Article 10 of the Magentonian Constitution.³²
15. Since the Magentonian IDPC and High Court had assessed Ras’ request in accordance to due process,³³ Magentonia had satisfied its positive obligation to respect Ras’ right to privacy.

B. Alternatively, Magentonia’s interference with Ras’ Right to Privacy under Article 17 of the ICCPR was lawful and non-arbitrary

16. Although Article 17 does not explicitly stipulate restrictions, the test of ‘unlawfulness’ and ‘arbitrariness’ is also subject to a three-part inquiry, namely whether the interference: (i) is provided by law; (ii) in accordance with the provisions, aims and objectives of the ICCPR; and (iii) reasonable in the particular circumstances.³⁴

(i) Magentonia’s decision was provided by law

17. An interference is ‘provided by law’ when it has a basis in domestic law, and that such law is

CJEU; *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, Judgement of the Court of 14 October 2004, C-36/02.

³⁰ Arguments, [4] – [12].

³¹ Fact Pattern, [4.7].

³² *X and Y* (n 6) [24]; and *Odièvre v France* (n 29) [46].

³³ Fact Pattern, [4.7] & [6.1].

³⁴ General Comment No. 16, (n 1) [3]-[4]; *Toonen v Australia* Communication No. 488/1992 U.N. Doc. CCPR/C/50/D/488/1992 [8.3]; *Van Hulst v The Netherlands* Communication No. 903/1999 U.N. Doc. CCPR/C/82/D/903/1999 (2004) [7.3]; *G v Australia* Communication No. 2172/2012 U.N. Doc. CCPR/C/119/D/2172/2012 [4.5]; Special Rapporteur 2013, (n 26) [28]-[29]; ICCPR (n 2), art 12(3), art 18(3), art 21 & art 22(2).

accessible to the public and foreseeable as to its effects.³⁵

a) The PIDPA was accessible

18. A law is accessible when citizens are able to have adequate indication of the legal rules applicable to a given case.³⁶

19. Since Ras is a naturalized Magentonian citizen since 2011,³⁷ he would have been well aware of the passing of the PIDPA in 2016.

b) Magentonia's decision to not grant Ras' request was foreseeable

20. The element of foreseeability means that the law must be formulated with sufficient precision³⁸ to enable a person to reasonably foresee the consequences which a given action may entail.³⁹

However, those consequences need not be foreseeable with absolute certainty, as the law

³⁵ *Delfi AS v Estonia* [GC] App no. 64569/09 (ECtHR, 16 June 2015) [120]; *VgT Verein gegen Tierfabriken v Switzerland* App no. 24699/94 (ECtHR, 28 June 2001) [52]; *Rotaru v Romania* App no. 28341/95 (ECtHR, 2000) [52]; *Gawęda v Poland* App no. 26229/95 (ECtHR, 14 March 2002) [39]; *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) [30].

³⁶ *Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) [49]; *Groppeara Rodio AG and Others v Switzerland* App no. 10890/84 (ECtHR, 28 March 1990) [68]; *Silver and Others v The United Kingdom* App nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75 (ECtHR, 25 March 1983) [88]; *MM v United Kingdom* App. No. 24029/07 (ECtHR 13 November 2012) [193].

³⁷ Fact Pattern, [2.2].

³⁸ *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Wingrove v UK* App no 17419/90 (ECtHR, 25 November 1996) [40]; *Lindon and others v France* App no 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) [52]; UN Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Syracusa Principles on the Limitation and Derogation of Provisions in the ICCPR' (1984) UN Doc E/CN.4/1984/4, principle 17.

³⁹ *The Sunday Times* (n 36) [49]; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015) [31]; *Malone v The United Kingdom* App no 8691/79 (ECtHR, 2 August 1984); *Miller v Switzerland*, App no 10737/84 (ECtHR, 24 March 1988); *Liberty and Others v The United Kingdom* App no. 58243/00 (ECtHR, 1 July 2008) [59].

cannot be excessively rigid and must be able to evolve with changing circumstances.⁴⁰

21. *First*, Section 22 of the PIDPA mirrors the GDPR regime⁴¹ by explicitly recognising “*the right to obtain from a data controller the rectification, erasure or blocking of data which is irrelevant, incomplete or inaccurate*”.⁴²
22. *Second*, the ‘right to be forgotten’ under the PIDPA is subject to the universal exception of ‘public interest’⁴³ akin to the GDPR⁴⁴ and various EU domestic data protection legislations.⁴⁵
23. *Third*, the PIDPA also provides effective procedural remedies⁴⁶ and does not constitute unfettered discretion that would impair the right to privacy⁴⁷ as it allows parties aggrieved by the decision of the IDPC to appeal to the Magentonian High Court.⁴⁸
24. Hence, Magentonia’s refusal to grant Ras’ request was not only foreseeable, but also done in

⁴⁰ *Delfi* (n 35) [121]; *Lindon and others v France* App no 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; *Centro Europa 7 Srl v Italy* App no 38433/09 (ECtHR, & June 2012) [141].

⁴¹ Council Regulation (EC) 2016/679 (n 10) art 17 & art 21.

⁴² Fact Pattern, [4.6].

⁴³ PIDPA, s 30; Fact Pattern, [4.6].

⁴⁴ Regulation (EU) 2016/679 (n 10) art 17.

⁴⁵ UK Data Protection Act 2018, s 15 & Schedule 2, Part 1; Federal Data Protection Act 2017 of Germany; Data Protection Act 2018 of Austria, s 7.

⁴⁶ ICCPR (n 2) art 2(3); *Posevini v Bulgaria* App no 63638/14 (ECtHR, 19 January 2017) [84]; *İrfan Güzel v Turkey* App no. 35285/08 (ECtHR, 7 February 2017) [94]-[99]; *Roman Zakharov v Russia* [GC] App no. 47143/06 (ECtHR, 4 December 2015) [233].

⁴⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9 [13]; *Observer and Guardian v The United Kingdom* App no. 13585/88 (ECtHR, 26 November 1991) [65]; *The Sunday Times* (n 36) [63]; *Huvig v France* App no. 11105/84 (ECtHR, 24 April 1990); *Kruslin v France* App no. 11801/85 (ECtHR, 24 April 1990) [33].

⁴⁸ Fact Pattern, [4.6].

pursuance to the rule of law.⁴⁹

(ii) Magentonia's decision pursued a legitimate aim

25. The permissible restrictions under the ICCPR are to protect national security, public order, public health or morals, and to respect the rights and reputation of others.⁵⁰

26. The Magentonian High Court justified the retention of the search results not only on the 'public interest' exception in Article 7 of the Magentonian Constitution,⁵¹ but also in light of "UConnect users' freedom to receive information, as guaranteed by Article 10 of the Magentonian Constitution".⁵² Hence, its decision pursued a legitimate aim.

(iii) Magentonia's decision was reasonable in the circumstances

27. According to the ICCPR's *travaux préparatoires*, the term 'reasonableness' in Article 17 means that any interference must be proportionate to the legitimate end sought.⁵³

a) The 2001 CT Story was a matter of public interest

28. The press has the task of imparting such information and ideas on political issues and areas of public interest, whilst the public has a corresponding right to receive them.⁵⁴

⁴⁹ General Comment No. 16 (n 1): Article 17 (Right to Privacy), [6]-[8]; *Vukota-Bojici v Switzerland* App no 61838/10 (ECtHR, 18 October 2016), [67]-[68].

⁵⁰ ICCPR (n 2), art 12(3), art 18(3), art 19(3), art 21 & art 22(2).

⁵¹ Fact Pattern, [4.6]

⁵² Fact Pattern, [6.1].

⁵³ CCCPR General Comment No. 16 (n 1): Article 17 (Right to Privacy), [3]-[4]; *Toonen* (n 34) [6.4] & [8.3]; *Van Hulst* (n34) [7.6]; *G v Australia* (n 34) [4.5] & [7.4].

⁵⁴ *Mavlonov and Sa'di v Uzbekistan* Communication No. 1334/2004 U.N. Doc. CCPR/C/95/D/1334/2004 [8.4]; *Lingens v Austria* App no. 9815/82 (ECtHR, 8 July 1986) [41]; *Bladet Tromsø and Stansaaas*, App no. 21980/93 (ECtHR, 20 May 1999) [62]; *Jersild v Denmark* [GC] App no. 15890/89 (ECtHR, 23 September 1994) [31].

29. Public interest is commonly defined as common values held by society, society's best interest, a moral standard for public action and other things besides.⁵⁵ The limits of acceptable criticism against politicians⁵⁶ are wider than that of a private individual⁵⁷ to ensure that the public has the means of discovering and forming opinion of politicians' attitudes.⁵⁸ The right to impart information on public interest, if done in good faith, should be protected regardless of damage done to affected individuals.⁵⁹

30. 'Public interest' is also recognised under the Magentonian Constitution and PIDPA.⁶⁰

31. The 2001 CT Story was of public interest, and not merely to satisfy the curiosity of a particular leadership on Ras's private life.⁶¹ At that time, Ras was a candidate running for the upcoming parliamentary election and representing the ruling political party.⁶²

32. The ECtHR in *Fuchsmann* opined that "*there was great public interest in corruption allegations*" even if based on mere suspicion dating back 16 years ago.⁶³ Here, since the 2001

⁵⁵ *Sürek v Turkey* (no. 1) App no 26682/95 (ECtHR, 8 July 1999) [61]; *Kacki v Poland* App no 10947/11 (ECtHR, 4 July 2017) [46].

⁵⁶ *Standard Verlags GmbH and Krawagna-Pfeifer v Austria* (No 2) App no 21277/05 (ECtHR, 04 September 2009) [47]; *Erla Hlynsdóttir v Iceland* App no 43380/10 (ECtHR, 10 July 2012) [65]; *Institut Ekonomichnykh Reform, TOV v Ukraine* App no 61561/08 (ECtHR, 17 October 2016) [44].

⁵⁷ *Lingens* (n 54) [42]; *Wolfgang Schussel v Austria* App no. 42409/98 (ECtHR, 21 February 2002) [8]; *Marchenko v Ukraine* App no. 4063/04 (ECtHR, 19 February 2009) [52]; *Vides Aizsardzibas Klubs v Latvia* App no. 57829/00 (ECtHR, 27 May 2004) [40]; *Lopes Gomes v Portugal* App no. 37698/97 (ECtHR, 28 September 2000) [30].

⁵⁸ *Lingens* (n 54) [42]; *Herrera Ulloa v Costa Rica* ser. C No.107 (IACtHR, 2 July 2004) [19].

⁵⁹ *Lepojic v Serbia* App no.13909/05 (ECtHR, 6 November 2007) [74].

⁶⁰ Fact Pattern, [4.6].

⁶¹ *Von Hannover v Germany* (No.2) (n 5) [65]; *Couderc* (n 39) [100]; *Satakunnan* (n 3) [169].

⁶² Fact Pattern, [2.2].

⁶³ *Fuchsmann v Germany* Application no. 71233/13 (ECtHR, 19 October 2017) [36].

CT Story concerned his alleged misappropriation of university funds during his previous tenure as a professor,⁶⁴ the public has an interest to be informed about his character.⁶⁵

33. Further, the influx of Cyanisian refugees into Magentonia was a widely perceived threat to Magentonia's economy.⁶⁶ Ras, a former Cyanisian, even promised in his electoral campaign to fast-track Magentonizan citizenship to all Cyanisian refugees.⁶⁷ The Magentonian public is entitled to appraise of immigration policies since they deeply affect society's well-being.⁶⁸

b) Ras actively stayed in the public limelight

34. It is critical to consider the conduct of the person concerned prior to publication, and whether related information had already appeared in an earlier publication.⁶⁹

35. In February 2001, when the 2001 CT Story was initially published by *The Cyanisian Times*, Ras responded that he was a victim of persecution for his political opinions.⁷⁰

36. On 1 April 2018, when the 2001 CT Story was republished by *Magentonian Mail*, he again merely clarified that it was a false allegation, and reproduced his former university's statement

⁶⁴ Fact Pattern [1.2]; Clarifications [8].

⁶⁵ *Couderc* (n 39) [99]; *Ojala v Finland* App no 69939/10 (ECtHR, 2 June 2014) [54]-[55]; *Ruusunen v Finland* App no 735779/10 (ECtHR, 14 April 2014) [49]-[50].

⁶⁶ Fact Pattern [2.3].

⁶⁷ Fact Pattern [2.3].

⁶⁸ *Couderc* [103]; *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985) [58]; *Sunday Times* (n 36) [66]; *Satakunnan* (n 3) [171].

⁶⁹ *Hachette Filipacchi AssociÈs (ICI PARIS)* [52]-[53]; *Sapan v Turkey* App no. 17252/09 (ECtHR, 20 September 2011) [34]; *Fuchsmann v Germany* (n 63) [49].

⁷⁰ Fact Pattern, [1.2].

on his full exoneration.⁷¹ He only requested for the republication to be removed, but not the original article.⁷² Consequently, the trending of public posts on Ras subsided.⁷³

37. The trending picked up again on 25 April 2018 when *TakeBackMag200* posted a web link to the 2001 CT Story with the caption “*you can’t erase history*”.⁷⁴ It is only at this point that Ras requested for the search results depicting the 2001 CT Story to be blocked or removed on UConnect for the first time.⁷⁵

38. However, such request is now redundant, and even counter-productive.

39. *First*, the passage of time naturally makes people forget inconsequential incidents, even if it involves criminal allegations.⁷⁶ The only reason the 2001 CT Story kept resurfacing on UConnect was due to the new publications linking to the article. Hence, so long as such republication is removed, the 2001 CT Story would no longer linger in the public’s memory.

40. *Second*, an individual actively seeking the limelight denudes his own right to privacy.⁷⁷ Ras could have requested the removal of the 2001 CT Story or de-listing from UConnect’s search results earlier. Instead, he chose to publicly rebut the allegations, attracting more attention to himself. As such, Ras now suffers from the paradoxical ‘*Streisand effect*’ – any further action

⁷¹ Fact Pattern, [4.1].

⁷² Fact Pattern, [4.2].

⁷³ Fact Pattern, [4.3].

⁷⁴ Fact Pattern, [4.4].

⁷⁵ Fact Pattern [4.5].

⁷⁶ Superior Court of Justice, decision No. REsp. 1.335.153. 20 October 2013.

⁷⁷ *Fuchsmann v Germany* (n 63) [49].

to censor the 2001 CT Story will inevitably entrench itself deeper into public consciousness.⁷⁸

c) *UConnect is not a ‘data controller’ in respect of its search functionality*

41. All data controllers are intermediaries, but not all intermediaries are data controllers.⁷⁹ An intermediary may be a controller only in specific functions.⁸⁰ For instance, Google is not a ‘controller’ in respect of its *Blogger* platform.⁸¹

42. In *Google Spain*, the CJEU found Google to be a ‘controller’ for its search engine as its function consisted of “*finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference*”.⁸²

43. However, ‘external’ search engine operators like Google and Bing must be distinguished from

⁷⁸ Minhui Xue., Gabriel Magno., Evandro Cunha, Virgilio Almeida. & Keith W. Ross, ‘The Right to be Forgotten in the Media: A Data-Driven Study, Proceedings on Privacy Enhancing Technologies (2016) no.4, p. 2; Daniel Solove, ‘What Google Must Forget: The EU Ruling on the Right to Be Forgotten’ 14 May 2014, < <https://www.linkedin.com/pulse/20140513230300-2259773-what-google-must-forget-the-eu-ruling-on-the-right-to-be-forgotten/> > accessed 5 November 2018; Evan Selinger & Woodrow Hartzog, ‘Google Can’t Forget You, But It Should Make You Hard To Find’, 20 May 2014, < <https://www.wired.com/2014/05/google-cant-forget-you-but-it-should-make-you-hard-to-find/> > accessed 4 November 2018.

⁷⁹ Daphne Keller, ‘The Right Tools: Europe’s Intermediary Liability Laws and the EU 2016 General Data Protection Regulation’ (2018) 3 Berkley Technology Law Journal 305, 323-324.

⁸⁰ Corte di Cassazione, sez. III Penale, sentenza 17 December 2013 – 3 February 2014, n. 5107 (It.), < [http://www.dirittoegiustizia.it/allegati/15/0000063913/Corte di Cassazione sez III Penale sentenza n 5107 14 depositata il 3 febbraio](http://www.dirittoegiustizia.it/allegati/15/0000063913/Corte%20di%20Cassazione%20sez%20III%20Penale%20sentenza%20n%205107%2014%20depositata%20il%203%20febbraio) > accessed 5 November 2018.

⁸¹ *Google Spain, SL v Agencia Protección de Datos*, S.A.N. Dec. 29, 2014 (R.J., No. 70) (Spain); Case C-131/12, *Google Spain SL v Agencia Española de Protección de Datos*, 2014 E.C.R. 317; Miquel Peguera, *Spain: The Right to Be Forgotten Does Not Apply to Blogger*, STAN. L. SCH. CTR. FOR INTERNET & SOC’Y (Mar. 4, 2015, 9:01 AM), <http://cyberlaw.stanford.edu/blog/2015/03/spain-right-be-forgotten-does-not-apply-blogger> accessed 7 November 2018.

⁸² *Google Spain* [41].

websites having ‘internal’ search engines.⁸³ Indexing done by the former has a more significant impact on privacy – *first*, by revealing a vast array of aspects of a person’s private life to create a detailed profile; and *second*, by making such information ubiquitously accessible to *all* Internet users.⁸⁴

44. UConnect is primarily a social media platform with a search functionality accessible *only* to its users.⁸⁵ Whilst search engine operators like Google employ a host of complex algorithms assessing a web-page’s relevancy on its own objective merits (*i.e.* freshness of content and good user experience),⁸⁶ UConnect’s functionality is influenced by subjective factors, exclusive to UConnect activities (*i.e.* user preference and behavior, and popularity of posts integrating the web-page).⁸⁷

45. Hence, UConnect’s search functionality does not qualify as a ‘controller’ under the PIDPA.

d) Deletion of all search results is not proportionate

46. The principle of proportionality dictates that the least restrictive technical means must be

⁸³ Working Party, art 29, Guidelines on the Implementation of the Court of Justice of the European Union Judgment on ‘Google Spain and Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González’ C-131/12 26 November 2014 [18].

⁸⁴ *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD) & Mario Costeja González* [80] & [87]; Article 29 Working Party, Guidelines on the Implementation of the Court of Justice of the European Union Judgment on ‘Google Spain and Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González’ C-131/12, 26 November 2014, [5]; *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited* (Joined Cases C-509/09 and C-161/10) [2012] QB 654 [45]; *NT1 and NT2 v Google LLC* [2018] EWHC 799 (QB) [33].

⁸⁵ Fact Pattern, [3.2] and [3.3].

⁸⁶ ‘How Search Algorithms Work’ < <https://www.google.com/search/howsearchworks/algorithms/> > accessed 5 November 2018.

⁸⁷ Fact Pattern, [3.4]; Clarifications, [22].

adopted when restricting content.⁸⁸

47. The CJEU in *Google Spain* ruled that “*the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages*”.⁸⁹ The remedy granted was lesser than Mr. Costeja’s request to completely “*prevent indexing of the information relating to him personally*” so that it would “*not be known to internet users*”.⁹⁰

48. Hence, the ruling only ‘blocks’ search results obtained by searches on the individual’s name, and does not go so far as requiring complete deletion of all links to the web-page from the search engine’s indexes – the web-page is still accessible if different search terms are used.⁹¹

49. The 2001 CT Story trended on the search results page for search terms including ‘Ras’, ‘Unger Ras’ and ‘Magentonia’.⁹² If Ras’ request to remove or block “*all search results depicting the 2001 Cyanisian Times story*”⁹³ is granted, the link to the 2001 CT Story will no longer show

⁸⁸ UN Human Rights Committee (HRC) *CCPR*, ‘*General comment No 34*’ on ‘*Article 19 (Freedom of Opinion and Expression)*’ (2011) UN Doc CCPR/C/GC/34, [34]; Manila Principles on Intermediary Liability <https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf> accessed 5 November 2018, principle IV (b) on *Laws and content restriction orders and practices must comply with the tests of necessity and proportionality*. Page 4; *Holt v Hobbs* 135 S.Ct. 853 (2015) [8]-[13]; *McCutcheon v Federal Election Commission* 572 U.S. 2014 [35]-[36]; *United States v Playboy Entertainment Group, Inc.* 529 U.S. 803 (2000) [811]-[827]; *Shelton v Tucker* 364 U.S. 479 (1960); *United States v Robel* 389 U.S. 258 (1967); *Schneider v Smith*, 390 U.S. 17 (1968); *Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council* 425 U.S. 748 (1976); *Central Hudson Gas & Electric Co. v PSC* 447 U.S. [557], [564], [565] & [569-571] (1980).

⁸⁹ *Google Spain* [88].

⁹⁰ *Google Spain* [20].

⁹¹ Working Party, art 29 (n 83) [21].

⁹² Fact Pattern [4.3], [4.4].

⁹³ Fact Pattern [4.5].

up even when searching the topic regardless of search terms.⁹⁴ Such overbroad de-listing order “almost has much the same effect as deleting the original content”.⁹⁵

50. Further, UConnect has the ability to “block search results *in any country*”.⁹⁶ Ras’ request to deletion would extend extraterritorially, affecting non-Magentonian users. Such sweeping deletion is currently fiercely contested in the CJEU Court between *Google* and France’s *CNIL* (at the time of writing, the case is awaiting decision expected to be delivered in December 2018).⁹⁷ Various human rights NGOs find such global expansion of the right to be forgotten as an ‘*inherently disproportionate interference with freedom of expression*’.⁹⁸

51. Hence, Ras’ request is an extremely excessive and intrusive measure.

⁹⁴ Clarifications, [19].

⁹⁵ Letter from Gerald Leitner, Secretary General., International Federation of Library Associations & Institutions, ‘Application of Right to be Forgotten Rulings: The Library Viewpoint’ (Oct. 24, 2016), <https://www.ifla.org/files/assets/faife/statements/161024_ifla_on_rtbf_case_in_france.pdf> accessed 5 November 2018; Daphne Keller, ‘The Right Tools: Europe’s Intermediary Liability Laws and the EU 2016 General Data Protection Regulation’ (2018) 3 Berkley Technology Law Journal 305, 325.

⁹⁶ Clarifications, [21].

⁹⁷ Case C-507/17: Request for a preliminary ruling from the Conseil d’État (France) lodged on 21 August 2017 — *Google Inc. v Commission nationale de l’informatique et des libertés (CNIL)* (2017) OJ C 347.

⁹⁸ Written Observations of Article 19 (n 21) [31].

II. THE SUSPENSION OF UCONNECT'S OPERATIONS DID NOT VIOLATE ARTICLE 19 OF THE ICCPR

52. The right to freedom of expression⁹⁹ under Article 19(2) of the ICCPR is not absolute.¹⁰⁰ An interference to such right would be lawful if it (A) is prescribed by law, (B) pursues a legitimate aim, and (C) is necessary in a democratic society.¹⁰¹ The interim injunction order granted by the Magentonian High Court on 1 July 2018¹⁰² suspending UConnect's operations in Magentonia fulfilled this three-part test.

⁹⁹ ICCPR (n 2) ; ECHR (n 2) art 10; American Convention on Human Rights (ACHR) (adopted 22 November 1969, entered into force 18 July 1978) art 13; Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) (UDHR) art 19; African Charter on Human and Peoples' Right (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (ACHPR) art 9; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) 12 IHRR 893 (ArCHR) art 32.

¹⁰⁰ General comment No 34 (n 88); *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49]; *Tae-Hoon Park v Republic of Korea* Communication No 628/1995 U.N. Doc CCPR/C/57/D/628/1995 (1998) [10.3]; *Perna v Italy* App no 48898/99 (ECtHR, 6 May 2003) [38]; *Benhadj v Algeria* Communication No 1173/2003 U.N. Doc. CCPR/C/90/D/1173/2003 (2007) [8.10] ; *Stoll v Switzerland* Application No 69698/01 (ECtHR, 10 Dec 2007) [87] ; *Hachette Filipacchi Associes v France* App no 71111/01 (ECtHR, 12/11/2007 [40]; *Mouvement Ralien Suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) [48]; *Animal Defenders International v United Kingdom* App No. 48876/08 (ECtHR, 22 April 2013) [100]; *Stephen Peter Gough v United Kingdom* App No 49237/11 (ECtHR, 28 October 2014) [164].

¹⁰¹ Special Rapporteur 2013 (n 26) [24]; *Refah Partisi (The Welfare Party) and Others v Turkey* App nos. 41340/98, 41342/98, 41343/98 and 41344/98 (ECtHR, 13 February 2003) [50]-[85]; *The Sunday Times* (n36) [45]; *Mukong v Cameroon* Communication no. 458/1991 U.N. Doc. CCPR/C/51/D/458/1991 (1994). [9.7] *Magyar Tartalomsgálatók Egyesülete and Index.hu Zrt v Hungary* Application no. 22947/13 (ECtHR, 2 February 2016) [46].; *Delfi* (n 35) [119].

¹⁰² Fact Pattern, [5.5].

A. Magentonia’s suspension of UConnect was prescribed by law

(i) The PIDPA was accessible

53. UConnect is headquartered in Magentonia and a recognized legal person under Magentonian Law.¹⁰³ Hence, it should be aware of the PIDPA being passed in 2016.

(ii) Magentonia’s suspension of UConnect was foreseeable

54. The scope of the PIDPA was sufficiently precise for UConnect to reasonably foresee¹⁰⁴ that enforcement actions could ensue if unlawful content appeared on its platform.

55. First, the term ‘person’ in Section 32 encompasses “*incorporated bodies carrying out any business or other activity within the territory of Magentonia*”.¹⁰⁵

56. Second, Section 3 and 5 of the PIDPA relate to grave offences prevalent in today’s modern digital era – ‘hate speech’ and ‘fake news’. The terms ‘advocacy of national, racial and religious hatred’ and ‘dissemination of false propaganda’¹⁰⁶ are sufficiently precise for UConnect to anticipate the correlation between any suspicious content and such offenses.¹⁰⁷

57. Third, even if such terms carry an element of uncertainty¹⁰⁸ or may be liable to more than one

¹⁰³ Fact Pattern, [3.1].

¹⁰⁴ *Wingrove* (n 38) [40]; *Editorial Board* (n 38) [51]– [52]; *Dmitriyevskiy v Russia* App no. 42168/06 (ECtHR, 3 October 2017) [78]; General Comment 34 (n 88) [25].

¹⁰⁵ Fact Pattern, [5.5].

¹⁰⁶ Fact Pattern, [5.5].

¹⁰⁷ *Kononov v Latvia* [GC] App no. 36376/04 (ECtHR, 2010) [185]; *Del Río Prada v Spain* [GC] App no. 42750/09 (ECtHR 21 October 2013) [79]; *Rohlena v the Czech Republic* [GC] App no. 59552/08, (ECtHR, 9 September 2013) [50]; *Radio France and Others v France* App no. 53984/00 (ECtHR, 30 March 2004) [20].

¹⁰⁸ *Jobe v the United Kingdom (dec.)* App no. 48278/09 (ECtHR, 14 June 2011) [8].

meaning,¹⁰⁹ the interpretation and application of the PIPDA are questions of practice for the Magentonian courts to determine,¹¹⁰ including the imposition of injunctions.¹¹¹

58. *Fourth*, professional people, who exercise a high degree of caution in their occupation, are expected to take special care in assessing the risks of their activities.¹¹² UConnect is the largest social media platform in Mangetonia,¹¹³ with an advertising revenue of USD 250 million in 2017.¹¹⁴ With such wide reach and high adoption, any Internet intermediary in the shoes of UConnect would reasonably anticipate that its users' activities would attract enforcement measures.

B. Magentonia's suspension of UConnect pursued a legitimate aim

59. Freedom of expression can be restricted for the respect of the rights and reputation of others, or the protection of national security, public order, public health or morals.¹¹⁵

60. Section 3 of the PIDPA is an exact mirror image of Article 20 of the ICCPR. In essence, the provision is a "hate speech" law, which is prevalent in many liberal democracies, including

¹⁰⁹ *Leyla Şahin v Turkey* [GC] App no. 44774/98 (ECtHR, 10 November 2005) [91], *Gorzelik and Others v Poland* [GC] App no. 44158/98 (ECtHR, 17 February 2004) [65].

¹¹⁰ *Delfi* (n 35) [127]; *Centro Europa* (n 40) [140]; *Gorzelik and Others v Poland* [67].

¹¹¹ *Krone Verlag GmbH & Co. KG v Austria* App no. 34315/96 (ECtHR, 26 February 2002) [23]; *News Verlags GmbH & Co. KG v Austria* App no. 31457/96 (ECtHR, 14 December 2006) [43].

¹¹² *Delfi* (n 35) [122]; *Otchakovsky-Laurens and July v France* [GC] App nos. 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; *Cantoni v France* App no. 17862/91 (ECtHR, 15 November 1996) [35]; *Chauvy and Others v France* App no. 64915/01 (ECtHR 29 June 2004) [43]-[45].

¹¹³ Fact Pattern, [3.1].

¹¹⁴ Fact Pattern, [3.7].

¹¹⁵ ICCPR (n 2), art 19(3).

Canada,¹¹⁶ Ireland,¹¹⁷ and UK.¹¹⁸ Such laws are critical to protect the rights of minority communities, including the right to life.¹¹⁹

61. Section 5 of the PIDPA prohibits the “*dissemination of false propaganda*”. The insidious impact of social media disinformation has been felt worldwide,¹²⁰ most notoriously in the US Presidential Election and UK Brexit referendum in 2016.¹²¹ Legislation prohibiting online falsehoods has been passed in Germany,¹²² while similar proposals are under Parliamentary review and public consultation in various jurisdictions including the UK¹²³ and Singapore.¹²⁴

62. Here, the flood of anti-Cyanisian posts¹²⁵ on UConnect in mid-2016 posed a serious risk to Magentonia’s electoral process. If left unchecked, hate speech coupled with false propaganda

¹¹⁶ Canadian Criminal Code, s. 319.

¹¹⁷ Ireland Prohibition of Incitement to Hatred Act 1989.

¹¹⁸ United Kingdom Public Order Act 1986, s. 17 of 29A.

¹¹⁹ Special Rapporteur 2013 (n 26) [25]; *Delfi* (n 35) [48].

¹²⁰ Larry Greenemeier, ‘When Hatred Goes Viral: Inside Social Media’s Efforts to Combat Terrorism’ *Scientific American* (24 May 2017) <<https://www.scientificamerican.com/article/when-hatred-goes-viral-inside-social-medias-efforts-to-combat-terrorism/>> accessed 7 November 2018; Caitlin Dickerson, ‘How Fake News Turned a Small Town Upside Down’ *The New York Times Magazine* (26 September 2017) <<https://www.nytimes.com/2017/09/26/magazine/how-fake-news-turned-a-small-town-upside-down.html>> accessed 7 November 2018; Francis Chan, ‘Indonesian Police Uncover “Fake News Factory”’ *The Straits Times* (17 September 2017) <<http://www.straitstimes.com/asia/se-asia/indonesian-police-uncover-fake-news-factory>> accessed 7 November 2018; Naja Bentzen, ‘“Fake News” and the EU’s Response’ (EP Think Tank, 2 April 2017) <<https://epthinktank.eu/2017/04/02/fake-news-and-the-eus-response/>> accessed 7 November 2018.

¹²¹ Singapore Ministry of Communications and Information and the Ministry of Law, ‘Deliberate Online Falsehoods: Challenges and Implications’, 5 January 2018, [16]-[24].

¹²² German Act to Improve Enforcement of Law in Social Networks (Network Enforcement Act) 2017.

¹²³ UK House of Commons, Digital, Culture, Media and Sports Committee, ‘Disinformation and ‘fake news’: Interim Report”, second Report of Session 2017-2019, 29 July 2018.

¹²⁴ Singapore Ministry of Communications and Information and the Ministry of Law, ‘Deliberate Online Falsehoods: Challenges and Implications’, 5 January 2018, [84].

¹²⁵ Fact Pattern, [5.1], [5.3]-[5.5].

will entrench divisions within society, sow the seeds of racial and religious extremism, and erode public trust in democratic institutions and the media.¹²⁶ Hence, enforcement action under the PIDPA was warranted.¹²⁷

C. Magentonia’s suspension of UConnect was necessary in a democratic society

63. The test of ‘necessity in a democratic society’ turns on the principle of proportionality – in that the measures taken by States must be proportionate to the legitimate aim pursued.¹²⁸ The relevant factors include the context and extent of the publication,¹²⁹ as well as the elements of due process and necessity of the suspension order.¹³⁰

(i) Context of publication

64. Context includes sensitive social and political background, tense security situation, or atmosphere of hostility and hatred.¹³¹ Threats to public order is not limited to public

¹²⁶ Singapore Ministry of Communications and Information and the Ministry of Law, ‘Deliberate Online Falsehoods: Challenges and Implications’, 5 January 2018, [59]-[60].

¹²⁷ UNHRC, ‘Annual Report of the United Nations High Commissioner for Human Rights’ (11 January 2013) UN Doc A/HRC/22/17/Add.4, 42; UNHRC, ‘Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda’ (3 March 2017) FOM GAL/3/17 preamble.

¹²⁸ General Comment No 34 (n 88) [33]; *Perna v Italy* (n 100) [38]; *Nikula v Finland* App no 31611/962 (ECtHR, 1 March 2002) [47].

¹²⁹ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, [29] (annexed to the Annual Report of the United Nations High Commissioner of Human Rights, A/HRC/22/17/Add.4, 11 January 2013).

¹³⁰ Manila Principles (n 88), Principles II, IV and V.

¹³¹ Toby Mendel, ‘Hate Speech Rules Under International Law’ (Centre for Law and Democracy, February 2010) <<http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf>> accessed 21 January 2018, 8; *Savva Terentyev v Russia* App no. 10692/09 (ECtHR, 28 August 2018) [78]; *Jersild* (n 54) [31]; *Zana v Turkey* App no. 18954/91 (ECtHR, 25 November 1997) [60]; *Incal v Turkey* App no 41/1997/825/1031 (ECtHR, 9 June 1998) [58]; *Soulas v France* App no. 15948/03 (ECtHR, 10 July 2009) [37]–[39].

disturbances, but also disruption to social structure.¹³²

65. In 2018, the plunge in the world price of natural gas, Magentonia's core industry, resulted in widespread fears of economic recession among the citizens, as well as rising resentment against the Cyanisian refugees demonized by MPF politicians for taking away their jobs.¹³³ In May 2018, the virulent attack peaked, as reflected by the high volume of trending anti-Cyanisian posts on UConnect.¹³⁴ Such exigencies called for greater governmental oversight.

(ii) Extent of publication

66. The Internet provides an unprecedented platform that augments the freedom of expression.¹³⁵ Intermediaries must not allow themselves to become a vehicle for the dissemination of hate speech and the promotion of violence, especially in situations of conflict and tension.¹³⁶ The harm is even more acute as its content can be disseminated rapidly and widely, and persistently remain online.¹³⁷

67. Content published on mainstream or highly visited web pages have more extensive reach compared to the ones that have minimal readership.¹³⁸ Since UConnect has an enormous user

¹³² *Perincek v Switzerland* App no. 27510/08 (ECtHR, 15 October 2015) [146].

¹³³ Fact Pattern, [2.3].

¹³⁴ Fact Pattern, [5.1] - [5.4].

¹³⁵ *Delfi* (n 35)[110], *Ahmet Yildirim v Turkey* App no. 3111/10 (ECtHR, 18 December 2012) [48], *Times Newspaper Ltd v the United Kingdom (nos. 1 and 2)* App nos. 3002/03 and 23673/03 (ECtHR, 2009) [27].

¹³⁶ *Sürek* (n 55) [60], [62] & [63]; *Erdogdu & Ince v Turkey* Application nos. 25067/94 and 25068/94 (ECtHR, 8 July 1999) [54].

¹³⁷ *Delfi* (n 35) [110].

¹³⁸ *Savva* (n 131) [79].

base in Magentonia (60% of population),¹³⁹ the anti-Cyanisians posts can reach the majority of citizens in a blink of an eye. The speed of dissemination was alarming: the **26 May 2018** and **30 May 2018** posts ‘trended’ on UConnect within 24 hours of publication.¹⁴⁰

68. The extensive reach afforded by social media far supersedes the traditional press justifies a different approach in regulation.¹⁴¹ The unfair advantages of paid content on UConnect may even curtail, rather than promote, a free and pluralist debate amidst the election period.¹⁴² Hence, suspending UConnect’s service in Magentonia was a reasonable measure.

(iii) Due process of the suspension

69. Prior restraints of the media are permissible, so long as there is a legal framework to ensure tight control over the scope of any bans and effective judicial review to prevent abuses.¹⁴³

70. Whilst intermediaries are generally not responsible for third party content published on its platform, content restrictions may be imposed by an independent and impartial judicial authority.¹⁴⁴ Such restrictions should be limited in geographical and temporal scope.¹⁴⁵

71. On 1 June 2018, the Magentonian High Court granted an injunction to suspend UConnect’s

¹³⁹ Fact Pattern, [3.1].

¹⁴⁰ Fact Pattern, [5.4].

¹⁴¹ *Editorial Board* (n 38) [63].

¹⁴² *Animal Defenders International* (n 100) [111]-[112]; *Centro Europa* (n 40) [134].

¹⁴³ *RTBF v Belgium* Application no. 50084/06 (ECtHR, 29 March 2011) [105] & [115]; *Ahmet Yildirim* (n 135) [64]; *Association Ekin v France* Application no. 39288/98 (ECtHR, 17 July 2001) [58]; *Editorial Board* (n 38) [55].

¹⁴⁴ Manila Principles (n 88), Principle II.a.

¹⁴⁵ Manila Principles (n 88), Principle II.b.

operations within Magentonia until the conclusion of trial.¹⁴⁶ The trial proceeded expeditiously, with the High Court delivering its verdict on 10 July 2018.¹⁴⁷ The suspension of UConnect only lasted for 1 month and 10 days, and only affected Magentonians but not users worldwide.¹⁴⁸ Hence, the suspension complied with due process of law.

(iv) Necessity of the suspension

72. While restrictions must adopt the least intrusive measure¹⁴⁹, the suspension of UConnect's operations was the only viable way to curb the threat of public disorder.¹⁵⁰

73. At the peak of TBM's campaign in May 2018, there was a sudden, suspicious surge of new users subscribing to UConnect and immediately sharing and viewing TBM's anti-refugee rhetoric.¹⁵¹ This raises concerns of malicious bots and trolls running rampant on UConnect, reminiscent of Russian agents weaponising social media to sow discord during the 2016 US Presidential Election.¹⁵²

74. Without a robust authentication system, UConnect would be ill-equipped to actively filter 'fake' users.¹⁵³ Removal of content and termination of user accounts are ineffective remedial

¹⁴⁶ Fact Pattern, [5.5].

¹⁴⁷ Fact Pattern, [6.2].

¹⁴⁸ Clarifications, [21] & [30].

¹⁴⁹ General Comment No 34 (n 88) [34].

¹⁵⁰ PIDPA, s 5; Fact Pattern, [5.5].

¹⁵¹ Fact Pattern, [5.4].

¹⁵² Alessandro B and Emilio F, 'Social bots distort the 2016 U.S. Presidential election online discussion' (*First Monday*, 7 November 2016) < <https://firstmonday.org/ojs/index.php/fm/article/view/7090> > accessed 1 November 2019.

¹⁵³ Fact Pattern, [5.3].

measures, as new bots and content can be generated instantaneously.¹⁵⁴

75. Hence, in order to maintain the integrity of Magentonian's electoral process¹⁵⁵, restricting the public's access to UConnect was justified.

¹⁵⁴Andrew Hutchinson, 'Twitter introduces New Measures to Tackle Trolls and Bots on the Platform' (*SocialMediaToday*, 27 June 2018) < <https://www.socialmediatoday.com/news/twitter-introduces-new-measures-to-tackle-trolls-and-bots-on-the-platform/526609/>> accessed 1 November 2019.

¹⁵⁵ General Comment No. 34 (n 88) [37]; *Kim v Republic of Korea* Communication No. 968/2001 U.N. Doc. CCPR/C/84/D/968/2001 (2005) [8.3]; *Animal Defenders* (n 100) [111]; *Bowman v the United Kingdom*, 19 February 1998, *Reports* 1998-I; [41].

III. THE PROSECUTION AND CONVICTION OF UCONNECT DID NOT VIOLATE ARTICLE 19 OF THE ICCPR

Magentonia's prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA fulfilled the three-part test of legality, necessity and proportionality.

A. Magentonia's prosecution and conviction of UConnect was prescribed by law

76. As adumbrated above,¹⁵⁶ the PIDPA was formulated with sufficient precision for UConnect to reasonably foresee that content posted by its user may attract criminal liability.

B. Magentonia's prosecution and conviction of UConnect pursued a legitimate aim

77. As adumbrated above,¹⁵⁷ the criminal action taken against UConnect pursued a legitimate aim *i.e.* for the protection of the rights of others and public order.

C. Magentonia's prosecution and conviction of UConnect was necessary in a democratic society

78. The prosecution and conviction of UConnect under Sections 3 and 5 of the PIDPA was necessary and proportionate, considering the nature of the anti-Cyanisian posts, as well as UConnect's role in their dissemination.

(i) Content of publications

79. Offensive statements with the sole intent to insult and humiliate amounts to wanton

¹⁵⁶ Arguments, [54]-[58].

¹⁵⁷ Arguments, [59]-[62].

denigration, and would fall outside the protection of free speech.¹⁵⁸ A publication should not be construed solely in reference to one or more statements in isolation, but rather in light of its overall thrust.¹⁵⁹

80. Furthermore, heightened protection from attacks by insult or slander ought to be afforded to vulnerable minority groups stricken with a history of oppression or inequality and facing deep-rooted prejudices, hostility and discrimination,¹⁶⁰ especially immigrants¹⁶¹ and native minorities.¹⁶²

81. The **26 May 2018** post hurled a plethora of offensive insults against the Cynasian refugees, such as “*bottom feeders*” (a derogatory term often associated with them), “*thieves*” and “*fraudsters*”.¹⁶³ The post even accused them of treason and terrorism. Although there was no explicit call for violence,¹⁶⁴ targeting such a vulnerable section of society with a long history of oppression and discrimination would further stigmatise and alienate them in the eyes of the populace. Worse still, they would even fear reprisals by angry mobs.

82. In **30 May 2018**, TBM published a second post claiming that a study by University of Magentonia revealed that the Cyanisian refugees would outnumber the Magentonia citizens by

¹⁵⁸ *Savva* (n 131) [68]; *Skalka v Poland* App no. 43425/98 (ECtHR, 27 May 2003) [34]; *Magyar* (n 101) [76].

¹⁵⁹ *Lewandowska-Malec v Poland* App no. 39660/07 (ECtHR, 18 September 2012) [62].

¹⁶⁰ *Savva* (n 131) [76].

¹⁶¹ *Soulas* (n 131) [36]-[41]; *Féret v Belgium* App no. 15615/07 (ECtHR, 16 July 2009) [69]-[73] & [78].

¹⁶² *Balsytė-Lideikienė v Lithuania* App no. 72596/01 (ECtHR, 4 November 2008) [78].

¹⁶³ Fact Pattern, [5.1].

¹⁶⁴ *Dmitriyevskiy v Russia* (n 104) [99]; *Ibragim Ibragimov and others v Russia* App nos. 1413/08 and 28621/11 (ECtHR, 28 August 2018) [94].

2025.¹⁶⁵ However, this was a bald-faced lie, shorn of any factual basis.¹⁶⁶ More worryingly, it was calculated to build upon the false narrative from the first post which alleged that the Cyanisian refugees “*want to form their own nation, kicking us out*”.¹⁶⁷

83. Such inflammatory personal attacks against the Cyanasian refugees transcended the boundaries of acceptable debate and discussion.¹⁶⁸ Incitement to hostility and discrimination does not in any way contribute to a discussion of public interest, hence should not be entitled to the protection of free speech.¹⁶⁹

(ii) UConnect is an active intermediary having substantial control over TBM’s posts

84. Internet intermediaries that host third-party content come in two forms: passive or active.

85. An intermediary is passive when its activities are merely technical, automatic and passive in nature.¹⁷⁰ Examples include WhatsApp (private communications) and Dropbox (private database storage).

86. However, an intermediary is deemed active when it exercises a substantial degree of control

¹⁶⁵ Fact Pattern, [5.4].

¹⁶⁶ Fact Pattern, [6.2.1].

¹⁶⁷ Fact Pattern, [5.1].

¹⁶⁸ *Tierbefrier e.V. v Germany* App no. 45192/09 (ECtHR, 16 January 2014) [56]; Research Department of the Council of Europe, ‘Internet: case-law of the European Court of Human Rights’, June 2015, 33.

¹⁶⁹ *Willem v France* App no. 10883/05 (ECtHR, 16 July 2009) [36]-[38]; *McVicar v The United Kingdom* App no. 46311/99 (ECtHR, 7 August 2002) [72], *Bladet Tromsø and Stensaas v Norway [GC]*, App no. 21980/93 (ECtHR, 20 May 1999) [65].

¹⁷⁰ Council Directive 2000/31/EC of European Parliament and Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1 (‘Directive On Electronic Commerce’) [42]; Joined Cases C-236/08, C-237/08 and C-238/08 *Google France and Google v Louis Vuitton* [2010] [113]; Johanna Tuohino, ‘Liability of Intermediary Service Providers in the EU: Review of current developments’ (Masters, University of Lapland, 2013).

over its users' content.¹⁷¹ The test of substantial control relies on two key factors: (a) economic interest; and (b) exclusive technical means to regulate the content.¹⁷²

87. Several notable cases illustrate the distinction between these two types:

- (a) In *L'Oreal SA*¹⁷³, eBay's featured allowed users to make a listing of offers on its website. At the same time, eBay utilized paid advertising provided by search engines to direct potential consumers to the offers. Hence, the CJEU held that eBay played an active role by optimizing the presentation of the offers for sale and promoting these offers.
- (b) In *Delfi AS*¹⁷⁴, the ECtHR held an online news portal liable for comments posted by third parties mainly because it retained the power to delete comments posted on its platform and had a direct economic interest in soliciting third party comments.
- (c) In *Telecinco*¹⁷⁵, the Spanish Court found that Youtube was not liable as an active intermediary because the 'suggested videos' function purely automated based on an objective criterion (user preference), hence did not amount to an editorial function.

88. Based on the test of substantial control, UConnect is deemed as an active intermediary.

89. First, UConnect employs a team of human reviewers to review the content reported by its

¹⁷¹ *Delfi* (n 35) [144].

¹⁷² *Delfi* (n 35) [144].

¹⁷³ Case C-324/09 *L'oreal SA v eBay* [2011] ECR I-6011 (CJEU).

¹⁷⁴ *Delfi v Estonia*.

¹⁷⁵ *Telecinco v Youtube* Judgment No. 289/2010, 23 July 2008.

users.¹⁷⁶ Second, UConnect reserves the right to remove posts that violates its Community Standards¹⁷⁷ and to terminate user accounts.¹⁷⁸ Third, UConnect allows advertisers and users to pay to increase visibility of their posts on the feeds of other users.¹⁷⁹ Fourth, the algorithm deployed¹⁸⁰ on UConnect restricts user exposure to similar offensive and inaccurate content¹⁸¹ and information coherent to their existing views,¹⁸² hence impairing effective access to alternative information.

90. Hence, as an active intermediary, UConnect has a higher degree of responsibility in monitoring and removing any unlawful user content.

(iii) UConnect failed to expeditiously remove TBM's posts

91. As a general rule, intermediaries are immune from liability of content posted by third party users.¹⁸³ However, upon having actual or constructive knowledge of illegal content published

¹⁷⁶ Fact Pattern, [3.5].

¹⁷⁷ Fact Pattern, [3.5].

¹⁷⁸ Fact Pattern, [5.3].

¹⁷⁹ Fact Pattern, [3.2.4].

¹⁸⁰ Fact Pattern, [3.2.2] & [3.4]; Clarifications, [15].

¹⁸¹ Special Rapporteur 2013 (n 26) [55]; Roheeni Saxena, 'The Social Media "Echo Chamber" Is Real' (ArsTechnica, 14 March 2017) <<https://arstechnica.com/science/2017/03/the-social-media-echo-chamber-is-real/>> accessed 21 January 2018.

¹⁸² Zaynep Tufekci, 'Mark Zuckerberg is in Denial' *The New York Times* (15 November 2016) <<https://www.nytimes.com/2016/11/15/opinion/mark-zuckerberg-is-in-denial.html>> accessed 21 January 2018; The Economist Staff, 'Yes, I'd Lie To You' *Economist* (10 September 2016) <<https://www.economist.com/news/briefing/21706498-dishonesty-politics-nothing-new-manner-which-some-politicians-now-lie-and>> accessed 21 January 2018

¹⁸³ Manila Principles (n 88), Principle I(b); The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization Of American States (OAS), Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR), Special Rapporteur on Freedom of Expression and Access to Information, Article 19, Global Campaign for Free Expression, and the Centre for Law and Democracy, "*Joint Declaration on Freedom of Expression and the Internet*," June 1, 2011, [2].

on its platform, they have a duty to expeditiously remove the illegal content.¹⁸⁴

92. In *Delfi*, the ECtHR justified the duty being borne by intermediaries because “*the ability of a potential victim to contentiously monitor the Internet is more limited than the ability of a large commercial internet news portal to prevent or rapidly remove such comments*”.¹⁸⁵ Such a duty arises even in the absence of any notice from victims or third parties.¹⁸⁶

93. Although there is no universal time frame as to what amounts to ‘expeditious’,¹⁸⁷ removal within 24 hours appears to be the emerging norm. The prime example is Germany’s *Act to Improve Enforcement of Law in Social Networks* which requires social media platforms to “*remove or block access to content that is manifestly unlawful within 23 hours of receiving the complaint*”.¹⁸⁸ Although non-binding, the 24-hour limit recommended by the European Commission’s *2016 Code of Conduct on Countering Illegal Hate Speech*¹⁸⁹ has been complied with by leading tech companies, such as *Facebook, Twitter and Youtube*.¹⁹⁰

94. The nature of content is also a critical factor. Where a content is manifestly unlawful (such as hate speech and incitement to violence), then immediate removal is imperative.¹⁹¹ In contrast,

¹⁸⁴ Directive on Electronic Commerce (n 170) art 14; US Digital Millennium Copyright Act 1996, s 512(c)(1)(c); Magentonian Public Information and Data Protection Act 2016 (‘PIDPA’), s 3.

¹⁸⁵ *Delfi* (n 35) [158].

¹⁸⁶ *Delfi* (n 35) [159].

¹⁸⁷ Edwards, L and Waelde, C, (eds), *Law and the Internet* (3rd edn Hart Publishing, Oregon 2009) [66].

¹⁸⁸ German Network Enforcement Act (n 122), s 3(2).

¹⁸⁹ European Commission, ‘Code of Conduct on Countering Illegal Hate Speech Online’, 19 January 2018.

¹⁹⁰ Věra Jourová, ‘Code of Conduct on Countering Illegal Hate Speech Online: First Results on Implementation’, December 2016.

¹⁹¹ *Delfi* (n 35) [115] & [117].

where there is doubt or ambiguity as to a publication's lawfulness (*e.g.* defamation), there is less urgency in removal.¹⁹²

95. Here, UConnect took 5 days to remove the **26 May 2018** post despite receiving numerous user complaints.¹⁹³ Its review team consulted with lawyers on its lawfulness, and yet waited for another 4 days before taking action.¹⁹⁴ Such delay was unreasonable and not expeditious, amounting to a violation of Section 3 of the PIDPA.
96. At this point, UConnect ought to have been put on notice over TBM's activities, especially having consciously decided against banning or suspending its account.
97. Undeterred, TBM followed up with a less incendiary but equally ominous-sounding post on **30 May 2018**. Although unreported, UConnect as a diligent economic operator should have been aware of the factual circumstances surrounding the veracity of the post.¹⁹⁵
98. First, TBM had been regularly posting numerous offensive posts since early May 2018.¹⁹⁶ Second, the **26 May 2018** post incident should have put the Applicant on alert, to closely monitor TBM on any subsequent reappearance of controversial content.¹⁹⁷ Third, UConnect

¹⁹² *Magyar* (n 101) [80]-[82] & [91].

¹⁹³ Fact Pattern, [5.1]-[5.2].

¹⁹⁴ Fact Patter, [5.2].

¹⁹⁵ *CG v Facebook Ireland Limited* [2016] NICA 54 [72]; Johanna Tuohino, 'Liability of Intermediary Service Providers in the EU: Review of current developments' (Masters, University of Lapland, 2013) [18]-[19]; *L'Oréal* (n 173) [120]; T-336/07 *Telefónica v Commission* [2012] [323].

¹⁹⁶ Fact Pattern, [5.1].

¹⁹⁷ Tomáš Elbert, 'Notice and Take Down, On Certain Aspects of Liability of Online Intermediaries', (Masters, Charles University in Prague, 2011) [36]; Reference for a preliminary ruling from High Court of Justice (England and Wales), Chancery Division, made on 12 August 2009 — *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Limited v eBay International AG, eBay Europe SARL, eBay*

could have employed mechanism to effectively detect infringing content, such as automated word-based filters on specific terms (e.g. ‘Cyanisian’, ‘refugees’)¹⁹⁸ – but failed to do so. *Fourth*, the **30 May 2018** post ‘trended’ on the live feeds and became the most viewed post for 3 days.¹⁹⁹ And yet, UConnect took no action to remove the post, or any steps of verification.²⁰⁰ Such failure amounts to a ‘*reckless dissemination of false propaganda*’ in violation of Section 3 of the PIDPA.

(iv) The fine imposed on UConnect was proportionate

99. The use of criminal sanctions to combat hate speech and falsehoods is not in itself disproportionate.²⁰¹
100. The Magentonian High Court punished UConnect for both offenses under Sections 3 and 5 of the PIDPA with a fine of USD 100,000.²⁰² The entire quantum amounts to merely 0.04% of UConnect’s advertising revenue of USD 250 million in 2017²⁰³ – a drop in the ocean far from being excessive and disproportionate.

(UK) Limited, Stephan Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi [2009] OJ C267/40 [9(c)].

¹⁹⁸ *Delfi* (n 35) 154]-[156].

¹⁹⁹ Fact Pattern, [5.4].

²⁰⁰ Fact Pattern, [6.2.2].

²⁰¹ *Radio France* (n 107) [40]; *Lindon, Otchakovsky-Laurens and July v France* [GC] App nos. 21279/02 and 36448/02 (ECtHR, 22 October 2007) [59]; *Długolecki v Poland* App no. 23806/03 (ECtHR, 24 February 2009) [47]; *Saaristo and Others v Finland* App no. 184/06 (ECtHR, 12 October 2010) [69]; *Pedersen and Baadsgaard v Denmark* [GC] App no. 49017/99 (ECtHR, 17 December 2004) [93]; *Bozhkov v Bulgaria* App no. 3316/04 (ECtHR, 19 April 2011) [53].

²⁰² Fact Pattern, [6.3].

²⁰³ Fact Pattern, [3.6].

PRAYER

For the foregoing reasons, the Respondent respectfully request this Honorable Court to adjudge and declare the following:

1. Magentonia's decision not to grant Unger Ras any rectification, erasure or blocking of search results depicting the 2001 *Cyanisian Times* story did not violate Article 17 of the ICCPR.
2. Magentonia's suspension of UConnect's operations under the PIDPA did not violate Article 19 of the ICCPR.
3. Magentonia's prosecution and conviction of UConnect under the PIDPA did not violate Article 19 of the ICCPR.

Respectfully submitted 7 November 2018,

701R,

Counsel for Respondent.