



# Ad perpetuam rei memoriam I.

ELTE Law School's memorials for  
the Monroe E. Price Media Law  
Moot Court Competition

Editors:  
Gergely Gosztonyi  
Anna Zanathy

2018

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## **ELTE Law School's memorials for the Monroe E. Price Media Law Moot Court Competition**

In 2008 University of Oxford established the Monroe E. Price Media Law Moot Court Competition with the aims to foster and cultivate interest in freedom of expression issues and the role of the media and information technologies in societies around the world. The competition challenges students to engage in comparative research of legal standards at the national, regional and international levels, and to develop their arguments (in written and oral forms) on cutting-edge questions in media and ICT law<sup>1</sup>.

ELTE Law School joined the competition in 2015 at the South-East European Regional Round<sup>2</sup>. Since that time ELTE Law School participated every year and its results are getting better and better.

With the publication of the written Memorials after each competition, ELTE Law School would like to appreciate the dedicated work of its students and help the future mooters to learn from their efforts.

We hope that our students will actually reach the stars and that we will find their names and scientific achievements in similar publications in the future as well.

Budapest, 2018.

The Editors

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<sup>1</sup> <http://pricemootcourt.socleg.ox.ac.uk/about-the-programme/>

<sup>2</sup> <http://pricemootcourt.socleg.ox.ac.uk/competitions/regional-rounds/south-east-europe/>

# Memorial for Applicants 2015/2016

ALEXANDRA, FUCHSNÉ VASTAG – GERGELY, GOSZTONYI –  
ARNO, HEGEDŰS – TEODÓRA, NAGY – PÉTER GYÖRGY, SZEGI –  
ANNA, ZANATHY

EÖTVÖS LORÁND UNIVERSITY FACULTY OF LAW // ELTE LAW SCHOOL

**PRICE MEDIA LAW MOOT COURT**

**2015/2016**

**Umani and Chatter v. Omeria**

**Memorial for Applicant**

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# 1. List of Abbreviations

- a. Court of Justice of the European Union: CJE
- b. European Convention on Human Rights: ECHR; Convention
- c. International Covenant on Civil and Political Rights: ICCPR
- d. The European Courts of Human Rights: The Court
- e. The Supreme Court of United States: The Supreme Court
- f. Universal Declaration of Human Rights: UDHR

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Fuentes Bobo v. Spain App no 39293/98 (ECHR, 29 February 2000)

Garaudy v. France App no 65831/01 (ECHR, 24 June 2003)

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Cohen v. Google, Inc., 25 Misc.3d 945, 887 N.Y.S.2d 424 (N.Y.Cty. 17 August 2009)

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### 3. Statement of Relevant Facts

First to clarify the background of the case, we have to point out that Omeria as a democratic state has a bad relationship with the neighbouring state, Brinnah. In Omeria the most popular social platform for communication is Chatter. Chatter is a web-based and mobile application which allows users not only to broadcast 150 characters-long messages but also to ‘re-chat’ them, however it does not create content of its own. Between 2009 and 2014 the following five messages were posted on Chatter by an anonymous Chatter account (@TheVigilanteInsider):

1) Post1: ‘New Flash! Brinnah’s economy on brink of collapse due to rampant godlessness.’ @TheVigilanteInsider, December 3, 2009, 18:49

2) Post2: ‘We fried the Brinnans in the war of ’74, Fly their shameful flag, we’ll burn you some more.’ @TheVigilanteInsider, May 21, 2010, 15:21

3) Post3: ‘Roses are red, violets are blue, and Brinnans are child killers. Heh, see not all poetry has to rhyme! ;-)’ @TheVigilanteInsider, November 5, 2013, 00:45

4) Post4: ‘Another Armistice anniversary approaches...would be a shame if those brutes within our borders magically disappeared...kaboom! I mean, poof!’ @TheVigilanteInsider, April 19, 2014, 23:06 (No violence occurred on the anniversary of the armistice.)

5) Post5: ‘Do your part to purify Omeria – your country will thank and pardon you – our leaders can’t say what they’re thinking but I can...’ @TheVigilanteInsider, May 22, 2014, 15:55

i. @Nightwatcher00 replied to this message, writing, ‘@TheVigilanteInsider – hearing you loud and clear!’

ii. Post6: @TheVigilanteInsider wrote back, '@Nightwatcher00 ...  
God willing.'

As Chatter received many complaints about @TheVigilanteInsider's comments, it suspended the anonymous account for one day in the case of the Post2. @TheVigilanteInsider also deleted Post3 four minutes after it was posted. Right after Chatter received the domestic court's order – issued under public pressure – it deleted Posts4-6 and revealed the identity of @TheVigilanteInsider complying with Anti-Terrorism & Extremism Law of 2012 by delivering the IP addresses from which the posts were made. The IP addresses belonged to the smartphone and official work computer of the Deputy Justice Minister of Omeria, Umani and to his daughter's home computer. Umani, just like many other politicians, owns a Chatter account, both an identifiable and an anonymous one.

## 4. Statement of Jurisdiction

Charges were brought against Umani for Posts 1-3 under the Omerian domestic law of No Hate Act of 2011 and for Posts 4-6 under the Omerian Anti-Terrorism & Extremism Law of 2012. Umani was convicted on all counts and sentenced to two years in prison. Charges were brought against Chatter for posts 1-3 under the No Hate Act of 2011 for facilitating Umani's speech and for Posts 4-6 under the Anti-Terrorism & Extremism Law of 2012 for Chatter's carelessness in monitoring and controlling Umani's anonymous messages. The Omerian Government sought and obtained a court order pursuant to the Anti-Terrorism & Extremism Law of 2012 to force Chatter to delete Posts 4-6 and to reveal the identity of @TheVigilanteInsider. In response, Chatter deleted these posts, and revealed the identity of Umani, but only after seven days, thus receiving a fine of the equivalent of US\$ 10,000 per day until compliance. Chatter was found liable for all posts except Post 2 over which it had temporarily suspended Umani's anonymous account. Chatter's liability was assessed at the equivalent of US\$ 5 million in addition to the seven days' worth of fines imposed previously. After exhausting the domestic appeals, both Umani's sentence and Chatter's fine were upheld on appeal to Omeria's Supreme Court. Umani and Chatter have challenged these verdicts at the present court, the Universal Court of Free Expression on 26th October 2015.

## 5. Questions Presented

It cannot be disputed that the decision of Omeria's Supreme Court in respect of both Umani and Chatter constituted an interference with their freedom of expression.<sup>1</sup> Consequently, the main question is whether the interference with their rights was legitimate.

In order to answer this question, based on ICCPR Article 19 (3) and the principles established in the relevant case-law we must find out if the restriction:

- 1) was prescribed by law;
- 2) had a legitimate aim;
- 3) was necessary; and
- 4) was proportionate to the legitimate aim pursued.

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<sup>1</sup> ICCPR Article 19, UDHR Article 19, ECHR Article 10

## 6. Summary of Arguments

First, we examined the characteristics and the status of Umani and Chatter. Then we concluded that the decision of Omeria's Supreme Court in respect of both Umani and Chatter constituted an interference with their freedom of expression established in Article 19 of ICCPR, Article 19 of UDHR and Article 10 of ECHR.<sup>2</sup> In order to judge the extent of the restriction of their rights we observed if it was prescribed by the law, had a legitimate aim, was necessary and proportionate to the legitimate aim.

Concerning the lawfulness of the interference we observed if the consequences of breaching the norm – if need be with appropriate advice – was foreseeable to a degree that was reasonable in the circumstances.<sup>3</sup> While investigating the legitimate aim of the interference we kept in mind that it had to be based on a legal document, e.g. a convention. Finally, we always attempted to judge whether a pressing social need existed<sup>4</sup> and if the domestic authorities have struck a fair balance when protecting two values, both guaranteed by conventions, but ones that might conflict in certain cases.<sup>5</sup>

For the above reasons we claim that:

- 1) in the case of Posts1-2 interference with Umani's freedom of expression had a legitimate aim and was necessary but it was not prescribed by the law and was disproportionate to the legitimate aim pursued;
- 2) in the case of Post3 interference with Umani's freedom of expression was prescribed by the law, had a legitimate aim and was necessary but it was not proportionate to the legitimate aim pursued;

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<sup>2</sup> ICCPR Article 19, UDHR Article 19, ECHR Article 10

<sup>3</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 71

<sup>4</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 78 (ii)

<sup>5</sup> Hachette Filipacchi Associés v. France App no 71111/01 (ECHR 14 June 2007) § 43

- 3) in the case of Posts4-6 interference with Umani's freedom of expression had a legitimate aim and was necessary but it was not prescribed by the law and was disproportionate to the legitimate aim pursued;
- 4) in the case of Post3 interference with Chatter's freedom of expression was prescribed by the law, had a legitimate aim, was necessary but it was not proportionate to the legitimate aim pursued;
- 5) in the case of Post1 and Posts4-6 interference with Chatter's freedom of expression had a legitimate aim, was necessary but it was not prescribed by the law and it was disproportionate to the legitimate aim pursued.

# 7. Arguments

## 7.1. The competence of the Court

The Court has stated many times that it is not in its power to resolve problems of interpretation of domestic legislation since its role is confined to ascertaining whether the effects of such an interpretation are compatible with the conventions.<sup>6</sup> Therefore, we believe that the Universal Court of Human Rights must restrict its competence the same way therefore judge only if the interference with the freedom of expression is complied with the law.

## 7.2. The definition of Umani and Chatter

### 7.2.1. Umani

Despite the fact that Umani is a public figure, he wrote the texts in question as a private individual. He also has a public account where he shares his views intended for the public. His private account was anonymous for a reason: to be able to freely speak about public affairs, political decisions and problems of the society. The statements in *Willem v. France*<sup>7</sup> verdict clearly show the difference between a situation when a public figure is speaking officially and when he is speaking privately. In the previously mentioned case the applicant posted on a governmental portal under his own name and public account. Umani's situation is exactly the opposite: he posted in an independent interface, using an anonymous account, as a private individual. Therefore the @TheVigilanteInsider and Umani are quite different from each other, because @TheVigilanteInsider is a private account, so everything published on should be considered as a private individual's right to freedom of opinion. Based on this

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<sup>6</sup> See, among others, *Pérez de Rada Cavanilles v. Spain*, 28 October 1998, § 43

<sup>7</sup> *Willem v. France* App no 10883/05 (ECHR 16 July 2009) § 37

distinction the domestic court should have regarded the posts in question as a private person's right to free speech about public interest.

### **7.2.2. Chatter**

In the present case, Chatter is a web-based and mobile application which allows users to broadcast 150 character-long messages. We would like to highlight that Chatter does not create content of its own, other than by posting announcements via its official Chatter account (@Chatter). Therefore, by applying HHJ Parkes QC's analogy, we might define Chatter as a gigantic notice board on which anyone can post comments.<sup>8</sup>

Based on these characteristics we must conclude that Chatter is an internet service provider (ISP), that is, a company that provides Internet connection and services to individuals and organizations,<sup>9</sup> with the purpose of hosting materials posted by users. We would also like to highlight that the classification of Chatter would not be different if we had applied the approach of the EU Member States. Based on Article 14 of the Directive 2000/31/EC of the European Parliament, Chatter is an intermediary service provider that offers information society service that consist of the storage of information provided by a recipient of the service.

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<sup>8</sup> Davison v. Habeeb [2011] EWHC 3031 (QB) § 38

<sup>9</sup> Jennie, Ness: The Role of Internet Service Providers in Stopping Internet Copyright Infringement (<http://www.asean.org/archive/21391-3.pdf>)

## **7.3. Legal assessment of the interference with Umani's freedom of expression in case of Post1-Post3 (Issue 1A)**

### **7.3.1. The law**

In the case of *Sunday v. the United Kingdom* the Court stated that the freedom of expression also extended to ideas that 'may shock or offend or disturb'<sup>10</sup>. In cases of criticism of the state or the government the Court clarified that any opinion, speculation and criticism fell under the protection of freedom of expression.<sup>11</sup> In *Morice v. France*, the Court reiterated the difference between statements of fact and value judgments by pointing out 'that the requirement to prove the truth of a value judgment is impossible to fulfill and infringes freedom of opinion. To distinguish between a factual allegation and a value judgment, the court says, it is necessary to take account of the circumstances of the case and the general tone of the remarks whilst bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact.'<sup>12</sup> Furthermore, the Court noticed that the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of the interference with freedom of expression may have a chilling effect on the exercise of that freedom. The Court pointed out that even moderate sanctions like fines would not suffice to negate the risk of a chilling effect on the exercise of freedom of expression.<sup>13</sup> In the *Karatas v. Turkey* decision the Court stated that: 'the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the

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<sup>10</sup> *Sunday Times v. the United Kingdom* App no 6538/74 (ECHR 26 April 1979) § 50 (a)

<sup>11</sup> *Castells v. Spain* App no 11798/85 (ECHR 23 April 1992) § 46

<sup>12</sup> *Morice v. France* App no 29369/10 (ECHR 23 April 2015) § 127, 176

<sup>13</sup> *Morice v. France* App no 29369/10 (ECHR 23 April 2015) § 104, 127

government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.’<sup>14</sup>

## **7.3.2. The application of the law**

### **7.3.2.1. Lawfulness**

Regarding the nature of restriction it is important to examine whether the limit of freedom of expression was prescribed by law. Umani was convicted based on the No Hate Act 2011 in the matter of the Posts1-3. In our opinion it cannot be expected from Umani to foresee the law in the cases of Posts1-2. Concerning these two posts, the sanctions were not legitimate as the Act did not exist at the time when Umani posted them. In these cases this would be considered as a retrospective effect of law (*nullum crimen sine lege*) which is not compatible with the relevant principles of the conventions.<sup>15</sup> In case of Post3 the consequences of breaching the norm were foreseeable.

### **7.3.2.2. Legitimate aim**

The legitimate aim of the restriction was the prevention of public disorder and the protection of others’ rights established in Article 17 of ICCPR. Based on the Article 19 paragraph 3. a. and b. of the ICCPR, this limitation was acceptable in the cases of Post3.

### **7.3.2.3. Necessity**

We acknowledge the importance of protection of others’ rights, however in this case the restrictions were not necessary in a democratic society; they did not contribute to the question

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<sup>14</sup> Karatas v. Turkey App no 23168/94 (ECHR 8 July 1999) § 50

<sup>15</sup> ICCPR Article 15, UDHR Article 11 (2), ECHR Article 7 (1)

of pressing social need. As the District Court Judge stated in the case *Reno v. American Civil Liberties Union*: ‘The internet affords much more equal opportunities for communication than the traditional press and broadcasting media, this is “the most participatory form of mass speech yet developed.”<sup>16</sup> The importance of freedom of expression requires the government to ‘restrain from criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without access to such remarks.’<sup>17</sup> As the Court noted, whilst the adjective ‘necessary’, within the meaning of Article 19 (3) of ICCPR, was not synonymous with ‘indispensable’, neither did it have the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’ and it implied the existence of a ‘pressing social need’.<sup>18</sup>

#### **7.3.2.4. Proportionality**

##### **7.3.2.4.1. Post1**

In this post Umani made remarks about the economy of Brinnah. Based on the conclusions of the *Karatas v. Turkey* case, Umani only exercised his right of freedom of expression since he expressed a permissible criticism with regard to the government and not to a private citizen or a politician.<sup>19</sup> Therefore the restriction in the case of the post did not comply with the principle of proportionality.

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<sup>16</sup> *Reno v. American Civil Liberties Union* 521 U.S. 844 (1997) (No. 96-511) p. 863

<sup>17</sup> *Karatas v. Turkey* App no 23168/94 (ECHR 8 July 1999) § 50, *Incal v. Turkey* (41/1997/825/1031) (ECHR, (GC) 9 June 1988) § 54

<sup>18</sup> *Sunday Times v. the United Kingdom* App no 6538/74 (ECHR 26 April 1979) § 59

<sup>19</sup> *Karatas v. Turkey* App no 23168/94 (ECHR 8 July 1999) § 50

#### **7.3.2.4.2. Post2**

To judge Post2 we must point out first the uniqueness of the situation since Umani chose to express himself through poetry<sup>20</sup>. As the Court stated in the *Karatas v. Turkey* case, art cannot be judged with the means of the law. Furthermore, Umani not only emphasised his thoughts in an artistic way, but he was also reflecting on a serious historical question, therefore it has a relevant political dimension. It cannot be disputed that by using art to express deep-rooted problems within the society his comment was part of the democratic debate. A democratic state should restrain from any interference, not just because of the artistic way of speaking<sup>21</sup> but also because he formed a permissible criticism that should be widely protected, if about the subject of it is a state.<sup>22</sup> To sum up, Umani not only expressed himself in an artistic form, but he also exercised his right to free speech to highlight the conflict between two ethnic groups, one of the most important subjects of the debate. Even though some of the exact phrases could be questioned, we must state that based on the Court's jurisprudence the principles of democracy and freedom of speech should protect morally reprehensive and provocative comments too as part of self-fulfillment. Moreover, a democratic system has to endure such manifestations of opinion<sup>23</sup>, otherwise the fundamental principles of democracy would be questioned. We must also point out that Umani's post did not cause a clear and present danger (see the reasoning in 7.4.2.4.). All in all, in our opinion the restriction was disproportionate.

#### **7.3.2.4.3. Post3**

Umani's third comment was referring to a widespread, but disproven belief. Despite the fact that this rumour has been disproven it was still at the centre of the attention within the society.

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<sup>20</sup> *Karatas v. Turkey* App no 23168/94 (ECHR 8 July 1999)

<sup>21</sup> *Karatas v. Turkey* App no 23168/94 (ECHR 8 July 1999) § 49

<sup>22</sup> *Karatas v. Turkey* App no 23168/94 (ECHR 8 July 1999) § 50, *Incal v. Turkey* judgment of 9 June 1998, Reports 1998-IV, pp. 1567-68, § 54

<sup>23</sup> *Castells v. Spain* App no 11798/85 (ECHR 23 April 1992) § 46

Consequently the post expressed an opinion about public interest so it was part of the democratic debate. Chatter was an important channel for self-expression in Omeria. If we accept this restriction as a proportionate one, it surely causes a chilling effect in the Omerian society.<sup>24</sup> In our point of view Umani had the right to express his opinion and be part of the public discourse even if it was an inconsistency with the basic values of democracy (see also: *Sunday Times v. the United Kingdom*).<sup>25</sup> Furthermore we must note that the post was deleted by Umani after four minutes. According to the rules of ‘notice-and-take-down system’ he is not responsible for his act when he showed active role in deleting the post (see also: *Delfi AS v. Estonia*). In conclusion, the decision of the domestic court infringed his freedom of expression since the interference did not reach the level of the legitimate restriction.

## **7.4. Legal assessment of the interference with Umani’s freedom of expression in case of Post4-Post6 (Issue 2A)**

### **7.4.1. The law**

In the case of *Ceylan v. Turkey* the Court examined whether a fair balance had been struck between the individual’s fundamental right to freedom of expression and a democratic society’s legitimate right to protect its national security and to prevent disorder or crime. (see also: *Yilmaz and Kiliç v. Turkey*, *Bahçeci and Turan v. Turkey*, *Kizilyaprak v. Turkey*, *Feridun Yazar v. Turkey*).<sup>26</sup> After the Court found that the interference had been prescribed by the law, it stated that freedom of expression could be restricted for the maintenance of

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<sup>24</sup> *Delfi AS v. Estonia* App no 64569/09 (ECHR 10 October 2013) § 73, *Morice v. France* App no 29369/10 (ECHR 23 April 2015) § 104, 127, 176

<sup>25</sup> *Castells v. Spain* App no 11798/85 (ECHR 23 April 1992) § 46

<sup>26</sup> *Gül and Others v. Turkey* App no 4870/02 (ECHR 8 June 2010) § 39

national security, the public safety, public order and the prevention of crimes<sup>27</sup> (see also: *Sürek v. Turkey* (No. 2.) 29.). While judging the interference with proportionality the Court declared that the statements should be examined in the light of the case as a whole, including the content of the impugned statements and the context in which they were made.<sup>28</sup> The circumstances of the case and the context of the expression, both have a special significance especially if the author was aware of them.<sup>29</sup> The Court concluded that there was a little scope for restrictions of the right to freedom of expression on political speech or on debate on matters of public interest<sup>30</sup> (see also: *Wingrove v. the United Kingdom*). The Court stated that even though the article in question was malicious, it did not encourage the use of violence or armed resistance or insurrection.<sup>31</sup> The Court pointed out that the applicant's conviction was disproportionate to the aims pursued therefore interference was not 'necessary in a democratic society'.<sup>32</sup> The Supreme Court of the United States also reaffirmed that the freedom of expression could be restricted if the speech created 'a clear and present danger'<sup>33</sup> (see also: *Virginia v. Black*). The requirement that a speech should 'cause imminent danger' of an offence, could allow for criminalisation of speech which causes only an abstract and remote risk of violence.<sup>34</sup> The Supreme Court outlined that an expression of opinion could not be tolerated if it imminently threatens immediate interference with the lawful and pressing purposes of the law.<sup>35</sup> (Later The Supreme Court reaffirmed the 'clear and present danger test' by adding 'intention', a third element to his test developing the 'Brandenburg test', 'imminent lawless action test'.) In the *Sürek v. Turkey* case (No. 2.) the Court reaffirmed that

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<sup>27</sup> *Zana v. Turkey* 69/1996/688/880 (ECHR, (GC) 25 November 1997) § 47-48, *Gül and Others v. Turkey* App no 4870/02 (ECHR 8 June 2010) § 35

<sup>28</sup> *Ceylan v. Turkey* App no 23556/94 (ECHR 8 July 1999) § 32. (iii)

<sup>29</sup> *Zana v. Turkey* 69/1996/688/880 (ECHR, (GC) 25 November 1997) § 59, *Sürek v. Turkey* (No. 2.) App no 24122/94 (ECHR 8 July 1999) § 33 (iii)

<sup>30</sup> *Ceylan v. Turkey* App no 23556/94 (ECHR 8 July 1999) § 34

<sup>31</sup> *Ceylan v. Turkey* App no 23556/94 (ECHR 8 July 1999) § 36

<sup>32</sup> *Ceylan v. Turkey* App no 23556/94 (ECHR 8 July 1999) § 38

<sup>33</sup> *Schenck v. United States* *Schenck v. United States* (1919), *Masses Publishing Co. v. Patten* 244 U.S. 535 (1917)

<sup>34</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (No. 492) p. 449.

<sup>35</sup> *Abrams v. United States*, 250 U.S. 616 (1919) (No. 316) p. 630.

the scope of freedom of expression not only covers the information and ideas that are favorably received but also those that offend, shock or disturb.<sup>36</sup> It also outlined that there was a narrow scope in the freedom of expression for restrictions on political speech or on debate on questions of public interest (see also: *Wingrove v. the United Kingdom*).<sup>37</sup>

## **7.4.2. The application of the law**

### **7.4.2.1. Lawfulness**

The conviction and sentence of Umani was based on the Omerian Anti-Terrorism & Extremism Law of 2012. However we consider that the wide definition of terrorism in Section 1 of Omeria's Anti-Terrorism & Extremism Law of 2012 is too general and lacks sufficient details<sup>38</sup> to satisfy the requirement that interferences with freedom of expression be 'prescribed by law' because of the vagueness of the extremism requirement. In our view, the consequences of breaching the norm would have been only foreseeable if a more precise definition of terrorism had been used.

### **7.4.2.2. Legitimate aim**

Similar to the cases mentioned above the legitimate aim of the restriction was the maintenance of national security, the public safety, protection of public order, the prevention of crimes and the protection of others' rights.<sup>39</sup>

### **7.4.2.3. Necessity**

In our case the pressing social need was obviously to answer the increasingly frequent violent acts of terrorism near the border region principally perpetrated by the Night Watch.

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<sup>36</sup> *Sürek v. Turkey (No. 2.)* App no 24122/94 (ECHR 8 July 1999) § 33 (i)

<sup>37</sup> *Sürek v. Turkey (No. 2.)* App no 24122/94 (ECHR 8 July 1999) § 34

<sup>38</sup> *Delfi AS v. Estonia* App no 64569/09 (ECHR 10 October 2013) § 75

<sup>39</sup> ICCPR Article 17, UDHR Article 12, ECHR Article 8

Therefore, the necessity was the protection of national security and public safety as well as the prevention of disorder or crime.

#### **7.4.2.4. Proportionality**

In our opinion the content of the comments should be considered as a political speech.<sup>40</sup> These posts were dealing with difficult problems of the country, therefore even if they were phrased in a less than moderate way they must be protected by law.<sup>41</sup> Since Omeria had to face with serious issues it was unavoidable for participants to express radical opinions in the public debate. Posts of Umani were definitely part of the democratic debate despite their radical nature. We think that in the given circumstances (i.e. the conflict between the countries, the tension on the ethnical minority, the high risk of terrorism actions etc.) the limitation of the freedom of speech would lead to a situation where citizens do not feel free to participate in public discussion. If a person could be convicted simply by showing that a reasonable person would be frightened by his words, it would have a chilling effect on freedom of speech to a large extent<sup>42</sup> And this would be something that could not be tolerated. Altogether, we reckon that Umani had not intended to promote terrorism or to sow discord amongst the nationalities with incitement. According to the law mentioned above, in a democratic society, any subject should be able to be discussed without restriction. In order to judge the proportionality of the interference we must examine the comments in the light of the case as a whole. Because the comments were posted on Chatter, an online platform, a different approach of the clear and present danger is required. We have to examine, whether the notion of clear and present danger can be applied and if so, how Umani's online activity

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<sup>40</sup> Ceylan v. Turkey App no 23556/94 (ECHR 8 July 1999) § 32

<sup>41</sup> Sürek v. Turkey (No. 2.) App no 24122/94 (ECHR 8 July 1999) § 33 (i)

<sup>42</sup> Cumpănă and Mazăre v. Romania App no 33348/96 (ECHR 17 December 2004) § 114, Dupuis and Others v. France App no 1914/02 (ECHR 7 June 2007) § 48, Morice v. France App no 29369/10 (ECHR 23 April 2015) § 104

should be judged. According to the clear and present danger a speech should not be protected by the law only in the case if it incites direct and clear threat.

However, in our case, the notion of ‘clear and present danger’ obviously cannot be established because of the following reasons:

- 1) The comments were sophisticated subtle threats, so abstract that they rather sounded like empty words than a real threat (see also: concurring opinion of Judge Bonello in *Sürek v. Turkey* (No. 2.);
- 2) The imminence was missing since the incitement and the possibility of reaction was remote in time and space.<sup>43</sup> The persuasiveness of these statements often rests on the absence of alternative speech challenging the arguments made. There were nine days before the anniversary of the armistice that passed by public outcry, debate and the criminal procedure. Apparently it was enough as there was no incident reported on the anniversary.
- 3) Similarly to the case of *State v. Locke*<sup>44</sup> the comments were not realistically threatening (see for example: magically disappearing);
- 4) Umani’s words were controversial. For example in Post4 the word ‘poof’ was a phrase that no reasonable person would attach much to. The term ‘Do your part’ in Post5 could be understood by some as to encourage hate, discrimination but not to action or act of violence.<sup>45</sup>

Finally we must emphasize that even in cases where the content of the expressions were more radical and more threatening the liability of the author was not established (see also: *Sürek v. Turkey* (No. 2.), *Ceylan v. Turkey*, *United States v. Alkhabaz*, *Elonis v. United States*, *Gül v. Turkey*). Indeed there was a legitimate aim, the restriction could have been necessary but the

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<sup>43</sup> Concurring opinion of Judge Bonello In: *Sürek v. Turkey* (No. 2.) App no 24122/94 (ECHR 8 July 1999) p. 22.

<sup>44</sup> *State v. Locke* 471 U.S. 84 (1985) (No. 83-1394) p. 791-792

<sup>45</sup> *Smith v. ADVFN Plv* (2008) EWHC 1797 (QB) at 13-17

degree of punishment was clearly not proportionate with the aim and necessity. It was declared by the Supreme Court of Canada that if a situation involves human rights, it is considered an unlawful restriction if the court applies more than the slightest punishment (Oakes-test). The principle is also known as minimal impairment test which means that only the smallest possible restrictions are acceptable. If this condition is not fulfilled the interference cannot be proportionate with the legitimate aim which means the restriction had offended the individual's right of the freedom of expression.<sup>46</sup>

## **7.5. Legal assessment of the interference with Chatter's freedom of expression (Issue 1B-2B)**

### **7.5.1. The law**

In the case of *Delfi AS v. Estonia* the Court had to answer the question whether holding Delfi, an internet news portal, liable for the comments posted by the readers infringe its freedom of expression.<sup>47</sup> After the Court had confirmed the existence of the interference with the freedom of expression of Delfi, the Court had to judge if the interference with the applicant's right was prescribed by the law, had one or more legitimate aims and if it was necessary in a democratic society. Concerning the lawfulness of the interference the Court found that the requirement of being prescribed by the law can be established if a citizen is able to foresee, to a degree that is reasonable in the circumstances, the consequences that a given action may entail. 'The Court further reiterated that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover, and the number and status of those to whom it is addressed.'<sup>48</sup> After Court had considered the protection of the

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<sup>46</sup> *Oakes v. Canada* [1986] 1 S.C.R. 103 (17550)

<sup>47</sup> *Delfi AS v. Estonia* App no 64569/09 (ECHR 10 October 2013) § 46

<sup>48</sup> *Delfi AS v. Estonia* App no 64569/09 (ECHR 10 October 2013) § 71-76

reputation and rights of others as a legitimate aim of the restriction, it found that based on the examined elements, in particular the insulting and threatening nature of the comments, the fact that the comments were posted in reaction to an article published by the applicant company in its professionally-managed news portal run on a commercial basis, the insufficiency of the measures taken by the applicant company to avoid damage being caused to other parties' reputations and to ensure a realistic possibility that the authors of the comments will be held liable, and the moderate sanction imposed on the applicant company, the domestic judgment that hold the applicant company liable for the defamatory comments posted by readers on its Internet news portal was a proportionate restriction on the applicant company's right to freedom of expression.<sup>49</sup>

## **7.5.2. The application of the law**

### **7.5.2.1. Lawfulness**

According to the jurisdiction of the court we have to examine the foreseeability of the consequences that a given action may entitle based on the law. First, we would like to point out that Post1 was posted before the No Hate Act of 2011 was accepted, therefore the judgment is not compatible with Article 15 of ICCPR and UDHR Article 11 (2) since Chatter was found liable for an act (facilitating @VigilanteInsider's statement) which did not constitute a penal offence under national or international law at the time when it was committed (*nullum crimen sine lege*). In the case of Post3 however, the restriction was foreseeable since the No Hate Act of 2011 made it clear that any entity that is responsible for facilitating another's statement prohibited under the Act may be held liable. Unlike Delfi, Chatter is not an official news portal but we have to consider that Chatter, like Delfi, is the most popular platform, therefore it should have been aware of the relevant law. Regarding

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<sup>49</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 77, 94

Posts 4-6 we consider that the effects of Anti-Terrorism & Extremism Law of 2012 were not foreseeable. Section 2 of the Act was too general, lacked details and even the examples given were so different from Chatter's service that the liability of Chatter would not have been foreseeable, not just to a degree that is reasonable in the circumstances, but not whatsoever. If Chatter was found liable based on Section 3 of the Act then we must outline that the scope of the Act only covers people but not legal entities. Since foreseeability depends on the number and status of those to whom the norm is addressed. The restriction of Chatter's right was definitely not foreseeable.

#### **7.5.2.2. Legitimate aim**

We believe that the legitimate aim cannot be different from what we have mentioned before. Therefore legitimate aim must have been the protection of other's rights and the prevention of public disorder.

#### **7.5.2.3. Necessity**

The interference must have a pressing social need<sup>50</sup>, since, as the Court already stated in certain democratic countries it might be necessary to regulate or even prevent all forms of expression that spread, incite, promote or justify hatred based on intolerance.<sup>51</sup>

#### **7.5.2.4. Proportionality**

Though the Court did not see any reason to question the definition of Delfi when it focused on the examination of the comments' context, it indirectly considered characteristics that distinguish a passive purely technical service provider from a publisher.<sup>52</sup> Later the Grand Chamber of the Court found the difference between these two relevant for the purposes of the

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<sup>50</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 78 (ii)

<sup>51</sup> Gündüz v. Turkey App no 35071/97 (ECHR 4 December 2003) § 32

<sup>52</sup> Delfi AS v. Estonia App no 64569/09 (ECHR, (GC) 16 June 2015) § 61, 113 and Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 86, 89

freedom of expression.<sup>53</sup> Therefore, in order to decide whether the interference was proportionate, first of all we have to decide the role of Chatter in the publication of the comments. First we must state that Chatter has different characteristics compared to Delfi. It cannot be denied that both of them were ISPs, their main activity being the hosting of comments. However, Chatter, unlike Delfi, did not create the content of its own. Therefore, it could not be expected from Chatter to be able to foresee not only the illicit, but any comments posted by a third person. In conclusion, Chatter had no chance to avoid the defamatory or hateful-comments in advance. In addition, Chatter allowed their users to exercise control over their posts. As we could see in the case of Post3, users had the right and the capability to modify or even to delete their posts. Therefore, Chatter was no more than, as Eady J described, a wall on which various people choose to inscribe graffiti.<sup>54</sup> According to the Court of Justice of the European Union (CJE) jurisdiction the ISP's role can only be considered passive, neutral if it has a mere technical, automatic and passive nature which also implies that the ISP cannot have the control over the information which is transmitted or stored. Otherwise the ISP's role must be seen active.<sup>55</sup> Based on Chatter previously presented features we must say that Chatter only had a passive role since it didn't exercise a substantial degree of control over the comments published on its portal. As Chatter only had a passive role, we believe that Chatter could not be perceived as a publisher of the comments. Chatter was only an intermediary, a passive instrument. Based on the conclusions of the Royal Court of Justice in the Bunt v. AOL and Others case, as Chatter only performed no more than a passive role in facilitating postings on the internet it cannot be deemed to be a publisher at the

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<sup>53</sup> Delfi AS v. Estonia App no 64569/09 (ECHR, (GC) 16 June 2015) § 146

<sup>54</sup> Tamiz v. Google Inc. [2013] EWCA Civ 68 § 16

<sup>55</sup> Google France SARL and Google Inc. v. Louis Vuitton Malletier SA (C-236/08), Google France SARL v. Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08) (CJE 23 March 2010) § 113, 120, L'Oréal and Others v. eBay Ltd. (C-324/09) (CJE 12 July 2011) § 122-124

common law.<sup>56</sup> Chatter, similar to postal service, did not participate in the process of publication as such, but merely acted as facilitator providing a means of transmitting communications without participating in that process in any way <sup>57</sup> (see also: *Godfrey v. Demon Internet*). As Hunt J also explained in the *Urbanchich v. Drummoyne Municipal Council* case, Chatter could be only held liable as a publisher for someone else's comments posted on its site if it was established that it had consented to, approved or, adopted, promote or in some way ratified the continued presence of the statement.<sup>58</sup> However, since Chatter never responded to Umani's comment in a positive way, moreover it even suspended his account and deleted Posts4-6 as a sanction, it obviously cannot be established that Chatter accepted the responsibility for the continued publication of the comment. Therefore, Chatter cannot be regarded as a publisher. After having judged the role of Chatter we must take a closer look at the measures applied by Chatter. By suspending Umani's account and deleting Posts4-6 Chatter surely cannot be claimed to have wholly neglected its duty to avoid causing harm to third parties. Since what sanction can be more efficient than taking the pen from the author? However, we believe that Chatter did not fail to fulfill its duty to protect others' rights at all for the following reasoning.

First, even if Chatter had used an automatic-word-based filter, it would not have been able to filter out odious unlawful comments, as all of Umani's posts contained hidden meaning or were either sophisticated expressions, like poems, or subtle threats.<sup>59</sup>

Second, we must point out that Umani's comments were not obviously illegal therefore using the notice-and-take-down system without the decision of a domestic court would have been more harmful than useful. Chatter surely wasn't in a position to determine for itself whether a complaint was or was not justified. If it had been to respond to every complaint by requiring

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<sup>56</sup> *Bunt v. AOL and Others* [2006] EWHC 407 (QB) § 36

<sup>57</sup> *Bunt v. AOL and Others* [2006] EWHC 407 (QB) § 9

<sup>58</sup> *Urbanchich v. Drummoyne Municipal Council* p. 69193

<sup>59</sup> *Delfi AS v. Estonia* App no 64569/09 (ECHR, (GC) 16 June 2015) § 156

the offending material to be taken down, it would have been making significant inroads into freedom of expression.<sup>60</sup> It would have led to a private censorship of Chatter, which is unacceptable if we acknowledge the important role Internet plays ‘in enhancing the public’s access to news and facilitating the dissemination of information in general’ (see also: Ahmet Yildirim, cited above, § 48 and Times Newspapers Ltd, cited above, § 27).

Finally, to form an opinion of the proportionality of the interference we have to judge whether the liability of the actual authors of the comments could serve as a sensible alternative to the liability of Chatter.<sup>61</sup> Obviously it was a realistic alternative choice to bring a claim against the author since he, Umani was sued and held liable in real life. Shifting from Umani to Chatter cannot be accepted based solely on the fact that it is more likely to be in a better financial position, since the author is a well-paid Deputy Justice Minister of Omeria.<sup>62</sup> We believe that the victim could and should have chosen the author since in criminal cases the identity of the account can be legally and easily disclosed. The lack of interference of the right of Umani and the necessity for breaking through his anonymity are proven by the facts that his comments were subjects in an investigation, and also contained sensitive information about a disproven fact of the chemical attack (falls within the scope to protect national security, public safety, also it can be considered as national secret. This test also sets out the criteria of the prevention of the rights and freedoms of others. This can be also proven by the fact that a newspaper also published an article on the problem. These others are the Brinnans, as their name and respect was in danger because of the comments and the activity of Umani. So his comments were strong enough to survive a motion for summary judgement, as Chatter was in possession of the court order on which it gave out the information required. (see also:

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<sup>60</sup> Davison v. Habeeb [2011] EWHC 3031 (QB) § 36

<sup>61</sup> Delfi AS v. Estonia App no 64569/09 (ECHR, (GC) 16 June 2015) § 147, Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 85

<sup>62</sup> Krone Verlags GmbH & Co. KG v. Austria (No. 4 App no 72331/01 (ECHR 9 November 2006) § 32, Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 92, Delfi AS v. Estonia App no 64569/09 (ECHR, (GC) 16 June 2015) § 151

McIntyre v. Ohio Elections Committee, Doe. v. Cahill, Independent Newspapers, Inc. v. Brodie, Inc. v. John Doe, Anonymous Online Speakers v. United States Dist. Court, Solers, Inc. v. John Doe, Rechnungshof v. Österreichischer Rundfunk, K.U. v. Finland, Copland v. the United Kingdom ACLU v. Reno)

Altogether, we believe that the restriction was disproportionate because:

- 1) Chatter, unlike Delfi, had an active role and was not the publisher of the comments;
- 2) unlike Delfi, Chatter fulfilled his duty to protect the rights of the third parties; and
- 3) it was realistic to bring a claim against the author.

## **8. Prayer / Relief Sought**

Based on the above mentioned arguments we hereby request the Court to declare that the respondent was not liable, therefore the interference was neither justified nor proportionate within the applicant's right to freedom of expression.

# Memorial for Respondent 2015/2016

ALEXANDRA, FUCHSNÉ VASTAG – GERGELY, GOSZTONYI –  
ARNO, HEGEDŰS – TEODÓRA, NAGY – PÉTER GYÖRGY, SZEGI –  
ANNA, ZANATHY

**PRICE MEDIA LAW MOOT COURT**

**2015/2016**

**Umani and Chatter v. Omeria**

**Memorial for Respondent**

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# 1. List of Abbreviations

- a. Court of Justice of the European Union: CJE
- b. European Convention on Human Rights: ECHR; Convention
- c. High Court of New Zealand: High Court
- d. International Covenant on Civil and Political Rights: ICCPR
- e. The European Courts of Human Rights: The Court
- f. The Supreme Court of United States: The Supreme Court
- g. Universal Declaration of Human Rights: UDHR

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### 3. Statement of Relevant Facts

Umani is the Deputy Justice Minister of Omeria who has gained his fame and garnered much praise and goodwill by being present at social media platforms, especially on Chatter. Chatter is a social platform that allows its users to broadcast messages. Though it does not create content of its own, other than by posting announcements via its official Chatter account, it has the power to control comments and to suspend the users in cases of unlawful actions. Though Umani has only 262,744 followers under his own name, he also maintains a very popular anonymous Chatter account under the name @TheVigilanteInsider, which had 844,056 followers as of July 2015. The bio on his account states: ‘Political poet telling the truth from the corridors of power.’

Umani uses Chatter to advocate his political position that is well-known for taking a hard line against settlements of ethnic Brinnans living in Omeria. Tensions are high between the two nations resulting in incidents of violence, typically around the June 1 anniversary of the armistice. Above all, an Omerian terrorist group, known as The Night Watch is seeking to get rid of the ethnical minority. Because of the frequent violent acts of terrorism near the border region Omeria enacted the Anti-Terrorism & Extremism Law of 2012 and also passed the so called No Hate Act of 2011 to diminish the amount of the shocking and offensive statements meant to cause distress or hatred.

Between 2009 and 2014 the following five controversial messages were posted on Chatter by @TheVigilanteInsider:

- a) Post1: ‘News Flash! Brinnah’s economy on brink of collapse due to rampant godlessness.’ @TheVigilanteInsider, December 3, 2009, 18:49
- b) Post2: ‘We fried the Brinnans in the war of ’74, Fly their shameful flag, we’ll burn you some more.’ @TheVigilanteInsider, May 21, 2010, 15:21

- c) Post3: ‘Roses are red, violets are blue, and Brinnans are child killers. Heh, see not all poetry has to rhyme! ;-)’ @TheVigilanteInsider, November 5, 2013, 00:45
- d) Post4: ‘Another Armistice anniversary approaches... would be a shame if those brutes within our borders magically disappeared... kaboom! I mean, poof!’ @TheVigilanteInsider, April 19, 2014, 23:06 - This post was re-chatted 3,500 times by other Chatter users. (*No violence occurred on the anniversary of the armistice.*)
- e) Post5: ‘Do your part to purify Omeria—your country will thank and pardon you—our leaders can’t say what they’re thinking, but I can...’ @TheVigilanteInsider, May 22, 2014, 15:55
  - i. @Nightwatcher00 replied to this message, writing, ‘@TheVigilanteInsider – hearing you loud and clear!’
  - ii. Post6: @TheVigilanteInsider wrote back, ‘@Nightwatcer00 ... God willing.’

Even though Chatter received many complaints about @TheVigilanteInsider’s comments it suspended the anonymous account only for one day in response to the second post. @TheVigilanteInsider also deleted the Post3 four minutes after it was posted but not after several thousand Chatter users had ‘re-chatted’ it to their own followers. After Chatter received the domestic court’s decision it deleted Posts4-6 and revealed the identity of @TheVigilanteInsider complying with the Anti-Terrorism & Extremism Law of 2012.

## 4. Statement of Jurisdiction

Charges were brought against Umani for Posts1-3 under the Omerian domestic law of No Hate Act of 2011 and for Posts4-6 under the Omerian Anti-Terrorism & Extremism Law of 2012. Umani was convicted on all counts and sentenced to two years in prison. Charges were brought against Chatter for Posts1-3 under the No Hate Act of 2011 for facilitating Umani's speech and for Posts4-6 under the Anti-Terrorism & Extremism Law of 2012 for Chatter's recklessness in monitoring and controlling Umani's anonymous messages. The Omerian Government sought and obtained a court order pursuant to the Anti-Terrorism & Extremism Law of 2012 to force Chatter to delete Posts4-6 and to reveal the identity of @TheVigilanteInsider. In response, Chatter deleted these posts, and revealed the identity of Umani, but only after seven days, thus receiving a fine of the equivalent of US\$ 10,000 per day until compliance. Chatter was found liable for all posts except Post2 over which it had temporarily suspended Umani's anonymous account. Chatter's liability was assessed at the equivalent of US\$ 5 million in addition to the seven days' worth of fines imposed previously. After exhausting the domestic appeals, both Umani's sentence and Chatter's fine were upheld on appeal to Omeria's Supreme Court. Umani and Chatter have challenged these verdicts at the present court, the Universal Court of Free Expression on 26th October 2015.

## 5. Questions Presented

It cannot be disputed that the decision of Omeria's Supreme Court in respect of both Umani and Chatter constituted an interference with their freedom of expression.<sup>1</sup> Consequently, the main question is whether the interference with their rights was legitimate.

In order to answer this question, based on ICCPR Article 19 (3) and the principles established in the relevant case-law we must find out if the restriction:

- 1) was prescribed by law;
- 2) had a legitimate aim;
- 3) was necessary; and
- 4) was proportionate to the legitimate aim pursued.

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<sup>1</sup> ICCPR Article 19, UDHR Article 19 and ECHR Article 10

## 6. Summary of Arguments

First we examined the characteristics and the status of Umani and Chatter. Then we concluded that the decision of Omeria's Supreme Court in respect of both Umani and Chatter constituted an interference with their freedom of expression established in Article 19 of ICCPR, Article 19 of UDHR and Article 10 of ECHR.<sup>2</sup> In order to judge the extent of the restriction of their rights we observed if it was prescribed by the law, had a legitimate aim, was necessary and proportionate to the legitimate aim.

Concerning the lawfulness of the interference we observed if the consequences of the norm – if need be with appropriate advice – was foreseeable to a degree that was reasonable in the circumstances.<sup>3</sup> While investigating for the legitimate aim of the interference we kept in mind that it had to be based on a legal document e.g. a convention. Finally, we always attempted to judge whether a pressing social need existed<sup>4</sup> and if the domestic authorities have struck a fair balance when protecting two values, both guaranteed by conventions, but ones that might conflict in certain cases.<sup>5</sup>

For the above reasons we claim that:

- 1) in the case of Posts1-3 interference with Umani's freedom of expression was prescribed by the law, had a legitimate aim, was necessary and proportionate to the legitimate aim pursued;

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<sup>2</sup> ICCPR Article 19, UDHR Article 19, ECHR Article 10

<sup>3</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 71

<sup>4</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 78 (ii)

<sup>5</sup> Hachette Filipacchi Associés v. France App no 71111/01 (ECHR 14 June 2007) § 43

- 2) in the case of Posts4-6 interference with Umani's freedom of expression was prescribed by the law, had a legitimate aim, was necessary and proportionate to the legitimate aim pursued;
- 3) in the case of Post1, Post3 and Posts4-6 interference with Chatter's freedom of expression was prescribed by the law, had a legitimate aim, was necessary and proportionate to the legitimate aim pursued.

# **7. Arguments**

## **7.1. The competence of the Court**

The Court has stated many times that it is not in its power to resolve problems of interpretation of domestic legislation since its role is confined to ascertaining whether the effects of such an interpretation are compatible with the conventions<sup>6</sup>. Therefore we believe that the Universal Court of Human rights must restrict its competence the same way therefore judge only if the interference with the freedom of expression is complied with the law.

## **7.2. The definition of Umani and Chatter**

### **7.1.1. Umani**

It should be noted that Umani is a public figure and his right to freedom of opinion and expression is different than that of a private person. For his own protection the applicant stated that his private account shows his private opinion and as a human being he has every right to have own views about public related topics. In this respect he contradicts with the bio on his own Chatter account ('Political poet telling the truth from the corridors of power'). The Court case law does not make a distinction about public figure's statements as a private and a public person. The @TheVigilanteInsider and Umani are not two different persons. Therefore he should be considered as a public person with special duties and responsibilities. The Willem v. France decision is also applicable in this case and this clearly shows the consequences when a public figure speaks or texts online. Court decision in this case shows that public figures have special duties and responsibilities in addition to freedom of

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<sup>6</sup> See, among others, Pérez de Rada Cavanilles v. Spain, 28 October 1998, § 43

expression. In the previously mentioned case the applicant posted on a governmental portal under his own name and public account.

### **7.1.2. Chatter**

In Chatter is web-based and mobile application which allows users to publish 150 character-long messages. We would like to highlight that Chatter does not create content of its own, other than by posting announcements via its official Chatter account (@Chatter). Therefore, by applying HHJ Parkes QC's analogy, we might define Chatter as a gigantic notice board on which anyone can post comments (see also: Davison v. Habeeb 38.). Based on these characteristics we might conclude that Chatter is an internet service provider (ISP), a company that provides Internet connection and services to individuals and organizations,<sup>7</sup> with the purpose of hosting materials posted by users. We would also like to highlight that the classification of Chatter would not be different if we had applied the approach of the EU Members States. Based on Article 14 of the Directive 2000/31/EC of the European Parliament Chatter is an intermediary service provider that offers information society service that consist of the storage of information provided by a recipient of the service.

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<sup>7</sup> Jennie, Ness: The Role of Internet Service Providers in Stopping Internet Copyright Infringement (<http://www.asean.org/archive/21391-3.pdf>)

## **7.3. Legal assessment of the interference with Umani's freedom of expression in case of Post1-Post3 (Issue 1A)**

### **7.3.1. The law**

In the *Karatas v. Turkey* case, the Court found in case of the hate speech the legitimate aim to restrict the freedom of expression could be national security, public safety and the prevention of the public disorder.<sup>8</sup> The Court emphasised in the *Gündüz v. Turkey* case that tolerance and respect for the equal dignity of all human being must be constituted in a democratic society. Therefore in a pluralistic society 'it may be considered necessary to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred, based on intolerance'.<sup>9</sup> As the Court outlined, freedom of expression includes the right to discuss public affairs in order to find the causes of the problems and to give more space for alternative solutions as well.<sup>10</sup> However, the Court also referred to special 'duties and responsibilities'. Those who exercise the right of freedom of expression must take some duties and responsibilities too. The Court reiterated that duties and responsibilities may have legitimately included the obligation to avoid expression offensive to others, consequently infringing the other right since these statements do not contribute to any form of public debate capable of furthering progress in human affairs<sup>11</sup> (see also: *Otto-Preminger-Institut v. Austria*, *Wingrove v. the United Kingdom*). The Court also found that statements seeking to spread, incite and justify hatred based on intolerance did not enjoy the protection of freedom of

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<sup>8</sup> *Karatas v. Turkey* App no 23168/94 (ECHR 8 July 1999) § 41-42

<sup>9</sup> *Gündüz v. Turkey* App no 35071/97 (ECHR 4 December 2003) § 40

<sup>10</sup> *Karatas v. Turkey* App no 23168/94 (ECHR 8 July 1999) § 47

<sup>11</sup> *Gündüz v. Turkey* App no 35071/97 (ECHR 4 December 2003) § 37, *Karatas v. Turkey* App no 23168/94 (ECHR 8 July 1999) § 50

speech.<sup>12</sup> In the *Karatas v. Turkey* case the Court examined a situation where speech is in the form of a poem. The Court found that those who create, perform, distribute or exhibit works of art contribute to the exchange of ideas or opinions which is essential for a democratic society. Freedom of expression does not only protect the information and ideas expressed, but also the form in which they are conveyed.<sup>13</sup>

### **7.3.2. The application of the law**

#### **7.3.2.1. Lawfulness**

Umani was convicted based on the No Hate Act 2011. Therefore the lawfulness of the interference meets all the standards highlighted by the Court in the case of *Rotaru v. Romania*.<sup>14</sup> Since it had a legal basis in the domestic law, it was accessible and foreseeable for everyone including the Justice Deputy Minister.

#### **7.3.2.2. Legitimate aim**

Similarly to the cases mentioned above the legitimate aim of the restriction was the prevention of public disorder and the protection of others' rights established in Article 17 of ICCPR. Based on the Article 19. paragraph 3. a. and b. of the ICCPR, this limitation is acceptable.

#### **7.3.2.3. Necessity**

The Court in the decision of *Gündüz v. Turkey* said that tolerance and respect for equal dignity is one of the basic values of a democratic society. It may be considered necessary in

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<sup>12</sup> *Gündüz v. Turkey* App no 35071/97 (ECHR 4 December 2003) § 51

<sup>13</sup> *Karatas v. Turkey* App no 23168/94 (ECHR 8 July 1999) § 49, *Müller and Others v. Switzerland* App no 10737/84 (ECHR 24 May 1988) § 27

<sup>14</sup> *Rotaru v. Romania* App no 28341/95 (ECHR 4 May 2000) § 52 ; *Maestri v. Italy* App no 39748/98 (ECHR 17 February 2004) § 30

democratic countries to regulate or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.<sup>15</sup>

#### **7.3.2.4. Proportionality**

First, in order to judge the proportionality of the interference we must consider the case as a whole, including the content and context of the posts in which they were published.<sup>16</sup> Concerning all three questionable comments, we must highlight that Umani, unlike Gündüz had the possibility of reformulating, refining, retracting or even deleting his comments (see also: Fuentes Bobo v. Spain 46.). However he only took this opportunity in the case of Post3.

##### **7.3.2.4.1. Post1**

As the Court has already mentioned, to distinguish hate speech from acceptable criticism<sup>17</sup> we must examine the entire online activity of Umani under the account of the @VigilantInsider. If we view all his activities, and we consider all the other posts, then this one can be interpreted in a differently. The continuous incitement might lead to a situation where even though this particular comment might be seen harmless, but for the daily followers and readers has a different level of understanding. Therefore Post1 must be judged together with other posts, not just by itself.

##### **7.3.2.4.2. Post2**

First we must point out that this time Umani was not referring to the country with the terms ‘burn you’, but to the people of Brinnan. Furthermore by the using the word ‘we’ he calls for help from Omerians as well. We consider this post was a threat because of the following:

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<sup>15</sup> Gündüz v. Turkey App no 35071/97 (ECHR 4 December 2003) § 40

<sup>16</sup> Zana v. Turkey 69/1996/688/880 (ECHR, (GC) 25 November 1997) § 59

<sup>17</sup> Gündüz v. Turkey App no 35071/97 (ECHR 4 December 2003) § 44

- 1) Umani was referring to the use of chemical weapons which is regarded so inhuman that it is prohibited by international treaties<sup>18</sup>;
- 2) By referring to an already existing rumour in the society Umani creates the atmosphere of reasonable fear;
- 3) Every reasonable reader would understand the magnitude, the weight of such words, especially if he knows the existing tensions between the two countries;
- 4) It could be understood as a general encouragement of committing violent act in the near future;
- 5) As a result Umani's account was suspended which must be seen as a serious sanction.

We would like to add that unlike in the case of Gündüz, Umani did not even try to give the impression of seeking to inform the public about the matter of great interest<sup>19</sup>, therefore his statement did not contribute in any way to public discussion or debate. The fact that it was phrased in a form of rhyme, does not make it an art of poem. Umani's intention was clear, a reasonable observer would have found the post conveyed intent to cause harm: he hid his threats in rhyme, so it could have been understood as a poem. But in reality in this post he was actually threatening with war crimes. Referring to the use of chemical weapons and committing war crimes was a threat without any doubt. It is an abuse of freedom of expression. Therefore we must say that Umani's comment is an incitement to violence that does not necessarily bring actual risk to the society but it can disturb large number of individuals. We reckon that the post phrased in rhyme does not make Umani's post a poem. Umani's intention was not to create, perform, distribute or exhibit art, but to cause harm, to threat with war crimes. Every reasonable man would see that Umani hid his threat in a rhyme

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<sup>18</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction Article 1b

<sup>19</sup> Gündüz v. Turkey App no 35071/97 (ECHR 4 December 2003) § 44

and only a narrow-minded reader could understand it as a poem. The fact that Umani's account was suspended also proves that the post was more than just a simple statement, it was something with deeper importance and that is capable of outraging the people among the readers and the society. In our opinion the restriction was disproportionate.

#### **7.3.2.4.3. Post3**

First of all we need to point it out that Umani's third post referred to a disproven belief.

From The Supreme Court's jurisdiction we know that the false statements might be valuable and their importance is unquestionable in order to have a proper and a well-functioning democratic society. However false comments that made with actual malice do not deserve the protection of the law. (Justice Black defined malice as an abstract concept which refers to the author's knowledge of the statements being false or his reckless disregarding of the truth)<sup>20</sup> In addition in the case of *Gertz v. Robert Welch* The Supreme Court said that neither intentional lie nor careless error advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. These, as The Supreme Court stated 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'.<sup>21</sup> Therefore we must conclude that the scope of freedom of expression does not apply to the third comment since the author was aware of its falseness.

According to the Article 19 of the ICCPR (3) exercise of the rights of freedom of expression, carries special duties and responsibilities with it. As we have already stated, the duties and responsibilities may include the obligation to avoid expression offensive to others consequently infringing the other right since the statement does not contribute to any form of

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<sup>20</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964)

<sup>21</sup> *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1964)

public debate capable of furthering progress in human affairs.<sup>22</sup> This principle therefore demands the expectable diligence from Umani to stay away from posting offensive comments and to make sure that he is not inciting hatred towards other ethnic groups on the basis of false statements. Umani's comment surely did not represent any social values, moreover, he intentionally used the word 'child killer' which is, in the everyday language, an insult intended to cause offence.<sup>23</sup> His behaviour indisputably was aiming to deepen the conflict between Brinnans and Omerians, and it is something that cannot be tolerated by the law. Therefore we must come to the conclusion that the interference was proportionate.

## **7.4. Legal assessment of the interference with Umani's freedom of expression in case of Post4-Post6 (Issue 2A)**

### **7.4.1. The law**

In the case of *Zana v. Turkey* the Court examined the balance between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organizations.<sup>24</sup> (see also: *Yilmaz and Kiliç v. Turkey*)<sup>25</sup> After the Court found that the interference had been proportionate to the prevention of crimes<sup>26</sup> and the conviction of Zana answered a 'pressing social need'<sup>27</sup> (see also: *Sürek v.*

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<sup>22</sup>*Gündüz v. Turkey* App no 35071/97 (ECHR 4 December 2003) § 37, *Karatas v. Turkey* App no 23168/94 (ECHR 8 July 1999) § 50

<sup>23</sup> *Gündüz v. Turkey* App no 35071/97 (ECHR 4 December 2003) § 49

<sup>24</sup> *Zana v. Turkey* 69/1996/688/880 (ECHR, (GC) 25 November 1997) § 55

<sup>25</sup> *Bahçeci and Turan v. Turkey* App no 33340/03 (ECHR 16 June 2009), *Kizilyaprak v. Turkey* App no 27528/95 (ECHR 2 October 2003), *Feridun Yazar and Others v. Turkey* App no 42713/98 (ECHR 23 September 2004)

<sup>26</sup> *Zana v. Turkey* 69/1996/688/880 (ECHR, (GC) 25 November 1997) § 47-48, *Gül and Others v. Turkey* App no 4870/02 (ECHR 8 June 2010) § 35

<sup>27</sup> *Zana v. Turkey* 69/1996/688/880 (ECHR, (GC) 25 November 1997) § 56

Turkey No. 2 29.) In another case the Court also added the protection of other's right as a potential legitimate aim.<sup>28</sup> The Supreme Court of the United States also affirmed that the freedom of expression can be restricted if the speech creates 'a clear and present danger'.<sup>29</sup> The Supreme Court outlined that an expression of opinion could not be tolerated if it imminently threatened immediate interference with the purposes of the law. As The Supreme Court explained, clear and present danger can only be established if either an immediate serious violence was expected or was advocated, or the past conduct of a victim furnished reason to believe that immediate and grievous action would be taken. The Supreme Court also stated that a speech can be forbidden only if it is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action. Later The Supreme Court reaffirmed the 'clear and present danger test' by adding 'intention', a third element to his test developing the 'Brandenburg test'.<sup>30</sup> Based on the jurisprudence of the Court, in order to judge the imminence, flowing from speech, the statements cannot be looked at in isolation. The circumstances of the case as well as the the context of the expressions must have a special significance especially if the author was aware of it.<sup>31</sup> In another case the Court also pointed out that the content of impugned statement must be considered as well.<sup>32</sup>

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<sup>28</sup> Sürek v. Turkey (No. 2) App no 24122/94 (ECHR 8 July 1999) § 29

<sup>29</sup> Schenck v. United States 249 U.S. 47 (1919), Masses Publishing Co. v. Patten 244 F. 535,1917 U.S. Dist., Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107)

<sup>30</sup> Brandenburg v. Ohio, 395 U.S. 444 (1969) (No. 492) p. 449.

<sup>31</sup> Zana v. Turkey 69/1996/688/880 (ECHR, (GC) 25 November 1997) § 59, Sürek v. Turkey (No. 2) App no 24122/94 (ECHR 8 July 1999) § 33 (iii)

<sup>32</sup> Sürek v. Turkey (No. 2) App no 24122/94 (ECHR 8 July 1999) § 33 (iii)

## **7.4.2. The application of the law**

### **7.4.2.1. Lawfulness**

We note that the applicant's conviction and sentence were based on the Omerian Anti-Terrorism & Extremism Law and therefore we consider that the impugned interference was 'prescribed by law'.

### **7.4.2.2. Legitimate aim**

Similarly to the cases mentioned above the legitimate aim of the restriction was the maintenance of national security, the public safety, public order, the prevention of crimes and the protection of others' rights.<sup>33</sup>

### **7.4.2.3. Necessity**

In our case the pressing social need was obviously to answer the increasingly frequent violent acts of terrorism near the border region principally perpetrated by the Night Watch. Therefore, the interference must have been necessary in order to protect the legitimate aims mentioned above.

### **7.4.2.4. Proportionality**

In order to decide whether the restriction was proportionate we must examine whether Umani's comments presented a clear and present danger. Concerning the imminence we have to state that advocacy of disorder, or terrorism at some unspecified, indefinite time in the future remains too abstract to be sufficiently closely connected with any likely or intended act. Concerning the question of imminence, the requirement is closely linked with that of the likelihood that the encouragement will bring about such an act shortly.<sup>34</sup> A Chatter user,

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<sup>33</sup> ICCPR Article 17 and UDHR Article 12, ECHR Article 8

<sup>34</sup> Hess v. Indiana, 414 U.S. 105 (1973) (No. 73-5290)

named after a terrorist organization of the country understood Umani's encouragement perfectly and did not wait to express it in his reply. Umani did not speak about for instance a future revolution; he spoke about the armistice anniversary that presented an imminent threat of violence.

About the content and the context we state that the publisher of ineffective, idle threats or incitements cannot be convicted<sup>35</sup>. 'The question in every case is whether the words used in such circumstances and are of such a nature as to create a clear and present danger.' In Post4 we find an onomatopoeic word: 'poof'. Poof used to describe a sudden disappearance, shooting by arms etc. These guesses however rest controversial. Post4 is an abstract advocacy of insurrection or violence and though a legitimate exercise of political speech. According to the meanings of the word 'purify', it is a verb encouraging to action. The encouragement in our case relates to an act of terrorism. If the celebration of terrorist acts is understood by listeners as encouraging them, in circumstances where it is also likely that 'single revolutionary spark may kindle a fire'<sup>36</sup>, then there is no reason of principle why a speaker glorifying the acts should not be held as guilty as a speaker using more direct language.<sup>37</sup> The Court declared that the statement cannot be looked at in isolation.<sup>38</sup> Just as the statements of Zana, Post5 of Umani had special significance in 'an already explosive situation in that region'.<sup>39</sup> The comments must have been interpreted by the audience as such that the applicant must have realized. If we put these words into their context in which the words were communicated, we find that they are degrading, can inflict hate and a reasonable reader<sup>40</sup> can come to the conclusion, that @TheVigilantInsider hates Briannans, that should disappear by

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<sup>35</sup> *Watts v. United States*, 394 U.S. 705 (1969) (No. 1107)

<sup>36</sup> Opinion of Edward Terry Sanford in *Gitlow v. New York*

<sup>37</sup> Larry, Alexander: *Incitement and Freedom of Speech* In: David, Kretzmer and Francine Kershman, Hazan (eds.), *Freedom of Speech and Incitement against Democracy* (Kluwer, 2000) p. 101

<sup>38</sup> *Zana v. Turkey* 69/1996/688/880 (ECHR, (GC) 25 November 1997) § 59

<sup>39</sup> *Zana v. Turkey* 69/1996/688/880 (ECHR, (GC) 25 November 1997) § 60

<sup>40</sup> *Elonis v. United States* N. 13-983. (2014) p. 13

purifying the country. The word ‘purify’ could not plausibly be treated as a contribution to the democratic public debate which lies at the foundation of a participatory democracy. In his call he indirectly encourages the public to act. Moreover, if we consider the position of the speaker with regard to that audience we come to the conclusion that Umani had the power to urge his followers to commit violent actions. He did not encourage terrorism in general, but he incited against the Briannans: in Post4 he revealed his dream that it would be magical if ‘those brutes would disappear’ and later he addressed his audience to take a share in the work that is ‘God willing’. In the *Elonis v. United States* The Supreme Court declared that “The crucial element separating legal innocence from wrongful conduct is the threatening nature of the communication. The mental state requirement must therefore apply to the fact that the communication contains a threat. Umani says he did not intend to encourage or induce the commission of any act of terrorism. We do not know if he wanted or not, but he could believe or would have had the reasonable grounds for believing that his 844,056 followers as @TheVigilantInsider, the people to whom he was speaking are likely to see his remarks as an inducement or encouragement to emulate that behaviour.<sup>41</sup> However Umani did not only encourage terrorism, he supported those taking action, and glorified their actions. By expressing clearly: ‘your country will thank and pardon you’ furthermore: ‘God willing’ in Post6, Umani not only indirectly encourages terrorism but emphasizes that terrorists are heroes whose actions should be copied, the whole nation will be grateful to them and as ‘God willing’ they go straight to Heaven.

Chatter allows, initiates, inflicts public discourse, it allows response and debate thus engaging freedom of expression. The democratic justification for freedom of speech only applies to expression which can be seen as contributing to public debate. That might include some types

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<sup>41</sup> *Elonis v. United States* N. 13-983. (2014) p. 13, see also: In: Ivan Hare, James Weinstein (eds.): *Extreme speech and Democracy* (Oxford University Press, 2009) Part V.

of extremist speech, but hardly incitements to violent action. Umani's posts intended to intimidate or could be understood as intimidating their audience as they stir up emotions rather than contribute to public debate. Advocates of terrorism do not consider that they have any obligation to obey laws of the state. Umani is not even claiming a right to participate in a democratic debate. He does not raise attention, he does not criticise the government, he rather denies this form of discourse which seeks to bring about change through the democratic process and targets a minority. Furthermore, we cannot go beyond the fact that the relevance of internet is increasing among social activities. In the past few years we could witness online debates transformed to mass protests and organized events which were affecting a wide range of the society to commit real, actual action (for example Arab spring, Ukraine protests). Altogether, we believe that Umani's defense cannot be accepted because as Eric Barrendt once said: 'if the celebration of terrorist acts is understood by listeners as encouraging them, in circumstances where it is also likely that they will soon commit further terrorist acts, then there is no reason of principle why a speaker glorifying the acts should not be held as guilty as a speaker using more direct language'.<sup>42</sup>

## **7.5. Legal assessment of the interference with Chatter's freedom of expression (Issue 1B-2B)**

### **7.5.1. The law**

The Court has come to a judgment in *Delfi AS v. Estonia* case in which the Court had to answer to the question whether holding Delfi, an internet news portal, liable for the comments

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<sup>42</sup> Larry, Alexander: *Incitement and Freedom of Speech* In: David, Kretzmer and Francine Kershman, Hazan (eds.), *Freedom of Speech and Incitement against Democracy* (Kluwer, 2000) p. 101

posted by the readers infringes its freedom of expression.<sup>43</sup> Concerning the lawfulness of the interference the Court found that the requirement could be established if a citizen was able to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action might entail. The Court also added that even though the certainty was desirable, the consequences did need not to be foreseeable with absolute certainty so that the law could keep its ability to keep pace with changing circumstances. Regarding foreseeability the Court pointed out that the consequences of breaching the norm can be foreseeable even if the person concerned has to take appropriate legal advice but only to a degree that is reasonable in the circumstances. The Court also stated that a professional publisher must have been at least familiar with the legislation and case-law, and could also have sought legal advice. Therefore the publisher was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail.<sup>44</sup> After the Court had considered the protection of the reputation and rights of others as a legitimate aim of the restriction, the Court found that based on the examined elements the domestic judgement that held the applicant company liable for the defamatory comments posted by readers on its Internet news portal was a proportionate restriction on the applicant company's right to freedom of expression.<sup>45</sup>

## **7.5.2. The application of the law**

### **7.5.2.1. Lawfulness**

According to the jurisdiction of the Court we have to examine the foreseeability of the consequences that a given action may entail based on the law. First, we have to point out that Post1 had been posted before the No Hate Act was adopted. However, we think that after the

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<sup>43</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 46

<sup>44</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 71-76

<sup>45</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 77, 94

Act had entered into force Chatter should have controlled the comments posted after that moment. In the case of Post3 and Posts4-6 we must declare that the restriction was foreseeable since both Acts made it clear that anyone who facilitates prohibited statements or provides material support, including any service may be held liable. Like Delfi, Chatter is the most popular platform in the country and also the degree of notoriety has been attributable to comments posted in it. Even though the Act was quite general, but, like in the case of Delfi AS v. Estonia, it does not mean that it did not constitute a sufficiently clear legal basis for Chatter. We believe that since Chatter was the most popular social platform for communication it must have been familiar with the legislation and case-law, and could have sought legal advice too.<sup>46</sup>

#### **7.5.2.2. Legitimate aim**

We believe that the legitimate aim cannot be different from what we have mentioned before. Therefore legitimate aim must have been the protection of others' rights and the prevention of public disorder.

#### **7.5.2.3. Necessity**

The interference must have the pressing social need<sup>47</sup>, since, as the Court already stated in certain democratic countries it might be necessary to regulate or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.<sup>48</sup>

#### **7.5.2.4. Proportionality**

Though the Court did not see any reason to call into question the definition of Delfi, when it focused on the examination of the comments' context, it indirectly considered characteristics

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<sup>46</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 76

<sup>47</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 78 (ii)

<sup>48</sup> Gündüz v. Turkey App no 35071/97 (ECHR 4 December 2003) § 32

that distinguish a passive, purely technical service provider from a publisher.<sup>49</sup> Later the Grand Chamber of the Court found the difference between these two relevant for the purposes of the freedom of expression.<sup>50</sup> Therefore, in order to decide whether the interference was disproportionate, first of all we have to decide the role of Chatter in the publication of the comments. According to the Court of Justice of the European Union (CJE) jurisdiction the ISP's role can only be considered passive, neutral if it has a mere technical, automatic and passive nature which also implies that the ISP can have neither knowledge of nor control over the information which is transmitted or stored. Otherwise the ISP's role must be seen active.<sup>51</sup> By applying the CJE's approach we must come to the conclusion that Chatter had an active role since it had the knowledge of the comments written by @TheVigilanteInsider and transmitted by him. Also, as Chatter took an active step to suspend Umani's anonymous account and deleted Posts4-6 it could not be perceived as a passive instrument.<sup>52</sup> We believe that Chatter not only had an active role but was the publisher of the comments as well. As the High Court of New Zealand explained, publication is the communication of a statement to a third person, which also includes the failure to erase or otherwise remove expression from a place where it may be seen by others.<sup>53</sup>

To be able to decide if Chatter was a publisher we should apply two different tests:

- 1) the actual knowledge test; or
- 2) the ought to know test.<sup>54</sup>

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<sup>49</sup> Delfi AS v. Estonia App no 64569/09 (ECHR, (GC) 16 June 2015) § 61, 113 and Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 86, 89

<sup>50</sup> Delfi AS v. Estonia App no 64569/09 (ECHR, (GC) 16 June 2015) § 146

<sup>51</sup> Google France SARL and Google Inc. v. Louis Vuitton Malletier SA (C-236/08), Google France SARL v. Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08) (CJE 23 March 2010) § 113, 120, L'Oréal and Others v. eBay Ltd. (C-324/09) (CJE 12 July 2011) § 122-124

<sup>52</sup> Murray v. Wishart [2014] NZCA 461 (19 September 2014) § 88

<sup>53</sup> Sadiq v. Baycorp (NZ) Limited and Anor HC AK CIV AND ANOR 2007-404-6421 [2008] NZHC 403 (31 March 2008) § 26

<sup>54</sup> Murray v. Wishart [2014] NZCA 461 (19 September 2014) § 81-82

The actual knowledge test was established in the *Byrne v. Deane* case by the British Court of Appeal and repeated several times. (see also: the *Sadiq v. Baycorp (NZ) Ltd, A v. Google New Zealand Ltd.*, *Davison v. Habeeb* and *Urbanchich v. Drummoyne Municipal Council.*)<sup>55</sup> Based on the actual knowledge test Chatter would be considered as a publisher of the comments made by @TheVigilanteInsider if it had known about comments and, despite its capability, had failed to remove it within the reasonable time,<sup>56</sup> or as Greer L. J. expressed anyone who allows an illicit statement to rest upon his wall and does not remove it with the knowledge that it would be read by the people to whom it would convey such meaning, would be taking part in the publication.<sup>57</sup> Since Chatter, in spite of its knowledge of the complaints, refused to take any action (for example: deleting the comments or even the whole account), even though it had the right and power to do so, must be associated with the continuance of the publication and thereby it became the publisher of the material.<sup>58</sup> According to the ought to know test Chatter would be regarded as a publisher if, even though it did not have the knowledge of the comment but in the circumstances it should have known that posting were being made, in the circumstances, were likely to be illicit.<sup>59</sup> Despite the concerns of the High Court of New Zealand<sup>60</sup> the test was even applied by the Court in the *Delfi* case when stating that *Delfi* should have foreseen the higher risk of insulting comments and hate speech when it posted an article dealing with a shipping company's activities that negatively affected the people.<sup>61</sup>

So we must see Chatter as a publisher based on the Court's arguments as well, since it should have expected more illegal comments from a user who has already posted a comment (Post2)

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<sup>55</sup> *Murray v. Wishart* [2014] NZCA 461 (19 September 2014) § 144

<sup>56</sup> *Murray v. Wishart* [2014] NZCA 461 (19 September 2014) § 81 and *Urbanchich v. Drummoyne Municipal Council* (1991), *Aust Torts Reports* 81-127 (NSWSC)

<sup>57</sup> *Byrne v. Deane* (1937) 1 KB 818 (CA) p. 830.

<sup>58</sup> *Byrne v. Deane* [1937] 1 KB 818 p. 835., *Davison v. Habeeb* [2011] EWHC 3031 (QB) § 47-48, *Tamiz v. Google Inc.* [2013] EWCA Civ 68 § 34

<sup>59</sup> *Murray v. Wishart* [2014] NZCA 461 (19 September 2014) § 88

<sup>60</sup> *Murray v. Wishart* [2014] NZCA 461 (19 September 2014) § 136-144

<sup>61</sup> *Delfi AS v. Estonia* App no 64569/09 (ECHR 10 October 2013) § 86

so hateful that even Chatter itself suspended the author's account. If we apply the conclusions of the Court of Final Appeal of Hong Kong, Chatter again must be seen as a publisher, since it played an active role in encouraging and facilitating posting on its forum.<sup>62</sup> In conclusion Chatter had an active role, moreover it was the publisher of the hateful comments, since not only was reckless in monitoring and controlling of Umani's anonymous messages but it also refused to take any action even after he was notified of them. Therefore, Chatter's behavior must be taken as evidence that it did promote and associate itself with the publication of the hate speech. After having judged the role of Chatter we must take a closer look of the measures applied by Chatter. In general, we must say that Chatter did not take any measures to filter comments amounting to hate speech or speech entailing an incitement to violence. For example, Chatter obviously did not apply the notice-and-take-down-system since it did not delete the posts in response to the complaints. On the other hand, we must say that even if Chatter have had instituted all of the mechanism that are capable of filtering illegal comments, in real life it still failed to remove the clearly unlawful comments, thus it wholly neglected its duty to avoid causing harm to third parties.<sup>63</sup>

Finally, to form an opinion of the proportionality of the interference we have to judge whether the liability of the actual authors of the comments could serve as a sensible alternative to the liability of Chatter.<sup>64</sup>

First we must outline that an information once made public most likely will remain public and circulate forever. So it must be a difficult task for Chatter to detect and remove all of the unlawful comments, however it would be an impossible mission of their victims who would be less likely to possess resources for continuous monitoring of the Internet.<sup>65</sup> It cannot be

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<sup>62</sup> Oriental Press Group Ltd v. Fevaworks Solutions Ltd [2013] HKEC 1025 § 50-54

<sup>63</sup> Delfi AS v. Estonia App no 64569/09 (ECHR, (GC) 16 June 2015) § 155-156, 159

<sup>64</sup> Delfi AS v. Estonia App no 64569/09 (ECHR, (GC) 16 June 2015) § 147, Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 85

<sup>65</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 92

argued that it would be unrealistic to expect from the victim to sue every single person (for example in case of Post4 3500 people) to remove the illicit posts, instead of Chatter who has the power to delete all at once. But even if the victim chose to litigate the author and the ‘reposters’ he would have to face the difficulty to establish their identity since on Chatter everyone uses anonym account that can be disclosed in only certain circumstances.<sup>66</sup>

It is impossible to break through all of the accounts who interfered with the right of the victim. The proceeding would take too much time and effort. The criteria of the proceeding would include: the test set out in the Council of European Convention and the case law of the free speech (see also: McIntyre v. Ohio Elections Committee, Doe. v. Cahill, Independent Newspapers, Inc. v. Brodie, Inc. v. John Doe, Anonymous Online Speakers v. United States Solers, Inc. v. John Doe, Rechnungshof v. Österreichischer Rundfunk, K.U. v. Finland, Copland v. the United Kingdom, ACLU v. Reno) As the Court pointed out in several cases, shifting from the author to Chatter, the publisher, who is more likely to be in a better financial position than the author, would not be a disproportionate interference with Chatter’s freedom of expression.<sup>67</sup>

Altogether, we believe that the restriction was proportionate because:

- 1) Chatter, like Delfi, was the publisher of the comments;
- 2) like Delfi, Chatter failed to fulfill its duty to protect the rights of the third parties; and
- 3) it is more realistic to bring a claim against Chatter, than against the author and all the other ‘reposters’.

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<sup>66</sup> Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 91, Delfi AS v. Estonia App no 64569/09 (ECHR, (GC) 16 June 2015) § 147

<sup>67</sup> Krone Verlags GmbH & Co. KG v. Austria (No. 4) App no App no 72331/01 (ECHR 9 November 2006) § 32, Delfi AS v. Estonia App no 64569/09 (ECHR 10 October 2013) § 92, Delfi AS v. Estonia App no 64569/09 (ECHR, (GC) 16 June 2015) § 151

## **8. Prayer / Relief Sought**

Based on the above mentioned arguments we hereby request the Court to declare that the applicant was liable for the defamatory and inciting posts, therefore the interference was a justified and proportionate restriction on the applicant's right to freedom of expression.

# Memorial for Applicants 2016/2017

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THE 2016–2017 PRICE MEDIA LAW

MOOT COURT COMPETITION

BALLAYA & SEESEY

(APPLICANTS)

V.

THE REPUBLIC OF AMOSTRA

(RESPONDENT)

MEMORIAL FOR APPLICANTS

[4926 words]

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## I. LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACommHPR	African Commission on Human and Peoples' Rights
BCSC	British Columbia Supreme Court
CEO	Chief Executive Officer
CJEU	Court of Justice of the European Union
ECPHR/ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
ESA	Election Safety Act of 2016
EU	European Union
EUI	European University Institute
EWCA	England and Wales Court of Appeal
GC	Grand Chamber
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IEHC	High Court of Ireland

OAS	Organization of American States
OHCHR	United Nations Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary of Assembly of the Council of Europe
RSCAS	Robert Schuman Centre for Advanced Studies
SIA	Stability and Integrity Act of 2014
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
US	United States of America

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3. UDHR (adopted 10 December 1948) UNGA Res 217A (III)
4. American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978)

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30. *Kazakov v Russia* App no 1758/02 (ECtHR, 18 December 2008)
31. *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987)
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### **III. STATEMENT OF RELEVANT FACTS**

A. Amostra is a small country which has inhabitants from two major religious groups, the Zasa majority and the Yona minority. In the past five years there has been an increased social unrest because the Yona people believe that the Zasa-led Government has systematically subjected them to various forms of political and economic discrimination.

B. Citizens of Amostra have access to the internet and use SeeSey, a website that allows users to share, comment and post content. The users of SeeSey from Amostra only make up a small fraction of SeeSey's users since SeeSey is available worldwide. It is based and operated from Sarranto, another State, where all the data is being hosted and no access of the data stored on its servers is provided to any of its subsidiary. The only actual connection SeeSey has with Amostra is that one of its many subsidiaries called SeeSALES, an independently operated law-abiding sales house, is headquartered in Amostra.

C. The situation in Amostra has led to several of non-violent protests and occasional skirmishes between the two religious groups. As a result, arrests, mainly from the Yona sect, took place and even a loss in life of a Yona protestor, possibly caused by the Zasa counter demonstrators or from the police itself.

D. Only because of continuous pressure from the international community and the residents, the Prime Minister of Amostra, without his resignation, announced that a general election would be held.

E. On the very same day of this announcement the Amostran National Election Authority communicated that some restrictions on political demonstrations and election-related speech will be enacted to ESA. This and the previously enacted SIA are highly restrictive statutes on the freedom of expression.

F. Blenna Ballaya, an insightful and bold Amostran blogger living in Sarranto, in light of her growing success and popularity was asked by the Sarranto based newspaper called 'The Ex-Amostra Times' to write a one-time column as an opinion contributor on the political matters incurred in Amostra.

G. It is known that because of the political instability and media censorship in Amostra, as media organisations are required to register with the Ministry of Defense and have to consult the content they have recently published and that they intend to publish, most citizens of Amostra have turned to the website SeeSey. It is held the one of the most reliable internet service provider and a platform for free discourse, since, unlike the Times, it allows people to comment their views. As additional features, users can generate their SeeMore list, to follow specific person's post that they are interested and also reach the Home Location option receiving the most popular posts near to them. For this SeeSey ranks as the most popular source of news and political discussion among the 18-35 year-olds in the country. SeeSey does not edit or change any of its posts or comments, but if notified, SeeSey, unlike Amostra, which only has the ability to block the entire service, does take down the specific offensive content. SeeSey was never asked by the Amostran Ministry of Defense to register and obtain the operating licence.

H. Ballaya responded with a column published in the Times where she stated that the Prime Minister of Amostra and other members of the Zasa sect are involved in corruption and violate the human rights of the Yona people. She called for an active but peaceful event before the elections which she believed was only a sham by the Government.

I. The article written by Ballaya was published by the Times on its online surface and also in print only distributed in Sarranto, but it was also posted to SeeSey, where also the Amostran residents could reach the content including the call for the assembly,

J. On the Day of Resistance to show her commitment Ballaya herself travelled to Amostra and attended at the peaceful public protest as well. Unfortunately, a minority has interfered and disrupted the peacefully ongoing organisation.

K. As a consequence, Ballaya was accused of and arrested for organising the protest in connection with her column based on that the protestors were chanting a song from her article, though it was undoubtedly a well-known Yona unity song. Amostra prosecuted Ballaya and was found guilty and sentenced to three years imprisonment and was also imposed to pay \$300,000 fine. Despite her appeal the courts in Amostra have upheld her conviction exhausted the domestic remedies.

L. As for SeeSey, instead of notifying and asking them first, an Amostran court issued a civil order requiring SeeSey to remove “all offensive content replicating or relating to Ballaya’s

column, including comments made by users of SeeSey, so that such content is no longer accessible anywhere on SeeSey from any location worldwide, including in Amostra and Sarranto” and to form an apology to calm tensions. SeeSey also appealed but it was dismissed and therefore, SeeSey exhausted the domestic remedies as well.

#### **IV. STATEMENT OF JURISDICTION**

Ballaya and SeeSey have challenged these decisions in the Universal Freedom of Expression Court (hereinafter referred to as ‘the Court’) and hereby submit to this Court their dispute concerning Articles 19 of UDHR and Article 19 of ICCPR.

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

## **V. QUESTIONS PRESENTED**

1. Whether Amostra's prosecution of Ballaya under SIA violated international principles, including Article 19 of UDHR and Article 19 of ICCPR.
2. Whether Amostra's prosecution of Ballaya under ESA violated international principles, including Article 19 of UDHR and Article 19 of ICCPR.
3. Whether Amostra had jurisdiction to obtain and enforce the civil order against SeeSey in Amostra and Sarranto.
4. Whether Amostra's civil order against SeeSey violated international principles, including Article 19 of UDHR and Article 19 of ICCPR.

## **VI. SUMMARY OF ARGUMENTS**

### **VI.1. Amostra violated Ballaya's right to freedom of expression under Article 19 of UDHR and Article 19 of ICCPR by prosecuting her under SIA**

Everyone has and shall have the right to freedom of expression. Prosecuting Ballaya under SIA violated Ballaya's right to freedom of expression under Article 19 of UDHR and Article 19 of ICCPR as it was unjustified. The prosecution was not prescribed by law and was not necessary in a democratic society.

The prosecution was not prescribed by law since SIA was insufficiently precise as its Sections' scopes of terms were overly vague and were not definite enough. There was no legal basis to prosecute Ballaya as there was no clear evidence for a connection that the protesters had read her article and that it was indeed the cause that triggered the violence later. Her actions were not subject to Section A or Section D of SIA since it was not a hate speech and the article wasn't addressed to the Amostran residents.

The prosecution of Ballaya did not correspond to a pressing social need and was not proportionate to the legitimate aim pursued. There was no pressing social need to prosecute her for her article since it was not a hate speech. Ballaya's article simply reflected her opinions as a journalist on public matters in a form that shall be respected. Ballaya's three years imprisonment was disproportionate in comparison to sentences other States have imposed in similar cases and for the fact imprisonment for journalists shall be the last applicable resort.

## **VI.2. Amostra violated Ballaya's right to freedom of expression and freedom of assembly by prosecuting her under ESA**

Freedom of peaceful assembly is a recognised human right which goes hand in hand with freedom of expression because it allows people to express their views together therefore its limitations are similar to the limitations of the freedom of expression

The prosecution was not prescribed by law. ESA was insufficiently precise and overly vague since its terms were unequivocal. There was no legal basis to prosecute Ballaya since Ballaya echoed a peaceful assembly, which should never be criminalised. By echoing others she cannot be marked and held responsible as the organiser of the event either.

The prosecution was not necessary in a democratic society since there was no pressing social need to fine Ballaya for \$300,000. The demonstration had no intention to spread extremist or seditious message, or seek to incite hatred, violence, or disrupt the democratic process.

The amount is not proportionate in comparison, since it is way over the practice of other similar States.

## **VI.3. Amostra's jurisdiction on SeeSey under SIA was unjustified**

Amostra did not have jurisdiction to obtain the civil order. „Jurisdiction” means the power of a court to hear and decide a case or make a certain order. States do not have unlimited jurisdiction over all persons and cases but it is generally confined to the territory of that State. Amostra

lacked legal basis of authority over the hearing of the case since there was no real and substantial connection between the act, the person and the court and it did not reach the threshold for granting a jurisdiction. Neither extraterritorial jurisdiction, nor personal jurisdiction shall be granted for Amostra since does not have a competence due to the lack of competence of its conditions.

SeeSey is a Sarranto based and operated website, the content itself was published by a Sarranto based newspaper primarily for its Sarranto based readership. Amostra lacks of competence to regulate SeeSey's global activities. The court in Amostra is a forum non convinens and a more appropriate court can be found in Sarranto to adjudge the case.

Amostra's jurisdictional claim based on SIA is unacceptable because it is not only too vague but it would basically enable universal jurisdiction for the Amostran courts in civil cases concerning free expression on the internet around the whole planet. This would not only violate jurisdictional limitations but would also violate other States' sovereignty.

Amostra did not have jurisdiction to enforce the civil order. The civil order can not be enforced since its request is impossible because the material would still be accessible on the internet regardless of the takedown. It would also violate freedom of expression. Amostra does not and cannot have the power to enforce its order on a different country to comply with it through an order on an out of State Applicant.

#### **VI.4. Amostra's civil order against SeeSey did violate SeeSey's right to freedom of expression under Article 19 of UDHR and Article 19 of ICCPR**

As a legal person and information source, SeeSey has the right to freedom of expression which was restricted by the civil order issued by the court of Amostra. Amostra's actions were unjustified on the basis of the requirements of international principles, including Article 19 of UDHR and ICCPR.

The restriction of the right to freedom of expression was not prescribed by the law in the meaning of foreseeability as terms of SIA were undetermined and even the sole intention of an action was criminalised.

To determine the lack of necessity on the restriction of the right to freedom of expression the following factors are examined: the context of the comments, measures taken by SeeSey, the liability of the actual authors of the comments and consequences of the comments for the both parties.

As for the context, the article was on a matter of public interest and the comments below it did not constitute unlawful speech, they were simply vulgar expressions. Additionally, SeeSey is just a mere, passive internet service provider that exercises a limited degree of control over its user generated content and it should not be held liable for third-party activities. The article and the comments posted did not significantly evaluate the attitude in Amostra, as it has been like that for quite a long time now.

SeeSey had a sufficiently working notice-and-take-down system and was never notified in the first place from the Amostran Government or others and thus SeeSeey was never aware of the posted content. Without notification SeeSey cannot be held liable for not taking down the comments.

Instead the liability of SeeSey, the liability of the actual authors of the comments should have been established due to the specific registration measures required to use the platform of SeeSey.

The consequences of the comments were not noxious due to the strict liability of SeeSey is not proportionate, the civil order was not addressed and precise enough on what shall be taken down exactly, the apology is not justified and a worldwide takedown is unacceptable since there are other disproportionate options available.

## VII. ARGUMENTS

### VII. 1. Amostra violated Ballaya's rights to freedom of expression by prosecuting her under SIA

1. Free speech is an indispensable tool of self-governance in a democratic society. It enables people to obtain information from a diversity of sources, make decisions and communicate those decisions to the Government.<sup>1</sup>Freedom of expression is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.<sup>2</sup>

2. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.<sup>3</sup>

3. Tolerance and respect for equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to prevent or even sanction all forms of expression which spread, incite, promote or justify hatred based on intolerance.<sup>4</sup>

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<sup>1</sup>Human Rights Issues in Criminal Justice 'Freedom of Speech and Freedom of Press' <<http://www.lincoln.edu/criminaljustice/hr/Speech.htm>> accessed 1 December 2016

<sup>2</sup>*Handyside v UK* App no 5393/72 (ECtHR, 7 December 1976) para 49.

<sup>3</sup> David Harris, Colin Warbrick, Michael O'Boyle, Edward Bates, Carla Buckley, Paul Harvey, Michelle Lafferty, Peter Cumper, Yutaka Arai, Heather Green, *Law of the European Convention on Human Rights* (first published 2009, Oxford University Press, 2014) p. 443

<sup>4</sup> *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006) para 56.

4. States have the right to narrow hate speech that is 'public speech that expresses hate or encourages violence towards a person or group based on something such as race, religion, sex, or sexual orientation'.<sup>5</sup> So to execute this obligation an interference may only be justified if it is prescribed by law, pursues a legitimate aim and is necessary in a democratic society.

*VII.1.1. The prosecution was unjustified*

Although Amostra may have acted in pursuance of a legitimate aim, the prosecution of Ballaya under SIA was however: not prescribed by law and not necessary in a democratic society.

*VII.1.1.1. The prosecution was not prescribed by law*

The statute is prescribed by law if it is sufficiently precise and any prosecution under it has a legal basis.

*VII.1.1.1.1. SIA is insufficiently precise as Section B is overly vague*

Section B includes that 'Any „person” guilty of a criminal offence under this Act is subject to fines and prison sentences'. The law does not clear the length of any sentence or the amount of

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<sup>5</sup><<http://dictionary.cambridge.org/dictionary/english/hate-speech>> accessed 1 December 2016

fine one has to pay. Section A has some terms that are insufficiently precise. For example „conduct or speech inciting people to rebel against, or conduct or speech insulting of Government authorities or law enforcement officials” is not acceptable. The wording is overly vague and insulting Government authorities cannot be sanctioned. The ECtHR has found that the domestic law was not “law” because it was not formulated with sufficient precision to enable any individual – if need with appropriate advice – to regulate his conduct.<sup>6</sup>

#### VII.1.1.1.2. There was no legal basis to prosecute Ballaya

Article 10 guarantees freedom of expression,<sup>7</sup> one of the cardinal rights guaranteed under the ECHR<sup>8</sup>. Freedom of expression constitutes one of the essential foundations of society, one of the basic conditions for its progress and for the development for every man.<sup>9</sup> The Court has consistently recognised that States must ensure that private individuals can effectively exercise communication among themselves.<sup>10</sup> According to the First Amendment of the US Constitution „Congress shall make no law abridging the freedom of speech.”<sup>11</sup> Ballaya by writing this article

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<sup>6</sup> *Rotaru v Romania* Application no. 28341/95 (ECtHR, 4 May 2000) para 55

<sup>7</sup> For analysis, see Monica Macovei, 'Freedom of Expression, A guide to the implementation of Article 10 of the European Convention on Human Rights' (2004) <<http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff48>> accessed 1 December 2016

<sup>8</sup> David Harris, Colin Warbrick, Michael O'Boyle, Edward Bates, Carla Buckley, Paul Harvey, Michelle Lafferty, Peter Cumper, Yutaka Arai, Heather Green, *Law of the European Convention on Human Rights* (first published 2009, Oxford University Press, 2014) p. 443

<sup>9</sup> *Handyside v UK* App no 5393/72 (ECtHR, 7 December 1976) para 49.

<sup>10</sup> Andrew Clapham, *Human Rights in the Private Sphere* (first published 1993, Clarendon Press, 1996) p. 231

<sup>11</sup> The First Amendment Of The Constitution of The United States

did not commit any felony that could harm freedom of speech. Moreover, there is no evidence that the protestors had read Ballaya's column and the words, what they had chanted, are from a famous Yona unity song.

Section A counts six terms and we do not know for which one Ballaya was convicted. According to Section A Ballaya was not calling for illegal action because the Day of Resistance was not illegal. Ballaya is not subject to Section D thus could not be prosecuted under SIA. This article was not distributed outside of Sarranto that is why Ballaya could not address the Amostra citizens directly; it was addressed to the readership of 'the Times'. These are the reason why there is no legal basis for Ballaya to be sentenced.

#### *VII.1.1.2. The prosecution was not necessary in a democratic society*

Interference is necessary in a democratic society if it corresponds to a pressing social need and is proportionate to the legitimate aim pursued.

##### VII.1.1.2.1. There was no pressing social need to prosecute Ballaya

Article 10 includes freedom of artistic expression - notably within freedom to receive and impart information and ideas - which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. Those who create, perform,

distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence there is an obligation on the State not to encroach unduly on the author's freedom of expression.<sup>12</sup> It would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth.<sup>13</sup>

Offend, shock or disturb the State or any sector of the population<sup>14</sup> of special importance to artistic work.<sup>15</sup> Even though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation.<sup>16</sup>

Some artistic work may be perceived as exceptionally offensive to the religious or moral convictions of members of a particular religious faith. Similarly, it may be considered defamatory or insulting to specific persons identifiable in the work. In such circumstances, the legitimate aims of protecting public morals or the rights of others can be invoked to justify appropriate measures against artistic expression.<sup>17</sup>

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<sup>12</sup> *Alinak v Turkey* App no 40287/98 (ECtHR, 29 March 2005) para 42.

<sup>13</sup> *Dalban v Romania*, App no 29114/95 (ECtHR, 28 September 1999) para 49.

<sup>14</sup> *Handyside v UK* App no 5393/72 (ECtHR, 7 December 1976) para 49.

<sup>15</sup> David Harris, Colin Warbrick, Michael O'Boyle, Edward Bates, Carla Buckley, Paul Harvey, Michelle Lafferty, Peter Cumper, Yutaka Arai, Heather Green, *Law of the European Convention on Human Rights* (first published 2009, Oxford University Press, 2014) p. 458.

<sup>16</sup> *Karatas v Turkey* App no 23168/94 (ECtHR, 8 July 1999) para 52.

<sup>17</sup> David Harris, Colin Warbrick, Michael O'Boyle, Edward Bates, Carla Buckley, Paul Harvey, Michelle Lafferty, Peter Cumper, Yutaka Arai, Heather Green, *Law of the European Convention on Human Rights* (first published 2009, Oxford University Press, 2014) p. 458.

#### VII.1.1.2.2. The prosecution was disproportionate in comparison with other State's practice

The PACE adopted a resolution<sup>18</sup> expressly recognising 'public access to clear and full information' as a basic human right'.<sup>19</sup> The Court already had occasion to indicate that Article 10(2) leaves little room for restrictions on freedom of expression in political speech or matters of public interest. Whilst an individual taking part in a public debate on a matter of general concern is required not to overstep certain limits as regards – in particular – respect for the rights of others, he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements.<sup>20</sup> It is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation.<sup>21</sup>

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<sup>18</sup> David Harris, Colin Warbrick, Michael O'Boyle, Edward Bates, Carla Buckley, Paul Harvey, Michelle Lafferty, Peter Cumper, Yutaka Arai, Heather Green, *Law of the European Convention on Human Rights* (first published 2009, Oxford University Press, 2014) p. 448.

<sup>19</sup> Resolution 1087 (1996) of the Parliamentary Assembly of the Council of Europe, para 4; *Gierra v Italy* 1998-I; 26 EHRR 357 Com Rep para 44.

<sup>20</sup> *Willem v France* App no 10883/05 (ECtHR, 16 July 2009) para 33.

<sup>21</sup> *Chauvy v France* App no 64915/01 (ECtHR, 29 September 2004) para 69.; *Monnat v Switzerland* App no 73604/01 (ECtHR, 21 September 2006) para 57.

Proportionality means to correct or suitable in size, amount or degree when considered in relation to something else.<sup>22</sup> Ballaya was sentenced to three years imprisonment, which is mightily disproportionate for she has done (or has not done). The nature and form of the punishment are determining, because it is not legal to sentence Ballaya more seriously than the punishment she deserves.

The Court has repeatedly emphasised that Article 10 safeguards not only the substance and contents of information and ideas but also the means of transmitting it. The press has been accorded the broadest scope of protection in the case law which encompasses preparatory acts for publication, such as activities of research and inquiries carried out by journalists.<sup>23</sup> Imprisonment for journalists should be the last resort.

Needless to say, the role of the press as a 'public watchdog' is vital to democracy' political process.<sup>24</sup> The press investigate journalism guarantee the healthy operation of democracy, exposing policy decisions and actions or omissions of Government to close scrutiny of the public opinion.<sup>25</sup> The imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as in the case of hate speech or incitement

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<sup>22</sup><<http://www.macmillandictionary.com/dictionary/british/proportionate>> accessed 1 December 2016

<sup>23</sup>*Sunday Times v the United Kingdom (No. 2)* App no 13166/87 (ECtHR, 24 October 1991) para 51 PC and *Dammann v Switzerland* hudoc (2006) para 52.

<sup>24</sup>*Sunday Times v UK (No1)* App no 6538/74 (ECtHR, 26 April 1979) para 65.; *Sunday Times v UK (No. 2)* App no 13166/87 (ECtHR, 24 October 1991) para 50.; *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) para 35.; *Goodwin v UK* App no 28957/95 (ECtHR, 27 Mar 1996) para 39; *Vides Aizsardzības Klubs v Latvia* App no 57829/00 (ECtHR, 27 May 2004)

<sup>25</sup>*Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. t. Turkey* App no 64178/00, 64179/00, 64181/00, 64183/00, 64184/00 (ECtHR, 30 March 2006) para 78.

violence.<sup>26</sup> The confidentiality of journalistic sources is crucial for press freedom.<sup>27</sup> Without such protection, the role of the press as a public watchdog in providing accurate and reliable information to the public and shaping a well-informed public may be jeopardized.<sup>28</sup>

## **VII. 2. Amostra violated Ballaya's rights to freedom of expression and freedom of assembly by prosecuting her under ESA**

Freedom of peaceful assembly is a recognised right under international human rights law.<sup>29</sup> The right to peaceful assembly is established in Article 11 of ECHR.<sup>30</sup> Parties may impose certain limitations on the exercise of this right. However, such restrictions must be prescribed by law and necessary in a democratic society.<sup>31</sup> Article 11 of ECHR not only protects an individual's right to peaceful assembly, but also imposes a positive obligation on State authorities to facilitate the exercise of this right and enable assemblies to take place peacefully.<sup>32</sup>

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<sup>26</sup>*Cumpăna and Mazare v Romania* App no 33348/96 (ECtHR, 17 Dec 2004) para 115.

<sup>27</sup> *Goodwin v UK* 1996-II; 22 EHRR 123 GC

<sup>28</sup> David Harris, Colin Warbrick, Michael O'Boyle, Edward Bates, Carla Buckley, Paul Harvey, Michelle Lafferty, Peter Cumper, Yutaka Arai, Heather Green, *Law of the European Convention on Human Rights* (first published 2009, Oxford University Press, 2014) p. 466

<sup>29</sup>European Court of Human Rights, 'Right to Peaceful Assembly' <<https://www.loc.gov/law/help/peaceful-assembly/index.php>> accessed 1 December 2016

<sup>30</sup> ECPHR, *supra* note 1, art. 11(1)

<sup>31</sup>European Court of Human Rights, 'Right to Peaceful Assembly' <[https://www.loc.gov/law/help/peaceful-assembly/echr.php#\\_ftn5](https://www.loc.gov/law/help/peaceful-assembly/echr.php#_ftn5)> accessed 1 December 2016

<sup>32</sup> Jim Murdoch, Ralph Roche *The European Convention on human rights and policing* (Council of Europe 2013)

### *VII.2.1.The prosecution was not prescribed by law*

The statute is prescribed by law if it is sufficiently precise and any prosecution under it has a legal basis.

#### VII.2.1.1. ESA is sufficiently precise

The prosecution was not prescribed by law. The statements of facts are not clear: in Section 1.there is a term 'disrupt the democratic process' which is not unequivocal. It is unclear what term precisely means as disrupt is a broad word and a person may not foresee the consequences of the action.

#### VII.2.1.2. There was no legal basis to prosecute Ballaya

Ballaya was convicted for violating Section 3 of the ESA for inciting a public demonstration where participants spread extremist or seditious message or seek to incite hatred, violence or disrupt the democratic process. Ballaya's action does not count as incitement as all she did was quoting a poem. The alleged incitement did not receive a wide reaction as only a minority started violence during the Day of Resistance. Amostra is a place where demonstrations frequently turn into skirmishes without any outer influence.

Freedom of assembly is the individual right or ability of people to come together and collectively express, promote, pursue and defend their ideas.<sup>33</sup> This assembly was meant to be a peaceful, which is legal under the statute. Therefore Ballaya did not violate this right with echoing the demonstration. Ballaya herself encouraged an active but peaceful assembly.

Whether words encouraging violence deserved criminal sanction should be assessed on the basis of the US doctrine of 'clear and present danger'; where the invitation to violence remains in the abstract and removed in time and space from actual or impending scene, the paramount interest of free speech should prevail.<sup>34</sup>

According to our case Ballaya's column echoing calls by other anti-Government Amostrans for an active but peaceful Day of Resistance. She is just echoing the others interests not organising the whole assembly. With this column, Ballaya exerts an influence on the public but only attend to a peaceful demonstration. The organisers should not be liable for the actions of individual participants.<sup>35</sup>

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<sup>33</sup> Jeremy McBride, *Freedom of Association, in The Essentials of Human Rights* (Hodder Arnold 2005) p. 18-20

<sup>34</sup> David Harris, Colin Warbrick, Michael O'Boyle, Edward Bates, Carla Buckley, Paul Harvey, Michelle Lafferty, Peter Cumper, Yutaka Arai, Heather Green, *Law of the European Convention on Human Rights* (first published 2009, Oxford University Press, 2014) p. 453

<sup>35</sup> Macovei, *Freedom of Expression - A guide to the implementation of Article 10 of the European Convention on Human Rights*, Human Rights Handbook No 2, 2nd edn, 2004

### *VII.2.2. The prosecution was not necessary in democratic society*

As stated above, interference is necessary in a democratic society if it corresponds to a pressing social need and is proportionate to the legitimate aim pursued.

#### VII.2.2.1. There was no pressing social need to prosecute Ballaya

As mentioned above it is not legal to limit a peaceful assembly. Ballaya did not intend to encourage imminent violence. Peaceful assemblies and deliverances indorse to the democratic progressions and even to check the Government. As a fundamental right, freedom of peaceful assembly should, insofar as possible, be enjoyed without regulation.<sup>36</sup>

The chilling effect concept has been recognised most frequently and articulated most clearly in decisions mainly concerned with the procedural aspects of the free speech adjudication.<sup>37</sup> The very essence of a chilling effect is an act of deterrence<sup>38</sup>: fear from punishment – go to imprisonment or pay fine.

Ballaya did not commit a crime with including the poem. The ECtHR held that even though some of the passages from the poems seem very aggressive in tone and to call for the use of

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<sup>36</sup> Organization for Security and Co-operation in Europe *Guidelines on Freedom of Peaceful Assembly: Second Edition* (2010) p. 15 2.1

<sup>37</sup> Columbia Law Review Association, Inc., 'The Chilling Effect in Constitutional Law' (1969) <<http://www.jstor.org/stable/1121147>> accessed 1 December 2016

<sup>38</sup> *Freedman v Maryland*, (1965) 380 US 51; *Gibson v Florida* (1963) 372 US 539

violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation. In *Karatas*, the ECtHR found that poetry which was arguably intended to incite violent acts should have been permitted, because it was unlikely to have that effect in practice.<sup>39</sup>

### *VII.2.3. The prosecution was disproportionate in comparison with other State's practice*

Except *Ballaya* there were no sentences about anyone else being prosecuted. Any restrictions imposed on freedom of assembly must be proportional. The least intrusive means of achieving the legitimate objective being pursued by the authorities should always be given preference. The principle of proportionality requires that authorities do not routinely impose restrictions.<sup>40</sup> By using different (or more moderate) tools, it could have been available for the Government to the aim pursued.

Restriction of freedom of speech could be only the last resort, on *ultima ratio* basis; it is the State's duty to deplete other legal instruments (or use non-legal instruments). The State's positive obligation to facilitate and protect peaceful assembly. It is the primary responsibility of the State to put in place adequate mechanisms and procedures to ensure that the freedom is practically enjoyed and not subject to undue bureaucratic regulation. In particular, the State

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<sup>39</sup> *Karatas v Turkey*, App No. 23168/94 (ECtHR, 8 July 1999)

<sup>40</sup> Organization for Security and Co-operation in Europe *Guidelines on Freedom of Peaceful Assembly: Second Edition* (2010) p. 16 2.4

should always seek to facilitate and protect public assemblies at the organisers' preferred location and should also ensure that efforts to disseminate information to publicize forthcoming assemblies are not impeded.<sup>41</sup>

As long as there is no evidence (direct or indirect) for the violent nature, the non-violent nature shall be presumed. Anything not expressly forbidden by law should be presumed to be permissible and those wishing to assemble should not be required to obtain permission to do so. A presumption in favor of this freedom should be clearly and explicitly established in law.<sup>42</sup>

The fines to violating Section 1 are irrelatively high. In Section 2 is written that attending a public demonstration is punishable by a maximum fine of \$10000, while incitement in Section 3 is \$300.000. Even where the criminal penalties consisted in relatively small fines, the Court argued against them as they could play the role of an implicit censorship. In more cases where journalists were fined the Court held: although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticism of that kind again in future. In the context of the political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same

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<sup>41</sup> Organization for Security and Co-operation in Europe *Guidelines on Freedom of Peaceful Assembly: Second Edition* (2010) p. 15 2.2

<sup>42</sup> Organization for Security and Co-operation in Europe *Guidelines on Freedom of Peaceful Assembly: Second Edition* (2010) p. 15 2.1

token, a sanction such as this is liable to hamper the press in performing its tasks as purveyor of information and public watchdog.<sup>43</sup>

In addition, fines and trial expenses may constitute an interference with the right to freedom of expression where their amount raises the question of the financial survival of the person that is ordered to pay it.<sup>44</sup> The Ballaya's sanction to \$300.000 does raise the question of financial survival.

### **VII. 3. Amostra did not have jurisdiction to obtain and enforce the civil order against SeeSey in Amostra and Sarranto**

The term „jurisdiction”, which primarily means the power of a court to hear and decide a case or make a certain order, is also used to refer to the territorial limits within which the jurisdiction of a court may be exercised. In this regard, it is useful to bear in mind that jurisdiction is an aspect of a State's sovereignty and for this reason it is generally confined to the territory of that State.<sup>45</sup>

States generally only have the power to exercise authority over all persons within its territorial boundaries.<sup>46</sup> Therefore, the following shall be underlined: SeeSey, the social media platform, is

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<sup>43</sup> *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986); *Barthold v Federal Republic of Germany* App no 8734/79 (ECtHR, 25 March 1985)

<sup>44</sup> *Open Door and Dublin Well Woman v Ireland*, (14234/88) [1992] ECHR 68 (29 October 1992)

<sup>45</sup> *Internet: case-law of the European Court of Human Rights*, Council of Europe/European Court of Human Rights, 2011, June 2015

<sup>46</sup> *Hirsi Jamaa v Italy* App no. 27765/09 (ECtHR, 23 February 2012) para 71.; *Banković v Belgium* App no. 52207/99 (ECtHR, 19 December 2001) paras 61., 67.; *Soering v UK* App no 14038/88 (ECtHR, 07 July 1989) para

operated and has its headquarters in Sarranto.<sup>47</sup> All of SeeSey's worldwide data is hosted on Sarranto based servers.<sup>48</sup> No activities and actions take place in Amostra from SeeSey that are connected to the publication. Even SeeSALES<sup>49</sup> is an independently operated company with a separate market conduct that acts barely as a commercial representative of SeeSey for its advertising functions that does not have any access to the data stored on SeeSey servers. SeeSey does not have a media operating licence in Amostra because it is contrary to Article 19,<sup>50</sup> and the Ministry of Defence has never asked SeeSey to register for one. The Amostran users of SeeSey only make up a small fraction of its worldwide users.<sup>51</sup>

These make the legal basis for Amostra's jurisdiction to obtain a civil order even weaker between the person, the act and the court, which is against the principle that jurisdiction in legal cases relating to internet content should be restricted to States to which those cases have a real and substantial connection with.<sup>52</sup> However, Sarranto does have this since the author resides in Sarranto, the content was uploaded from there as well and was primarily directed towards the

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86.; *Ilaşcu v Republic of Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) para 312.; *Catan v Republic of Moldova and Russia* App no 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) para 104.

<sup>47</sup> Compromis, para 8.

<sup>48</sup> Compromis, para 8.

<sup>49</sup> Compromis, para 9.

<sup>50</sup> HRC, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, para 39.

<sup>51</sup> Compromis, para 13.

<sup>52</sup> Frank LaRue, Dunja Mijatović, Catalina Botero Marino, Faith Pansy Tlakula 'International Mechanisms for Promoting Freedom of Expression' <<http://www.osce.org/fom/78309?download=true>> 4.a., accessed 1 December 2016; *Ben El Mahi v Denmark* App no 5853/06 (ECtHR, 12 December 2006)

readership of a newspaper which is only accessible in Sarranto.<sup>53</sup> Additionally based on the general provisions and the ‘actor sequitur forum rei’ principle jurisdiction shall not belong to Amostra since the jurisdiction shall be where the defendant resides.

Because of these reasons the Court in Amostra is a ‘forum non conviens’ because there is a more appropriate forum available. Upon the ongoing issue, Amostra neither through its agents,<sup>54</sup> lacks of effective power and control outside its national territory so it does not have extraterritorial jurisdiction either.<sup>55</sup>

Amostra’s jurisdiction claim is based upon Section C of SIA,<sup>56</sup> which grants the power to Amostra courts to obtain and enforce a civil court order in certain cases. This and the following Section open the legal boundaries and enable jurisdiction to Amostra courts. It grants jurisdiction to the courts even if someone outside of Amostra publishes something through the internet worldwide because then that could be addressed to Amostra residents as well. This would allow a nation, with increased political tensions and acclaimed media censorship, to possibly have global jurisdiction over speech on the internet which is unacceptable because it could lead to a monitored and restricted internet with Governmental domination of communication violating the

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<sup>53</sup> Compromis, paras 16., 17.

<sup>54</sup> Cedric Ryngaert, Clarifying the Extraterritorial Application of the European Convention on Human Rights, *Merkourios 2012 Utrecht Journal of International and European Law – Volume 28/Issue 74*, Case Note, p. 57-60., see also *Al-Jedda v United Kingdom*, Application no. 27021/08 (ECtHR, 7 July 2011)

<sup>55</sup> *Banković v Belgium* App no. 52207/99 (ECtHR, 19 December 2001) para 80.; *Al-Skeini v UK* App no 55721/07 (ECtHR, 7 July 2011) paras 131., 136-137.; *Ilașcu v Republic of Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) para 311.

<sup>56</sup> Compromis, para 10.

freedom of expression.<sup>57</sup> A court in general does not have power over every person in the world.<sup>58</sup> Since the Amostran courts are not international courts they should not be making an order that has a reach that extends around the world and orders other States to act according its judgments.<sup>59</sup>

There should be no right for a universal jurisdiction as that should be only granted for exceptional criminal offences.<sup>60</sup> If more countries had similar regulations then the laws would not be clear and legal uncertainty would rise upon finding the proper court. Hence this Section's scope of application is too wide and therefore makes it controversial and unusable. Operating a website on the internet should not, by itself, subject a party to global jurisdiction.<sup>61</sup> Granting the jurisdiction for Amostra solely based under SIA would oppose international principles and would violate Sarranto's or any other potential States' sovereignty.<sup>62</sup>

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<sup>57</sup>Stephen Carter (1984), 'Technology, Democracy and the Manipulation of Consent', *The Yale Law Journal*, 93, p. 581-607., p. 585.

<sup>58</sup> Betsy Rosenblatt, 'Principles of Jurisdiction' <<https://cyber.harvard.edu/property99/domain/Betsy.html>> accessed 1 December 2016

<sup>59</sup>*Equustek Solutions Inc. v Jack* (2014) BCSC 1063

<sup>60</sup>International Justice Resource Center, 'Universal Jurisdiction' <<http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/>> accessed 1 December 2016

<sup>61</sup>Jurisdiction in Cyberspace <<http://corporate.findlaw.com/law-library/jurisdiction-in-cyberspace.html>> accessed 1 December 2016

<sup>62</sup>General Assembly, '2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' <<http://www.un-documents.net/a25r2625.htm>> accessed 1 December 2016

Granting jurisdiction for Amostra would lead to a court order<sup>63</sup> that cannot be enforced and recognised and would violate the freedom of expression. Even if SeeSey took down the material it would still be accessible on the internet through different portals.<sup>64</sup> Secondly, internet publications fall within the scope of freedom of expression<sup>65</sup> and since it is basically prohibited for Governments to restrict a person from receiving information that others wish or may be willing to impart the global takedown around the world would violate other people's right of access to this information.<sup>66</sup> Furthermore, it is also inconsistent with Article 19(3) of ICCPR to prohibit a site from publishing material solely on the basis that it may be critical of the Government.<sup>67</sup> Moreover, all persons have the right to know the truth especially about human rights violations.<sup>68</sup> The order is not precise enough and an order cannot and ought not to be made where it is not clear what is expected of the defendants in order to fully comply with the order.<sup>69</sup> Thus regarding the takedown itself, it must be said that the global takedown, including Amostra as well as in Sarranto is not possible, proportionate or lawful.

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<sup>63</sup> Compromis, para 24.

<sup>64</sup> Dan Jerker B. Svantesson, 'The *Google Spain* case: Part of a harmful trend of jurisdictional overreach' 2015 European University Institute Robert Schuman Centre for Advanced Studies Florence School of Regulation, EUI Working Paper RSCAS 2015/45 p. 5.

<sup>65</sup> Internet: case-law of the European Court of Human Rights, Council of Europe/European Court of Human Rights, 2011, June 2015

<sup>66</sup> *Leander v Sweden* App no 9248/81 (ECtHR, 26 March 1987) para 74.

<sup>67</sup> HRC, 'General Comment 34' (12 September 2011) UN Doc ICCPR/C/GC/34, para 43.

<sup>68</sup> *Gomes Lund v Brazil* (IACtHR, 24 November 2010) para 200.; *Claude-Reyes v Chile*, Merits, Reparations and Costs Judgment (IACtHR, 19 September 2006) and *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004)

<sup>69</sup> *McKeogh v John Doe & Ors* [2012] IEHC 95 [21]

Based upon the Zippo test, which states that the exercise of personal jurisdiction is „directly proportionate to the nature and quality of commercial activity that an entity conducts over the internet”,<sup>70</sup> SeeSey is not an active site since it only presents information and advertises but does not make it possible to users for example to order products or services therefore Amostra shall not establish personal jurisdiction either.

Amostra’s jurisdiction can not stand on the Calder test either which focuses on the intention, aim and harm caused by a Respondant’s actions,<sup>71</sup> as SeeSey wasn’t the one who intentionally wrote, published and posted the article and Ballaya’s article wasn’t expressly aimed at the State of Amostra but to the readership of ‘Times’.

There is no international agreement between two States that would guarantee the jurisdiction for Amostra in this issue and the domestic laws of Amostra are not global thus cannot be applied to a company based in another country which laws differ.

Lastly upon registering to a website, the users accept its Operating Policies, which usually do make litigation clear by saying that the laws of which country will apply to any disputes and where those should be exclusively held.<sup>72</sup> There is no way that SeeSey would choose the laws and the jurisdiction of Amostra.

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<sup>70</sup>*Zippo Mfr. Co. v Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)

<sup>71</sup>*Calder v Jones*, 465 U.S. 783, 790 (1984)

<sup>72</sup><<https://www.facebook.com/legal/terms>> accessed 1 December 2016

## VII. 4. Amostra's civil order against SeeSey did violate SeeSey's right to freedom of expression under Article 19 of UDHR and Article 19 of ICCPR

The right to freedom of expression, pursuant to Article 19 of UDHR and in Article 19 of ICCPR, is the 'foundation stone for every free and democratic society'.<sup>73</sup> States have to carry special obligation to establish the condition and guarantee of prevail the right to freedom of expression.<sup>74</sup> Only certain, necessary and proportionate consequences could constitute restriction<sup>75</sup> such as 'respect of the rights or reputations of others, protection of national security or of public order, or of public health or morals'.<sup>76</sup>

As a legal person and an information source, SeeSey has the right to freedom of expression, moreover, such online platforms have essential<sup>77</sup> function<sup>78</sup> to communicate and enhance the people's access to news and information.<sup>79</sup> Recently the SeeSey's right to freedom of expression

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<sup>73</sup> HRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 2; *Abdelhamid Benhadj v Algeria* UN Doc ICCPR/C/90/D/1173/2003 (HRC, 26 September 2007); *Tae-Hoon Park v Korea* UN Doc 628/1995 (HRC, 20 October 1998)

<sup>74</sup>United Nations, 'International Covenant on Civil and Political Rights' <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>> accessed 1 December 2016

<sup>75</sup>*Kimel v Argentina*, Merits, Reparations and Costs Judgment (IACtHR May 3, 2008) para 54.; *Palamara Iribarne v Chile*, Merits, Reparations and Costs Judgment (IACtHR, November 22, 2005) para 79.; *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 120.; *Tristán-Donoso v Panama* (IACtHR, 27 January 27 2009) para 110; *Ríos et al v Venezuela* (IACtHR, 28 January 2009) para 106; *Perozo et al. v Venezuela* (IACtHR, 28 January 2009) para 117.;

<sup>76</sup>ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Art 19 (2)-(3)

<sup>77</sup>*Marques de Morais v Angola* UN Doc CCPR/C/83/D/1128/2002 (HRC, 29 March 2005); HRC, 'General Comment 34' (12 September 2011) UN Doc ICCPR/C/GC/34 para 13.

<sup>78</sup>*Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 79.

<sup>79</sup>*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 56.; "*The Last Temptation of Christ*" (*Olmedo-Bustos et al.*) v *Chile*, Merits, Reparations and Costs Judgment (IACtHR, 5 February 2001) para 68.

was restricted by the civil order issued by Amostra<sup>80</sup> and the domestic jurisdiction approved.<sup>81</sup> From the perspective of SeeSey, it is highly debateable that the Respondent fulfilled the binding requirements of UDHR and ICCPR and applied necessary and proportionate measures.

The interference with a human right has to be prescribed by law, has to have legitimate aim and has to be necessary in a democratic society according to the applied case law of the ECtHR,<sup>82</sup>IACtHR,<sup>83</sup> ACtHPR<sup>84</sup> and UNHRC<sup>85</sup>.

#### *VII.4.1. The restriction of the right to freedom of expression was not prescribed by law in the meaning of foreseeability*

The restriction of freedom of expression must be prescribed by law.<sup>86</sup> Enacting SIA made possible to establish restriction.<sup>87</sup> Although a norm, in particular SIA and also its manifestation

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<sup>80</sup> Compromis, para 24.

<sup>81</sup> Compromis, para 25.

<sup>82</sup>*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 46.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 119.; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 70.; *Sunday Times v UK (No1)* App no 6538/74 (ECtHR, 26 April 1979) para 45; *Ceylan v Turkey* App no 23556/94 (ECtHR 8 July 1999) para 24.

<sup>83</sup>*Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 120.;

<sup>84</sup>*Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* AHRLR 268 Comm no 294/04 (ACommHPR, 2009) para 80.; *Interights v Mauritania* AHRLR 87 Comm no 242/2001 (ACommHPR, 2004) paras 78-79.

<sup>85</sup>HRC, 'General Comment 34' (12 September 2011) UN Doc ICCPR/C/GC/34 para 22., *Velichkin v Belarus* UN Doc ICCPR/C/85/D/1022/2001 (HRC, 20 October 2005) para 7.3.; *Sohn v Republic of Korea* UN Doc ICCPR/C/54/D/518/1992 (HRC, 19 July 1995) para 10.4.; *Malcolm Ross v Canada* UN Doc ICCPR/C/70/D/736/1997 (HRC, 18 October 2000) para 11.2.

of hands, the civil order, cannot be considered as law unless it regulates the conduct of a resident in a satisfactory way to foresee the consequences which may entail in the event of the norm is breached.<sup>88</sup> The level of foreseeability depends on the content and nature of the law in question.<sup>89</sup> SIA as a defamation penal law<sup>90</sup> constitutes certain conducts, even the sole, objectively undetectable intents with sanctions attached, punishable.<sup>91</sup> Moreover, lays down the principles of media censorship.<sup>92</sup> The conducts are too generally,<sup>93</sup> extensively and punitively determined, rather undetermined<sup>94</sup> to be foreseeable to a person and the sole intention of an action is not acceptable to impose criminal liability under no circumstances considering the essential function of freedom of speech.<sup>95</sup>

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<sup>86</sup>*Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 (ECtHR, 22 October 2007) para 41.; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) para 51.

<sup>87</sup> Compromis, para 10.

<sup>88</sup>*Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 71.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 12.0; *Vgt Verein gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001) para 52.; *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) para 52; *Gawęda v Poland* App no 26229/95 (ECtHR, 14 March 2002) para 39.; *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) para 30.

<sup>89</sup>*Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 72.; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 51.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 121.; *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 (ECtHR, 22 October 2007) para 41.; *CentroEuropa7 S.r.l. and Di Stefano v Italy* App no 38433/09 (ECtHR, 7 June 2012) para 141.

<sup>90</sup>ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

<sup>91</sup> Compromis, para 10.

<sup>92</sup>*Kimel v Argentina*, Merits, Reparations and Costs Judgment (IACtHR May 3, 2008) para 54.; *Palamara Iribarne v Chile*, Merits, Reparations and Costs Judgment (IACtHR, November 22, 2005) para 79.; *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 120.; Compromis, para 11.

<sup>93</sup>*Usón Ramírez v Venezuela*, Preliminary Objections, Merits, Reparations and Costs Judgement (IACtHR November 20, 2009) para 55.

<sup>94</sup> Compromis, para 10.

<sup>95</sup>ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

#### *VII.4.2. The restriction did not pursue a legitimate aim*

The restriction has to pursue a legitimate aim of protecting the rights of others.<sup>96</sup> Article 19 of UDHR and ICCPR challenge Article 12 of UDHR as well as Article 17 of ICCPR, namely SeeSey's right to freedom of expression intervenes with the Respondent's right to protection of reputation. The conflict of two human rights causes the possible legitimate scope of restriction.<sup>97</sup>

#### *VII.4.3. The restriction was not necessary in a democratic society*

The interference with freedom of speech has to be necessary<sup>98</sup> in a democratic society. The interference must correspond to a 'pressing social need',<sup>99</sup> be proportionate<sup>100</sup> to the legitimate aim and be justified by domestic judicial decision with sufficient reasoning.<sup>101</sup> As mentioned

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<sup>96</sup>*Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 77.; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 52.

<sup>97</sup>*Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 130.

<sup>98</sup>*Sunday Times v UK (No1)* App no 6538/74 (ECtHR, 26 April 1979) para 59.

<sup>99</sup>*Observer and Guardian v UK* App no 13585/88 (ECtHR, 26 November 1991) para 71.

<sup>100</sup>*López-Álvarez v Honduras*, Merits, Reparations and Costs Judgment (IACtHR, 1 February 2006) para 164.; *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 109.; *Ricardo Canese v Paraguay*, Merits, Reparations and Costs Judgment (IACtHR 31 August 2004) para 78.; *Ivcher-Bronstein v Peru*, Merits, Reparations and Costs Judgment (IACtHR, 6 February 2001) para 147.; *"The Last Temptation of Christ" (Olmedo-Bustos et al.) v Chile*, Merits, Reparations and Costs Judgment (IACtHR, 5 February 2001) para 65.;

<sup>101</sup>*Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 78.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 131.; *Hertel v Switzerland* App No 25181/9425 (ECtHR, 25 August 1998) para 46.; *Steel and Morris v UK*, App no 68416/01, (ECtHR, 15 February 2005) para 87.; *Mouvementraëliensuisse v Switzerland* App no. 16354/06 (ECtHR, 13 July 2012) para 48.; *Animal Defenders International v the UK* App no 48876/08 (ECtHR, 22 April 2013) para 100.

before the two fundamental rights deserve equal appreciation.<sup>102</sup> Therefore, SeeSey's right to freedom of expression is examined in light of the Prime Minister's right to good reputation. The following analysis is able to establish the important factors and the unfair balance between the two human rights<sup>103</sup> of the present case due to the unnecessary and disproportionate restriction.

Moreover, to establish the justification of the human right restriction the Court has identified the following test for the analysis of the case: the content of the comment, measures taken by the company, liability of the actual authors of the comment and the consequence for the parties.<sup>104</sup>

#### VII.4.3.1. Context of the defamatory comments

As for the context of the comments, the news article published on SeeSey<sup>105</sup> was a matter of public interest,<sup>106</sup> especially the political and religious abuses and threats by the Government.<sup>107</sup> Additionally, it is remarkable from SeeSey's perspective that the editorial freedom of media does

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<sup>102</sup>*Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 82; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) paras 110, 139.

<sup>103</sup>*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 69.

<sup>104</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 142.; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 62.

<sup>105</sup> Compromis, paras 16-17.

<sup>106</sup>*Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 86.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 117.

<sup>107</sup> Compromis, para 18.

not prevail in Amostra, censorship is in force,<sup>108</sup> which questions per se the democratic functioning of the country.<sup>109</sup>

The comments also appeared in matter of public debate on political corruption and human rights violation.<sup>110</sup> The article, to which the comments were attached, had factual information<sup>111</sup> and the user-generated content was based on relevant and sufficient reasons considering the political situation in Amostra.<sup>112</sup> The user generated comments<sup>113</sup> were simply vulgar expression of opinion,<sup>114</sup> did not constitute unlawful speech such as hate speech and incitement to violence.<sup>115</sup> Amostra cannot prohibit unnecessarily the criticism of the Government,<sup>116</sup> there was rather a pressing social need for publicity of this information.<sup>117</sup>

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<sup>108</sup> Compromis, para 11.

<sup>109</sup>ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

<sup>110</sup> Committee's general comment No. 25 (1996) on Article 25 (Participation in public affairs and the right to vote), para 25., Official Records of the General Assembly, Fifty-first Session, Supplement No. 40, vol. I (A/51/40 (Vol. I)), annex V.

<sup>111</sup>*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 72.

<sup>112</sup>*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 71.

<sup>113</sup> Compromis, para 20.

<sup>114</sup>*Swift v ADVFN Plc.* [2008] EWHC 1767 QB [13]-[17]; *Clift v Clarke* [2011] EWHC 1164 (QB) [32] [36]

<sup>115</sup>*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 64.

<sup>116</sup> Compromis, para 21.

<sup>117</sup>HRC, 'General Comment 34' (12 September 2011) UN Doc ICCPR/C/GC/34

Fundamentally, it has to be emphasised that Times is the publisher of the article,<sup>118</sup> and SeeSey is an internet service provider, performing only technical, passive conduct, namely data storage, which is evidenced by the lack of operating licence in Amostra without blocking the whole platform by the Government through many years.<sup>119</sup> It is highly important to ascertain that these kind of portals' duties differ from the traditional press,<sup>120</sup> especially in online third party comments.<sup>121</sup>

#### VII.4.3.2. Measures taken by SeeSey

According to its Operating Policies, SeeSey maintains a notice-and-take-down system<sup>122</sup> which states that SeeSey is willing to remove the defamatory content on condition it was notified.<sup>123</sup> The notice-and-take-down system is the only satisfactory tool as regards to its rapidity and proportionality which shall be applied by an internet service provider.<sup>124</sup> In this case, neither the Government nor the people mentioned took such action that meets with the criteria of

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<sup>118</sup> Compromis, para 17.

<sup>119</sup>Preliminary ruling of joined cases Google France, Google Inc v Louis Vuitton Malletier SA C-236/08 (CJEU, 23 March 2010) Google France v Viaticum SA and Luteciel SARL C-237/08 (CJEU, 23 March 2010) Google France v Centre national de recherche en relations humaines (CNRRH) SARL and Others C-238/08 (CJEU, 23 March 2010) para 109; Compromis, para 13.

<sup>120</sup>ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

<sup>121</sup>*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 62.; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 113.

<sup>122</sup> Compromis, para 14.

<sup>123</sup>*Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 155.

<sup>124</sup>*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 91.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 159.

notification,<sup>125</sup> then the internet service provider shall not have the power to apply take-down measures,<sup>126</sup> and other options like word-based filter<sup>127</sup> or pre-moderation would work against the very essence of freedom of speech.<sup>128</sup>

#### VII.4.3.3. Liability of the actual authors as an alternative to SeeSey's liability

Due to the specific measure of registration and logging in to SeeSey's platform,<sup>129</sup> the identification of the authors as an alternative to SeeSey's liability would be easily executed, then so the Government would have brought a civil claim against actual authors<sup>130</sup> who posted to SeeSey. The anonymity on the internet must be equitable with others' rights.<sup>131</sup>

#### VII.4.3.4. Consequences of the comments for the Parties

From the perspective of the Respondent, with the ongoing political situation in Amostra and the content of the article published by the Times has already created a high level of dissatisfaction

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<sup>125</sup> Compromis, para 24.

<sup>126</sup> *Mosley v UK* App no 48009/08 (ECtHR, 10 May 2011) para 126.

<sup>127</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 87.

<sup>128</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 36.

<sup>129</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 90.; Compromis, para 6.

<sup>130</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 91.; *Von Hannover v Germany (No. 2)* App nos. 40660/08 and 60641/08 (ECtHR, 7 Feb 2012) para 98.

<sup>131</sup> *K.U. v Finland* App no 2872/02 (ECtHR, 2 December 2008) para 49.

among citizens<sup>132</sup> and the comments did not evaluate the attitude additionally and did not create significant impact on the political era.<sup>133</sup> Therefore, the consequences of the comments for Amostra were not as noxious as for SeeSey described as follows.

Due to the fact that SeeSey is an internet service provider and taking into account the operated notice-and-take-down system,<sup>134</sup> SeeSey cannot be held liable<sup>135</sup> for the data stored on its platform because prior to the civil order, it was not aware of the unlawful nature of the content.<sup>136</sup> Before notification, SeeSey did not know or ought to have known reasonably the defamatory content of the comments considering no notification was made<sup>137</sup> the Government acted unlawfully of just with directly issuing the civil order.<sup>138</sup> Strict liability of internet service providers would not be the proper answer to the new trends of the digital world,<sup>139</sup> free electronic media would collapse.<sup>140</sup>

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<sup>132</sup> Compromis, para 20.

<sup>133</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 85.

<sup>134</sup> Compromis, para 14.

<sup>135</sup> *Bunt v Tilley & Others* [2006] EWHC 407 (QB); [2007] 1 WLR 1243; [2006] 3 All ER 336; [2006] EMLR 523 [9] [15];

<sup>136</sup> Preliminary ruling of joined cases *Google France, Google Inc v Louis Vuitton Malletier SA* C-236/08 (CJEU, 23 March 2010) *Google France v Viaticum SA and Luteciel SARL* C-237/08 (CJEU, 23 March 2010) *Google France v Centre national de recherche en relations humaines (CNRRH) SARL and Others* C-238/08 (CJEU, 23 March 2010) para 109.

<sup>137</sup> *Payam Tamiz v Google Inc.* [2013] EWCA Civ 68 [26]

<sup>138</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 83 .

<sup>139</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 40.

<sup>140</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 88.

Civil order contained uncertain and overly restrictive prohibitions and resulted chilling effect on freedom of expression.<sup>141</sup> Firstly, the civil order was not addressed and did not identify the specific defamatory comments,<sup>142</sup> only prescribed to takedown ‘all offensive content replicating or relating to Ballaya’s column.’ Secondly, as the notice-and-take-down system<sup>143</sup> is a sufficient measure to maintain in such event, the requirements for releasing a public apology<sup>144</sup> are not justified.<sup>145</sup> Thirdly, the worldwide takedown<sup>146</sup> is also unacceptable due to that fact there was alternative more proportionate way to forbid the access, namely SeeSey had the power to make comments available in certain countries and block the SeeMore list<sup>147</sup> added to user generated defamatory content.<sup>148</sup> Therefore, the order and the domestic proceedings were not necessary and were not proportionate in a democratic society.

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<sup>141</sup>*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 86.

<sup>142</sup> Compromis, para 24.

<sup>143</sup> Compromis, para 14.

<sup>144</sup> Compromis, para 24.

<sup>145</sup>*Kazakov v Russia* App no 1758/02 (ECtHR, 18 December 2008) paras 24., 30.; *Editorial Board of Pravoye Delo and Shtetel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) para 58.

<sup>146</sup> Compromis, para 24.

<sup>147</sup> Compromis, para 7.

<sup>148</sup>*Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 89.

## **VIII. PRAYER / RELIEF SOUGHT**

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

1. Amostra violated Ballaya's right to freedom of expression by prosecuting her for article under SIA.
2. Amostra violated Ballaya's right to freedom of expression by prosecuting her under ESA.
3. Amostra does not have jurisdiction to obtain and enforce the civil order against SeeSey in Amostra and Sarranto.
4. Amostra violated SeeSey's right to freedom of expression and by applying for a civil order under SIA.

Respectfully submitted 2 December 2016, 304 Counsel for the Applicants

# Memorial for Respondent 2016/2017

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THE 2016–2017 PRICE MEDIA LAW

MOOT COURT COMPETITION

BALLAYA & SEESEY

(APPLICANTS)

V.

THE REPUBLIC OF AMOSTRA

(RESPONDENT)

MEMORIAL FOR RESPONDENT

[4949 words]

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## I. LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACommHPR	African Commission on Human and Peoples' Rights
BCSC	British Columbia Supreme Court
CEO	Chief Executive Officer
CJEU	Court of Justice of the European Union
ECPHR/ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EHRR	European Human Rights Reports
ESA	Election Safety Act of 2016
EU	European Union
EUI	European University Institute
EWCA	England and Wales Court of Appeal
GC	Grand Chamber
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IEHC	High Court of Ireland

OAS	Organization of American States
OHCHR	United Nations Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PACE	Parliamentary of Assembly of the Council of Europe
RSCAS	Robert Schuman Centre for Advanced Studies
SIA	Stability and Integrity Act of 2014
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
US	United States of America

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51. *Sürek v Turkey (No. 3)* App no 24735/94 (ECtHR, 8 July 1999)
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### **III. STATEMENT OF RELEVANT FACTS**

A. Amostra is a small country which has inhabitants from two major religious groups, the Zasa majority and the Yona minority. In the past five years there has been increased social unrest because the Yona sect argued that the Zasa-led Government has systematically subjected them to various forms of political and economic discrimination.

B. This has led to protests and skirmishes between the two sides and the use of violence was not unusual. In 2014, a protest even led to significant destruction of Government property and a series of threats against the lives of the Prime Minister and other leading officers.

C. As a response, Amostra enacted SIA to protect the public order and to have a legal response to the disorder. SIA prohibits extremist or anti-patriotic statements and any person being associated with such actions is a subject to fines and prison sentences.

D. Acknowledging that the situation has not changed and tensions have not softened, the Prime Minister of Amostra announced that a general democratic election will be held. Based on the foregoing, Amostra enacted restrictions on elections-related speech to ESA as an effort to protect public order and to curb the recurring violence. ESA prohibits demonstrations where extremist or seditious messages are spread or people seek to incite hatred, violence and disrupt the democratic process. Additionally, the ones inciting and attending such public demonstrations were also fined.

E. Blenna Ballaya, an Amostran blogger living in Sarranto, who is known for being the first to post the latest political rumors and caricatures, was asked by a newspaper called 'The Ex-Amostra Times' to write a one-time column titled 'An Open Letter to the Oppressors' on the political matters in Amostra.

F. In her column she accuses the legitimately elected Prime Minister and other members of the Zasa sect of corruption and serious human rights violation against people belonging to the Yone sect and calls the election a sham for the Zasa political gain. Such writings made her known to be sympathetic towards a group of the minority but was unpopular with the majority of the Zesas. She echoed the calls of anti-Government Amostrans to an active Day of Resistance just before the elections.

G. Since citizens of Amostra have a free access to the internet the vast majority of Amostra reached the article through the highly popular social media platform called SeeSey, which allows users to share, comment and post content. It does not hold a media operating licence in Amostra although it ranks indeed as the most popular source of news and political discussion among the 18-35 year-olds. SeeSey's subsidiary, SeeSALES is headquartered and operated in Amostra to promote the use of SeeSey amongst Amostran businesses, including the purchase of paid ads. Last year, thanks to its presence in Amostra, SeeSALES earned 5 million USD in revenue for which it paid taxes to the Amostran Bureau of Taxation.

H. On the Day of Resistance, despite the best efforts of the Government, to which Ballaya herself travelled to protest as well, riot and violence broke out as a Zasa religious building

frequented by Zasa political leaders, was set on fire and the law enforcement who tried to prevent the arson were attacked as well while hard-line political messages and a song featured in Ballaya's column were chanted too by the rioters. The rioters were part of the Yona sect, who also happened to post comments in large number under Ballaya's article on SeeSey that stated they were prepared to defend themselves and would carry knives or other available weapons to the protest.

I. Ballaya was arrested and identified as the organiser of the protest for her contribution in connection with her column. Prosecution was brought against Ballaya for violating Sections A and B of SIA and Section 3 of ESA. After her trial, she was found guilty and was sentenced to a three-year imprisonment and was also imposed to pay \$300,000 fine as well. An appeal was granted to her but at the end Supreme Court of Amostra has upheld the previous decision.

J. The Amostran court did not impose a fine on SeeSey only issued a civil order in order to calm down the tensions. Pursuant to the Amostran regulation SeeSey, according to its Operating Policies, maintains a notice-and-take-down system, shall remove from its site all the offensive content in connection with Ballaya's writing and post a form of apology. The Government of Amostra does not have the technical ability to delete certain comments by itself since it can only block the entire service, which the Government has obviously no intention to do, while on the other hand SeeSey can easily carry this out under the obligation of the civil order.

#### **IV. STATEMENT OF JURISDICTION**

Ballaya and SeeSey have challenged these decisions in the Universal Freedom of Expression Court (hereinafter referred to as ‘the Court’) and hereby submit to this Court their dispute concerning Articles 19 of UDHR and Article 19 of 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.

## **V. QUESTIONS PRESENTED**

1. Whether Amostra's prosecution of Ballaya under the SIA violated international principles, including Article 19 of UDHR and ICCPR.
2. Whether Amostra's prosecution of Ballaya under the ESA violated international principles, including Article 19 of UDHR and ICCPR.
3. Whether Amostra had jurisdiction to obtain and enforce a civil order against SeeSey in Amostra and Sarranto.
4. Whether Amostra's civil order against SeeSey violated international principles, including Article 19 of UDHR and ICCPR.

## **VI. SUMMARY OF ARGUMENTS**

### **VI.1. Amostra did not violate Ballaya's right to freedom of expression by prosecuting her under SIA**

Freedom of expression is not an absolute right. Ballaya was prosecuted under SIA because her article was inciting violence and religious hatred. Any interference with the freedom of expression is legitimate if it was prescribed by law, on pursuit of a legitimate aim and necessary in a democratic society as it is stated in UDHR.

The Statute was prescribed by law as it was sufficiently precise and the prosecution under it had a legal basis. The law was sufficiently precise as Ballaya could foresee the results of her action. Ballaya was subject to Section D of SIA therefore the prosecution had a legal basis.

The statute pursued the legitimate aims of protecting public order and protecting the rights and reputations of others as Ballaya's article incited to violence and hatred and was defaming. Freedom of expression does not protect incitement to violence or hatred. In her article Ballaya directly focuses on the members of the Zasa sect, making a case for group defamation. Afterwise, with quoting a Yona unity song, she incited to violence and religious hatred which was an offence under Section A of SIA.

The prosecution was necessary in a democratic society since it corresponds to a pressing social need and it is proportionate to the legitimate aim pursued. There was a pressing need to convict Ballaya since she, as a journalist, violated the duties and responsibilities that come from

practicing freedom of expression, especially in times of tension. Ballaya intentionally created an article that built on the tension between the two religious group. The public reacted to the incitement as they left comments saying they would carry knives with them and later, during a demonstration, set a Zasa religious building on fire.

The three year prison sentence was proportionate as imprisonment for a press offence in the case of incitement is compatible with freedom of expression. The State acted within its margin of appreciation when it imprisoned Ballaya as she was a threat to the democratic order of the whole country.

#### **VI.2. Amostra did not violate Ballaya's right to freedom of expression by prosecuting her under ESA**

Ballaya incited an assembly with peaceful aims to turn into a violent demonstration with religious hatred. Also with her action, she endangered other people's rights to exercise their freedom. Therefore, her conviction did not violate her freedom of expression as the interference was justified.

As stated above any interference with freedom of expression is legitimate if it was prescribed by law in pursuit of a legitimate aim and was necessary in a democratic society as it is stated in UDHR.

The prosecution was prescribed by law as Ballaya could foresee the consequences of her actions as she incited violence on a public demonstration which is an offence under Section 1 of ESA. The wording was clear and the law does not violate freedom of assembly or expression.

The prosecution pursued the legitimate aim of protecting public order and preserving the right of others. Incitement to violence may be legitimately restricted in favour of public order and Ballaya's incitement endangered the right of the people to freedom of assembly.

Interference is necessary in a democratic society if it corresponds to a pressing social need and is proportionate to the legitimate aim pursued. Amostra has a history of social unrest and violent protest making any incitement a threat to public order. The incitement was both imminent and likely to produce violence and religious hatred so there was necessary to convict Ballaya for the violation of Section 3 of ESA.

The State acted within its margin of appreciation with imposing a \$300,000 fine which was not the maximum and was proportionate to the legitimate aim namely the protection of public order.

### **VI.3. Amostra's jurisdiction on SeeSey under SIA was justified**

Jurisdiction means the power of a court to hear and decide on a case or issue a certain order. Besides the territorial principle, a person residing in a State may be sued in another State as well for several reasons even without residing in that particular State. Amostra had legal basis for authority over the hearing of the case through personal jurisdiction.

The conditions for personal jurisdiction have been fulfilled since just minimal contacts with Amostra have been provided for a long arm statute. The exercise of jurisdiction was reasonable since the published material itself was aimed at the citizens of Amostra as well and was about Amostra's public affairs.

SeeSey's service was addressed to the residents of Amostra as they have been using SeeSey and through its transnational effect SeeSey should be seen as a single market unit. A significant connection was established between SeeSey and Amostra through SeeSALES, its taxpaying and that SeeSey's business took place in Amostra as well.

Professional multinational corporations, like SeeSey, must abide the law that they operate in therefore if SeeSey wishes to operate in Amostra, it is subject to the Amostran laws.

The civil court order, which was foreseeable and prescribed by law, was made by an independent, competent judicial body pursuant to the laws of Amostra. It must be said that a global takedown is not disproportionate but necessary to ensure the effectiveness.

#### **VI.4. Amostra's civil order against SeeSey did not violate SeeSey's right to freedom of expression**

Amostra, as freedom of expression is an essential tool of a democratic society, carries active obligation in order to protect public order and rights of others. Recently, the social media

platform, SeeSey's right to freedom of expression was restricted by Amostra to fulfil its active duty.

The restriction of the right to freedom of expression under SIA was prescribed by law in the terms of foreseeability. SeeSey was aware of possibility to be held liable for its conduct under SIA.

To determine the necessity on the restriction of the right to freedom of expression the following factors are examined: the context of the comments, measures taken by SeeSey, the liability of the actual authors of the comments and the consequences of the comments for the parties.

As for the context, the article constituted incitement to hatred and violence, a religious group, the Yona sect was harassed by the article. SeeSey, as the most popular news source shall carry special liability for its content and be aware of its impact on the users.

Measures taken by SeeSey were not satisfactory, because only a notice-and-take-down system was maintained and SeeSey did not remove the infringing comments pursuant to the civil order.

Liability of the actual authors of the comments cannot be established considering their vulnerable position and SeeSey's choice to allow anyone to register.

As for the consequences to SeeSey, due to the civil order the social media platform did not have to change its business model, its conduct did not comply with SIA and the margin of

appreciation applied by the domestic jurisdiction did not exceed the proportionate limit, thus the defamatory comments were just ordered to be taken down, the whole system would not have been blocked by the Government.

## VII. ARGUMENTS

### VII.1. Amostra did not violate Ballaya's rights to freedom of expression by prosecuting her under SIA

The right to freedom of expression, pursuant to Article 19 of UDHR and in Article 19 of ICCPR, is the 'foundation stone for every free and democratic society'.<sup>1</sup> States have to carry special obligation to establish the condition and guarantee of prevail the right to freedom of expression.<sup>2</sup> Only certain necessary and proportionate consequences could constitute restriction<sup>3</sup> such as 'respect of the rights or reputations of others, protection of national security or of public order, or of public health or morals'.<sup>4</sup>

SIA was a justified limitation to freedom of expression as it was for the protection of public order and protection of reputation of others. Ballaya's column is needed to be examined as a whole: it was incitement to violence as it heavily went against the members of the Zasa sect, implying that the responsibility was on the whole sect and not only the leaders. As in the same

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<sup>1</sup> HRC, 'General Comment 34' (12 September 2011) UN Doc ICCPR/C/GC/34 para 2.; *Abdelhamid Benhadj v Algeria* UN Doc ICCPR/C/90/D/1173/2003 (HRC, 26 September 2007); *Tae-Hoon Park v Korea* UN Doc 628/1995 (HRC, 20 October 1998)

<sup>2</sup> HRC, 'General Comment 34' (12 September 2011) UN Doc ICCPR/C/GC/34 para 7.

<sup>3</sup> *Kimel v Argentina*, Merits, Reparations and Costs Judgment (IACtHR May 3, 2008) para 54.; *Palamara Iribarne v Chile*, Merits, Reparations and Costs Judgment (IACtHR, November 22, 2005) para 79.; *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 120.; *Tristán-Donoso v Panama* (IACtHR, 27 January 27 2009) para 110.; *Ríos et al v Venezuela* (IACtHR, 28 January 2009) para 106; *Perozo et al. v Venezuela* (IACtHR, 28 January 2009) para 117.; IACHR. Annual Report 1994. Chapter V (Report on the Compatibility of „Desacato” Law with the American Convention on Human Rights). Title IV. OEA/Ser. L/V/II.88. doc. 9 rev. February 17, 1995.

<sup>4</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 19 (2)-(3)

column, it was paired with part of a unity song, including “we are not afraid to fight, not afraid to die”, Ballaya most certainly had the intention of causing a riot.

The prosecution of Ballaya was consistent with the UDHR and ICCPR and the practice of international courts. Freedom of expression may be limited under specific circumstances.<sup>5</sup> The approach may differ however in courts, but they all share a three part test that the limitation must be previously established by law, pursue a legitimate goal and be necessary in a democratic society.<sup>6</sup>

#### *VII.1.1. The statue was prescribed by law*

The first step in examining whether a limitation is lawful for it has to be prescribed by law. According to the jurisdiction of the country the limitation is only considered lawfully if it is prescribed by law, it is sufficiently precise and any prosecution under it has a legal basis.<sup>7</sup>

##### VII.1.1.1. The SIA was sufficiently precise

In any jurisdiction it is crucial that a person can foresee conviction. Ballaya could foresee her sentence as the wording in the law was sufficiently clear. Case law crystallised that vague or

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<sup>5</sup> *Ríos et al v Venezuela (IACtHR, 28 January 2009)*, para 346.

<sup>6</sup> *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004), para 120.; *Observer and Guardian v UK* App no 13585/88 (ECtHR, 26 November 1991) para 59(a).

<sup>7</sup> HRC, ‘General Comment 34’ (12 September 2011) UN Doc ICCPR/C/GC/34 para 24-27.;

unclear provisions will not suffice.<sup>8</sup> Law must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public.<sup>9</sup> Ballaya could have seen the consequences of acting unlawfully as these terms are understandable.

The clarity of the terms cannot be questioned, as regulation need not be absolutely precise to ‘keep pace with changing circumstances’.<sup>10</sup> The SIA was passed during a time of social unrest and right after a violent protest,<sup>11</sup> where the legislation was found to be the most effective to protect the citizens from the variety of extremist and anti-patriotic statements.<sup>12</sup> So that the regulation must be sufficient to prevent any threat to the democratic order without risking an unlawful restriction. Therefore, a vague expression like “calling for illegal action” must be accepted in order to provide the widest protection.

#### VII.1.1.2. Ballaya’s prosecution had a legal basis

Ballaya was subject to Section D of the statute as she addressed her statement to Amostra residents. The recipients cannot be in question as she echoed calls to a Day of Resistance being held in Amostra and encouraged people of Amostra to attend and play an active role.

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<sup>8</sup> Sunday Times v UK (No1) App no 6538/74 (ECtHR, 26 April 1979) para 47.

<sup>9</sup> HRC, ‘General Comment 34’ (12 September 2011) UN Doc ICCPR/C/GC/34 para 25.

<sup>10</sup> Sunday Times v UK (No1) App no 6538/74 (ECtHR, 26 April 1979) para 49.

<sup>11</sup>Compromis, para 1.

<sup>12</sup> Compromis, para 10.

The regulations must be accompanied by adequate safeguards to ensure against interpretive abuse or disproportionate application, like the opportunity to challenge and remedy any unjustified restrictions.<sup>13</sup> Ballaya had the opportunity to challenge the verdict in front of the Supreme Court.<sup>14</sup>

It is understood that the law does not give a maximum sentence for a criminal offence<sup>15</sup> but it does not account to its predictability as case law has cleared that “consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances.”<sup>16</sup> There is a variety of ways to violate SIA from defamation to promoting sedition which cannot be punished the same way.

### *VII.1.2. The prosecution pursued a legitimate aim*

Prosecution was justified as it was in protection of public order and for the protection of the rights and reputations of others. These are accepted grounds for limitation as they are mentioned

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<sup>13</sup> UNHRC, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (16 May 2011) UN Doc A/HRC/17/27 para 24.; *Mukong v Cameroon* UN Doc 458/1991 (HRC, 21 July 1994)

<sup>14</sup> *Compromis*, para 25.

<sup>15</sup> *Compromis*, para 10.

<sup>16</sup> *Sunday Times v UK (No1)* App no 6538/74 (ECtHR, 26 April 1979) para 49.

by UDHR<sup>17</sup>, ICCPR<sup>18</sup> and the international courts, such as the ECHR<sup>19</sup>, ACHR<sup>20</sup> follow them too.

The protection of public order was a legitimate aim because of incitement to violence as Ballaya encouraged to fight on a peaceful assembly. According to the ECHR, incitement to violence falls outside the protection conferred by Article 19 where an intentional and direct wording incites to violence and where there is a real possibility that the violence may occur.<sup>21</sup> In order to understand the circumstances the Court must look at „the impugned interference in the light of the case as a whole, including the content and the context.”<sup>22</sup>

Section A of SIA also protects against defamation. It is without doubt that in her article, Ballaya emphasised on the accused being members of the Zasa sect. This would only be acceptable if she precisely named the public officials as they knowingly lay themselves open to the scrutiny of the press and public.<sup>23</sup> Considering her article as a whole her action counts as group defamation. Additionally, she built on the existing conflict and incited hatred against a religious group,

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<sup>17</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III) Article 29(2)

<sup>18</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 19(3)

<sup>19</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) Article 10(2)

<sup>20</sup> American Convention on Human Rights Article 13(2)

<sup>21</sup> Macovei, Freedom of Expression - A guide to the implementation of Article 10 of the European Convention on Human Rights, Human Rights Handbook No 2, 2nd edn, 2004

<sup>22</sup> *Yarar v Turkey* App no 57258/00 (ECtHR, 19 December 2006) para 41.; *Sürek v Turkey (No. 1)* App no 26682/95 (ECtHR, 8 July 1999) para 58.; *Handyside v UK* App no 5393/72 (ECtHR, 7 December 1976) para 48.

<sup>23</sup> *Dichand and Others v Austria* App no 29271/95 (ECtHR, 26 February 2002) para 39.

namely the Zasa, with the closing line “not afraid to fight” which is incitement to hatred and violence, also an offence under Section 1 of SIA.

### *VII.1.3. The prosecution was necessary in a democratic society*

An interference is necessary in a democratic society if it corresponds to a pressing social need and is proportionate to the legitimate aim pursued.<sup>24</sup>

#### VII.1.3.1. There was a pressing social need to convict Ballaya

There was a pressing social need to convict Ballaya as in her article she incited violence and hatred on a religious basis. Ballaya did not work in accordance with the duties and responsibilities of a journalist. The ECtHR stated that for protection a journalist needs to act “in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”<sup>25</sup> Duties and responsibilities of media professionals assume special significance in situations of conflict and tension.<sup>26</sup>

It must be highlighted that there have been several violent protests causing a loss in life in Amostra lately. Quoting the part of the Yona unity song „had a special significance in the

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<sup>24</sup> *Observer and Guardian v UK* App no 13585/88 (ECtHR, 26 November 1991) para 71.

<sup>25</sup> *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999) para 54.; *Bergens Tidende and Others v Norway* App no 26131/95 (EHtCR, 2 May 2000) para 53.

<sup>26</sup> *Sener v Turkey* App no 26680/95 (ECtHR, 18 July 2000) para 42.

circumstances of the case, as the Applicant must have realised”<sup>27</sup> the effect it would have on people. The action has to be regarded as likely to exacerbate an already explosive situation in that region.<sup>28</sup> Ballaya wrote her article with „actual malice”, which means that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false.<sup>29</sup> Ballaya, who is known to be sympathetic to the Yona sect,<sup>30</sup> referred to the people she accused as members of the Zasa sect and called the election a sham for Zasa political gain,<sup>31</sup> implying that the whole religious community is responsible. This was very dangerous and irresponsible in the context in which it was made. Together with the echoing and the “fighting words” she created an article that built on the tension between the two religious groups. Afterwise, she used the lines „We trust that our faith will carry us home, We are not afraid to fight, we are not afraid to die”.<sup>32</sup> Quoting these two lines turn Ballaya’s political article into incitement to violence and religious hatred. The first line indicates that the conflict is about religion and the second line incites violence. The public reacted to the incitement as in comments they stated they would carry knives with them.<sup>33</sup> Later, they set a Zasa religious building on fire, which could have been a result of Ballaya’s incitement against the Zesas.<sup>34</sup>

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<sup>27</sup> *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997) para 59.

<sup>28</sup> *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997) para 60.

<sup>29</sup> *New York Times v Sullivan*, 376 U.S. 254 (1964)

<sup>30</sup> *Compromis*, para 15.

<sup>31</sup> *Compromis*, 18.

<sup>32</sup> *Compromis*, 21.

<sup>33</sup> *Compromis*, 20.

<sup>34</sup> *Compromis*, 21.

### VII.1.3.2. The interference was proportionate to the legitimate aim pursued

The Court held that “the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression [...] in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.”<sup>35</sup> Ballaya’s imprisonment was justified as she incited to violence and hatred.

Where “remarks incite to violence [sic!] against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.”<sup>36</sup> States which suffer from intense social unrest can justify imprisonment for inciting to hatred and violence, like in the case of Israel and Palestine. Ballaya was a serious threat to the democratic order so her imprisonment was a proportionate reaction to her crime.

The conviction was also proportionate to the standards of criminal code practices, for instance in the US Criminal Code the maximum sentence is five years.<sup>37</sup>

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<sup>35</sup> *Cumpăna and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004) para 115.

<sup>36</sup> *Sürek v Turkey (No. 1)* App no 26682/95 (ECtHR, 8 July 1999) para 62.

<sup>37</sup> US. Code para 2101.

## VII.2. Amostra did not violate Ballaya's right to freedom of expression under ESA

Freedom of expression is a right in itself as well as a component of other rights protected under the ECHR, such as freedom of assembly.<sup>38</sup> Freedom of expression forms “a basis for the full enjoyment of a wide range of other human rights. For instance, freedom of expression is integral to the enjoyment of the rights to freedom of assembly”<sup>39</sup> to which everyone has a right.<sup>40</sup> With her article, Ballaya incited an assembly with peaceful aims to turn into a violent demonstration with religious hatred so endangered other people's rights to exercise their freedom. As a result, the restriction on Ballaya's right to freedom of expression is justified under Article 29(2) UDHR.

### *VII.2.1. The statute was prescribed by law*

As stated, a statute is prescribed by law if it is sufficiently precise and any prosecution under it has a legal basis.<sup>41</sup>

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<sup>38</sup> Macovei, Freedom of Expression - A guide to the implementation of Article 10 of the European Convention on Human Rights, Human Rights Handbook No 2, 2nd edn, 2004

<sup>39</sup> HRC, 'General Comment 34' (12 September 2011) UN Doc ICCPR/C/GC/34 para 4.

<sup>40</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 19(2)

<sup>41</sup> HRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 paras 24. and 27.

#### VII.2.1.1. The ESA was sufficiently precise

Lawfulness requires that the statute should be accessible and formulated with sufficient precision to enable those to whom it applies to foresee to a reasonable degree the consequences of their actions.<sup>42</sup> Section 1 precisely lists the different offences on a political demonstration and then clears the actions which make a person subject to it, with the expectable punishment.

ESA does not violate freedom of assembly since the aim of the statute is to ensure the peacefulness of political demonstrations by punishing actions which may turn an assembly into a non-peaceful one.

#### VII.2.1.2. Ballaya's prosecution had a legal basis

Any interference with the exercise of freedom of expression must have a basis in the national law.<sup>43</sup> Ballaya could be convicted under ESA as she incited a political demonstration barred by Section 1, namely the Day of Resistance.

Even though Ballaya was marked as an organiser of the column,<sup>44</sup> her status is not of legal matter, as she was convicted under Section 3 for inciting such demonstration.<sup>45</sup>

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<sup>42</sup> HRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 para 25.

<sup>43</sup> Macovei, Freedom of Expression - A guide to the implementation of Article 10 of the European Convention on Human Rights, Human Rights Handbook No 2, 2nd edn, 2004

### *VII.2.2. The prosecution pursued a legitimate aim*

The prosecution pursued a legitimate aim of protecting public order and preserving the right of others. It is generally recognised that incitement to violence is an unacceptable form of speech and may be legitimately restricted on public order grounds.<sup>46</sup>

The article, as mentioned, consists of three crucial parts: accusation, echoing a demonstration and quoting a song which includes the words “not afraid to fight, not afraid to die”. The article needs to be seen as a whole, as that is the journalist’s aim. With her incitement, Ballaya endangered the rights of others to practice their freedom of assembly.

The Court held that “any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles [...] do a disservice to democracy and often even endanger it.”<sup>47</sup> This implies the court should find a legitimate aim in a democracy to interfere with a person’s freedom of expression when it comes to incitement to violence and racial hatred in protection of public order.

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<sup>44</sup> Compromis, para 22.

<sup>45</sup> Compromis, 23.

<sup>46</sup> Human Rights Watch Volume 15, No. 3 (B) p. 12 <https://www.hrw.org/sites/default/files/reports/venez0503.pdf> accessed 1 December 2016

<sup>47</sup> *Sergey Kuznetsov v Russia* App no 10877/04 (ECtHR, 23 October 2008) para 45.

### *VII.2.3. The prosecution was necessary in a democratic society*

Interference is necessary in a democratic society if it corresponds to a pressing social need and is proportionate to the legitimate aim pursued.

#### VII.2.3.1. There was a pressing social need to convict Ballaya

Public demonstrations in Amostra have a history of occasional skirmishes<sup>48</sup> due to the unstable political history and the differences between the two religious groups. The environment is always of great importance. The Courts have emphasised the “necessity of studying the historical background of the impugned laws to find out the circumstances leading to their enactment, the prevailing conditions, the mischief that was intended to be addressed.”<sup>49</sup>

There have been several protests and a protestor was killed during a clash.<sup>50</sup> In this environment, there was a pressing social need to interfere with a person’s freedom of expression in order to prevent further violence or deaths. In Amostra strict regulation had to be enacted to prevent any disruption in a heated time that could harm the rights of others and lead to physical violence. In *Karataş v Turkey*, the ECtHR took note of the sensitivity of the security situation and the “need

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<sup>48</sup> *Compromis*, para 1.

<sup>49</sup> *Republic v Tommy Thompson Books Ltd and others* [1997-98] 1 GLR 515.7 Id, 524.

<sup>50</sup> *Compromis*, para 1.

for the authorities to be alert to acts capable of fuelling additional violence.”<sup>51</sup> The circumstances in Amostra played a crucial role in Ballaya’s conviction.

In *Sürek* (No. 3) the ECtHR held that “the content of the article must be seen as capable of inciting to further violence in the region. Indeed the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor.”<sup>52</sup> In her article Ballaya advocated the use of force by including the Yona lines. The SCOTUS held that the State could prohibit advocacy of the use of force only “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

The expression undoubtedly was intended to incite imminent violence as Ballaya named the event as echoing calls to the Day of Resistance. The likelihood to incite can be measured in two factors. Firstly, she was targeting a social group, the Yonas, quoting their well-known song. Secondly, the response can be seen in the comment section, where some people wrote they would carry knives with them.

The Respondent holds that the Court should find that there was a pressing need to convict Ballaya, because these two factors prove for dangerous speech. Ballaya, considering she was a prominent figure with exert an influence on the public violated the law with publishing her article.

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<sup>51</sup> *Karatas v Turkey* App no 23168/94 (ECtHR, 8 July 1999) para 44.

<sup>52</sup> *Sürek v Turkey* (No. 3) App no 24735/94 (ECtHR, 8 July 1999) para 40.

### VII.2.3.2 The interference was proportionate to the legitimate aim pursued

Criminal convictions, such as fines, are accepted means for an interference with freedom of expression.<sup>53</sup> “The Contracting States have a margin of appreciation in assessing” whether a need exists to punish actions<sup>54</sup> as “State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the „necessity” of a „restriction” or „penalty” intended to meet them.”<sup>55</sup>

The fine imposed was modest, as it was not the maximum. The maximum fine may seem high but the legislation’s aim was to prevent incitement from happening, which cannot be achieved with symbolic fines.

### **VII.3. Amostra had jurisdiction to obtain and enforce the civil order against SeeSey in Amostra and Sarranto**

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<sup>53</sup> *Barfod v Denmark* App no 11508/85 (ECtHR, 22 February 1989) para 34.

<sup>54</sup> *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) para 39; *Janowski v Poland* App no 25716/94 (ECtHR, 21 January 1999) para 30; *Tammer v Estonia* App no 41205/98 (ECtHR, 6 February 2001) para 60.

<sup>55</sup> *Handyside v UK* App no 5393/72 (ECtHR, 7 December 1976) para 48.

The term „jurisdiction” means the power of a court to hear and decide a case or make a certain order.<sup>56</sup> States generally have the power to exercise authority over persons only within their boundaries.<sup>57</sup> This approach alone is not suitable for disputes in connection with the internet because of its cross-border network nature since sites could be operated simultaneously from more locations at the same time.

The question of jurisdiction is answered by the domestic courts applying the private international law norms.<sup>58</sup> Section C of SIA can be interpreted to settle the issue so therefore it can be said that by Amostran laws Amostra does have a jurisdiction.

SeeSey’s social media platform is available and widely used by the residents of Amostra as they have particularly embraced it by ranking among the most popular sources for news.<sup>59</sup> It is the best news source as publicly stated by the CEO of SeeSey.<sup>60</sup> This and the possibility of the „SeeMore” option<sup>61</sup> therefore suggest that SeeSey’s service is addressed to the residents of Amostra as well. It is unquestionable that SeeSey’s global presence has transnational effects and impact upon different countries including Amostra as well therefore it would be unfair to not let

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<sup>56</sup> Internet: case-law of the European Court of Human Rights, Council of Europe/European Court of Human Rights, 2011, June 2015

<sup>57</sup> *Hirsi Jamaa v Italy* App no. 27765/09 (ECtHR, 23 February 2012) para 71; *Banković v Belgium* App no. 52207/99 (ECtHR, 19 December 2001) paras 61 and 67; *Soering v UK* App no 14038/88 (ECtHR, 07 July 1989) para 86; *Ilaşcu v Republic of Moldova and Russia* App no 48787/99 (ECtHR, 8 July 2004) para 312.; *Catan v Republic of Moldova and Russia* App no 43370/04, 8252/05 and 18454/06 (ECtHR, 19 October 2012) para 104.

<sup>58</sup> Council of Europe/European Court of Human Rights, 2011, June 2015 (update); Internet: case-law of the European Court of Human Rights p. 4.

<sup>59</sup> Compromis, para 13.

<sup>60</sup> Compromis, para 14.

<sup>61</sup> Compromis, para 6.

Amostra have jurisdiction on any basis as the article itself addressed matters in Amostra and had its greatest effects there.

A person resident in a State may be sued in another State. A plaintiff may bring his case at his choosing before the court of the place of performance of the agreed service and the court of the place of the event causing liability or the one in whose district the damage was suffered.<sup>62</sup> Besides the done damages in Amostra, SeeSey was used and does business there, moreover, its service took place in Amostra too.

Personal jurisdiction can be established under the Calder test.<sup>63</sup> Under this test, a Respondent must (1) commit an intentional act that is (2) expressly aimed at the forum state that (3) causes harm that the Respondent knows is likely to be suffered in the forum state.<sup>64</sup> It can be said that SeeSey operating its website was an intentional act.<sup>65</sup> The article's title<sup>66</sup> suggests that the content of the article was expressively aimed at Amostra and it should have been known, because of the country instability, that damages will be suffered in Amostra.

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<sup>62</sup> Code of Civil Procedure (2007) (France)

<sup>63</sup> *Calder v Jones*, 465 U.S. 783, 790 (1984)

<sup>64</sup> Yasmin R. Tavakoli and David R. Yohannan, 'Personal Jurisdiction in Cyberspace: Where Does It Begin, and Where Does It End?' (Intellectual Property & Technology Law Journal, January 2011)  
<[http://www.kelleydrye.com/publications/articles/1431/\\_res/id%3DFiles/index%3D0/Personal%2520Jurisdiction%2520in%2520Cyberspace\\_IP%2526Tech%2520Law%2520Journal\\_January2011.pdf](http://www.kelleydrye.com/publications/articles/1431/_res/id%3DFiles/index%3D0/Personal%2520Jurisdiction%2520in%2520Cyberspace_IP%2526Tech%2520Law%2520Journal_January2011.pdf)> accessed 1 December 2016

<sup>65</sup> *Brayton Purcell, LLP v Recordon & Recordon*, 606 F.3d at 1129, citing *Rio Props. Inc. v Rio Int'l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002)

<sup>66</sup> Compromis, para 18.

It is justified that those seeking to profit from global activity should be more responsible for the global effects of their actions. Thus professional multi-national corporations must abide the respective laws of the jurisdictions they operate in.<sup>67</sup>

Technological development cannot overwhelm law.<sup>68</sup> Neither the sued company's registered residence, nor the company's corporate structure should be the ones determining whether a State has jurisdiction because this approach facilitates the company's position on escaping jurisdiction.<sup>69</sup> The concept of the company shall be interpreted as a single economic unit, even if in a legal perspective, this unit consists of several different persons. If such an economic entity infringes the rules then it shall be held responsible for it.<sup>70</sup> Courts can always assert jurisdiction over an entity or things physically present in the State.<sup>71</sup> Furthermore through the function of SeeSALES,<sup>72</sup> SeeSey not only targets its economic activity at Amostra but maintains a place of business there, since it is headquartered there, it has a significant type of activity that connects it to Amostra besides paying its taxes there too.<sup>73</sup> As a result, Amostra does have jurisdiction of

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<sup>67</sup> O'Reilly C., 'Finding jurisdiction to regulate Google and the Internet' (European Journal of Law and Technology, Vol. 2, No. 1, 2011) <<http://ejlt.org/article/view/57/92>> accessed 1 Dec 2016

<sup>68</sup> Monroe E. Price, 'The Newnewss of New Technology' *Cardozo Law Review*, 22, pp.1885-1913., p. 1888.

<sup>69</sup> Dan Jerker B. Svantesson, 'The *Google Spain* case: Part of a harmful trend of jurisdictional overreach' 2015 European University Institute Robert Schuman Centre for Advanced Studies Florence School of Regulation, EUI Working Paper RSCAS 2015/45, p. 5.

<sup>70</sup> *Alliance One International Inc. and Standard Commercial Tobacco Co. Inc. v European Commission and European Commission v Alliance One International Inc. and Others*, C-628/10, (19 July 2012) para 42.

<sup>71</sup> *Burnham v Superior Court*, 495 U.S. 604, 619, 110 S. Ct. 2105, 2115 (1990).

<sup>72</sup> Compromis, para 36.

<sup>73</sup> *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González*, C-131/12, (CJEU, 13 May 2014) para 56.

SeeSey itself too according to commercial law principles because of its transnational activities and since its subsidiary company.

Companies can be a subject to the law of a foreign country even without a physical presence.<sup>74</sup> State courts also assert personal jurisdiction over entities located outside of the State using „long-arm statutes.”<sup>75</sup> SeeSey directed its activities towards Amostra, the claim is related to Amostra and the exercise of Amostra’s jurisdiction is sufficiently substantial, reasonable and just minimal contacts have been provided for a long arm statute, like Section C of SIA, which allows the State to exercise personal jurisdiction over an out-of-state respondent.<sup>76</sup>

Although SeeSey did not register at the Ministry of Defence<sup>77</sup> its implicit conduct means that by providing its service it has accepted the laws of Amostra and even if SeeSey’s headquarters are abroad any company with servers located outside of a country can still be subject to its law if it provides services to its users.<sup>78</sup> What is not legal offline should not be legal online either therefore if SeeSey wishes to operate in Amostra, it is subject to the Amostran laws,<sup>79</sup> regardless of where the parent companies are incorporated. SeeSey does indeed implement the facts of

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<sup>74</sup> Dennis Holmes, 'Debating the Where in Online Jurisdiction' (2013) The Privacy Advisor | Westin Research Center <<https://iapp.org/news/a/debating-the-where-of-online-jurisdiction/>> accessed 1 December 2016

<sup>75</sup> <http://corporate.findlaw.com/law-library/jurisdiction-in-cyberspace.html#2> accessed 1 December 2016

<sup>76</sup> *International Shoe Co. v Washington*, 326 U.S. 310 (1945); Internet and Technology of Law: A U.S. Perspective, First edition, 2015, Konnie G. Kustron p. 17.

<sup>77</sup> Compromis, para 13.

<sup>78</sup> Marco Civil da Internet, Law no 12.965 (2014) (Brazil) Art. 11.

<sup>79</sup> Giancarlo Frosio, 'A Brazilian Judge Orders Facebook off Air if It Fails to Remove a Defamatory Discussion' (The Center for Internet and Society, 7 October 2013) <<http://cyberlaw.stanford.edu/blog/2013/10/brazilian-judge-orders-facebook-air-if-it-fails-remove-defamatory-discussion>> accessed 1 December 2016

SIA<sup>80</sup> therefore it should be held liable. Due process was guaranteed for SeeSey before and civil court order, which was foreseeable and prescribed by law, was made by an independent, competent judicial body pursuant to the laws.<sup>81</sup>

The States' foremost obligation is to guarantee the rights of its citizens. By not recognising Amostra's jurisdiction, its citizens are denied from remedy against unlawful actions. By abusive jurisdictional clauses, it becomes nearly impossible for regular citizens to litigate against another country's law in another country whilst on the other hand SeeSey, as a professional company, is exceedingly more likely to do so. Additionally, if Amostra courts were only able to examine publication-related cases if the place of publication fell within the courts' jurisdiction that would encourage publishers to publish in countries in which prosecution was unlikely.<sup>82</sup>

SeeSey's case is interrelated to Ballaya's criminal case, where Amostra's jurisdiction is unquestionable, therefore not granting jurisdiction for Amostra could lead to conflicting and controversial judgments. Upon this connection, the courts Amostra can adjudge the dispute most efficiently.

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<sup>80</sup> Compromis, para 10.

<sup>81</sup> UNGA, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (10 August 2011) UN Doc A/66/290 paras 38. and 82.

<sup>82</sup> *Perrin v UK* App no 5446/03 (ECtHR, 18 October 2005)

The Government cannot solve the situation by itself therefore enforcing the order only in Amostra would not lead to a sufficient result, thus a global takedown is necessary to ensure the civil court order's effectiveness.<sup>83</sup>

Granting jurisdiction to Amostra would not be without a precedent as there is general trend of national courts gaining jurisdiction over internet and technology companies.<sup>84</sup>

#### **VII.4. Amostra's civil order against SeeSey did not violate SeeSey's right to freedom of expression under Article 19 of UDHR and Article 19 of ICCPR**

As a Member State of UDHR and ICCPR Amostra carries an active obligation to protect public order and others' rights even if it interferes with freedom of expression.<sup>85</sup> Recently, SeeSey's right to freedom of expression was restricted by a civil order issued by Amostra<sup>86</sup> and the domestic jurisdiction approved.<sup>87</sup> From the perspective of Amostra, the Respondent fulfilled the binding requirements of UDHR and ICCPR and applied necessary and proportionate measures.

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<sup>83</sup> *Equustek Solutions Inc. v Jack* (2014) BCSC 1063

<sup>84</sup> Dan Jerker B. Svantesson, 'The *Google Spain* case: Part of a harmful trend of jurisdictional overreach' 2015 European University Institute Robert Schuman Centre for Advanced Studies Florence School of Regulation, EUI Working Paper RSCAS 2015/45, p. 3.; *Yahoo! Inc v La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006)

<sup>85</sup> UDHR (adopted 10 December 1948) UNGA Res 217A (III) art 19 (3); HRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 para 21.

<sup>86</sup> Compromis, para 24.

<sup>87</sup> Compromis, para 25.

The interference of a human right has to be prescribed by law, has to have a legitimate aim and has to be necessary in a democratic society according to the applied case-law of the ECtHR,<sup>88</sup> IACtHR<sup>89</sup>, ACtHPR<sup>90</sup> and UNHRC.<sup>91</sup>

#### *VII.4.1. The statute was prescribed by law*

The restriction of freedom of expression must be prescribed by law.<sup>92</sup> Enacting SIA made it possible to establish restriction.<sup>93</sup> Although a norm, in particular SIA and also its manifestation of hands, the civil order, cannot be considered as law unless it regulates the conduct of a resident in a satisfactory way to foresee the consequences which may entail in the event of the norm is

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<sup>88</sup> *Magyar Tartalomsgátlatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 46.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 119.; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 70.; *Sunday Times v UK (No1)* App no 6538/74 (ECtHR, 26 April 1979) para 45.; *Ceylan v Turkey* App no 23556/94 (ECtHR 8 July 1999) para 24.

<sup>89</sup> *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 120.; *Ricardo Canese v Paraguay*, Merits, Reparations and Costs Judgment (IACtHR 31 August 2004) para 72.a.

<sup>90</sup> *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* AHRLR 268 Comm no 294/04 (ACommHPR, 2009) para 80.; *Interights v Mauritania* AHRLR 87 Comm no 242/2001 (ACommHPR, 2004) paras 78–79.

<sup>91</sup> HRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 para 22., *Velichkin v Belarus* UN Doc ICCPR/C/85/D/1022/2001 (HRC, 20 October 2005) para 7.3.; *Sohn v Republic of Korea* UN Doc ICCPR/C/54/D/518/1992 (HRC, 19 July 1995) para 10.4.; *Malcolm Ross v Canada* UN Doc ICCPR/C/70/D/736/1997 (HRC, 18 October 2000) para 11.2.

<sup>92</sup> *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 (ECtHR, 22 October 2007) para 41.; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) para 51.

<sup>93</sup> Compromis, para 10.

breached.<sup>94</sup> The level of foreseeability depends on the content and nature of the law in question.<sup>95</sup> SIA, as a defamation penal law<sup>96</sup> determined the certain conducts punishable and attached sanctions clearly.<sup>97</sup> SIA made it foreseeable to such internet portal and legal person run on an economic basis<sup>98</sup> like SeeSey that it could be held liable for the content posted on its website with defamatory meaning and even the sanctions were clear under Sections 1-4 of SIA.<sup>99</sup>

Additionally, it is not the Court's duty fulfil the domestic courts' place and apply domestic law like SIA, the Court's role is only to ascertain whether the interpretation of the right is compatible of ICCPR and UDHR.<sup>100</sup>

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<sup>94</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 71.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 120.; *Vgt Verein gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001) para 52; *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000) para 52.; *Gawęda v Poland* App no 26229/95 (ECtHR, 14 March 2002) para 39.; *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) para 30.

<sup>95</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 72.; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) paras 49. and 51.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 121.; *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 (ECtHR, 22 October 2007) para 41.; *CentroEuropa 7 S.r.l. and Di Stefano v Italy* App no 38433/09 (ECtHR, 7 June 2012) para 141.

<sup>96</sup> HRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 para 47.

<sup>97</sup> *Compromis*, para 10.

<sup>98</sup> *Donald and Others v France* App no. 36769/08 (ECtHR, 10 January 2013) para 34.

<sup>99</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 128.

<sup>100</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 49.; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 74.; *Pérez de Rada Cavanilles v Spain* (116/1997/900/1112 (ECtHR, 28 October 1998) para 43.; *CentroEuropa7 S.r.l. and Di Stefano v Italy* App no 38433/09 (ECtHR, 7 June 2012) para 140.; *Kruslin v France* App No 11801/85 (ECtHR, 24 April 1990) para 29.; *Kopp v Switzerland* App no 23224/9425 (ECtHR March 1998) para 59.; *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999) para 35.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 127.

#### *VII.4.2. The prosecution pursued a legitimate aim*

The restriction has to pursue a legitimate aim of protecting the rights of others.<sup>101</sup> Article 19 of UDHR and ICCPR challenge Article 12 of UDHR as well as Article 17 of ICCPR, namely SeeSey's right to freedom of expression intervenes with the Respondent's right to protection of reputation. The conflict of two human rights causes the possible legitimate scope of restriction.<sup>102</sup>

#### *VII.4.3. The prosecution was necessary in a democratic society*

The interference with freedom of speech has to be necessary<sup>103</sup> in a democratic society. The interference must correspond to a 'pressing social need',<sup>104</sup> be proportionate<sup>105</sup> to the legitimate aim and be justified by domestic judicial decision with sufficient reasoning.<sup>106</sup> As mentioned

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<sup>101</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 77.; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 52.

<sup>102</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 77.; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 52.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 130.

<sup>103</sup> *Sunday Times v UK (No1)* App no 6538/74 (ECtHR, 26 April 1979) para 59.

<sup>104</sup> *Observer and Guardian v UK* App no 13585/88 (ECtHR, 26 November 1991) para 71.

<sup>105</sup> *López-Álvarez v Honduras*, Merits, Reparations and Costs Judgment (IACtHR, 1 February 2006) para 164.; *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) para 109.; *Ricardo Canese v Paraguay*, Merits, Reparations and Costs Judgment (IACtHR 31 August 2004) para 78.; *Ivcher-Bronstein v Peru*, Merits, Reparations and Costs Judgment (IACtHR, 6 February 2001) para 147.; *"The Last Temptation of Christ" (Olmedo-Bustos et al.) v Chile*, Merits, Reparations and Costs Judgment (IACtHR, 5 February 2001) para 65.;

<sup>106</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 78.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 131.; *Hertel v Switzerland* App No 25181/9425 (ECtHR, 25 August 1998) para 46.; *Steel and Morris v UK*, App no 68416/01, (ECtHR, 15 February 2005) para 87.; *Mouvementraëliensuisse v*

before the two fundamental rights deserve equal appreciation.<sup>107</sup> Therefore, SeeSey's right to freedom of expression is examined in the light of the Prime Minister's right to good reputation and in favour of public order. It also has to be reiterated that though the press fulfils essential function in a democratic society,<sup>108</sup> must not overstep certain boundaries.<sup>109</sup> The following analysis are able to establish the important factors and the fair balance between the two human rights<sup>110</sup> of the present case due to the necessary and proportionate restriction.<sup>111</sup>

Moreover, to establish the justification of the human right restriction the Court has identified the following test for the analysis of the case: the content of the comment, measures taken by the company, liability of the actual authors of the comment and the consequence for the parties.<sup>112</sup>

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*Switzerland* App no. 16354/06 (ECtHR, 13 July 2012) para 48.; *Animal Defenders International v the UK* App no 48876/08 (ECtHR, 22 April 2013) para 100.

<sup>107</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 82.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) paras 110. and 139.

<sup>108</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 132.; *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) para 31.; *De Haes and Gijssels v Belgium* App no 19983/92 (ECtHR, 24 February 1997) para 37.; *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECtHR, 20 May 1999) para 58.

<sup>109</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 132.; *Prager and Oberschlick v Austria* App no 15974/90 (ECtHR, 26 April 1995) para 68.; *Bladet Tromsø and Stensaas v Norway* App no 21980/93 (ECtHR, 20 May 1999) para 59.

<sup>110</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 69.

<sup>111</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 82.; *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) para 87.; *Von Hannover v Germany (No. 2)* App nos. 40660/08 and 60641/08 (ECtHR, 7 Feb 2012) para 106.; *Timciuc v Romania* App no 28999/03 (ECtHR, 12 October 2010) para 144.; *Mosley v UK* App no 48009/08 (ECtHR, 10 May 2011) para 111.

<sup>112</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 142.; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 62.

#### VII.4.3.1. Context of the comments posed to SeeSey

Ballaya's article which the comments were attached to<sup>113</sup> had covered a topic with certain degree of public interest.<sup>114</sup> The article as it is mentioned before constituted incitement to hatred and violence. In Amostra, a religious group, namely Yona sect,<sup>115</sup> executed public unrest and harrassment against Zasa sect, the Government and the Prime Minister.<sup>116</sup> SeeSey should have realised that it might cause negative attitude and there was also a higher than average risk of the content of the comments going beyond the boundaries of the fair criticism and reaching the level of costless insult, even some amount hate speech.<sup>117</sup>

According to its CEO, SeeSey is also the most popular social media platform in Amostra,<sup>118</sup> covering the widest range of consumers run on a commercial basis,<sup>119</sup> thus had economic interest on posting comments attracting consumers.<sup>120</sup>

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<sup>113</sup> Compromis, para 20.

<sup>114</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 86.

<sup>115</sup> Compromis, para 15.

<sup>116</sup> Compromis, paras 1. and 21.

<sup>117</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 86.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 117.; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) paras 64. and 74.

<sup>118</sup> Compromis, para 12.

<sup>119</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 115.

<sup>120</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 144.; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) paras 64. and 73.

It is highly important to ascertain that these kind of portals' duties differ from the traditional press,<sup>121</sup> especially in online third party comments<sup>122</sup> and such audiovisual media as SeeSey has more powerful effect on consumers than print media.<sup>123</sup> SeeSey is an active media platform, with not just data storing but controlling over data<sup>124</sup> and serving third parties. Although it is true that the primary publisher of the article was Times, but it does not provide platform for readers content,<sup>125</sup> only SeeSey thus it is a publisher as well. This statement is further supported that SeeSey defines the limits of the permitted contents and be able to remove or block defamatory speech covering journalistic activity.<sup>126</sup>

#### VII.4.3.2. Measures taken by SeeSey

According to its Operating Policies, SeeSey maintains a notice-and-take-down system<sup>127</sup> of which SeeSey is willing to remove the defamatory content on the condition that it was notified.<sup>128</sup> The notice-and-take-down system is the only satisfactory tool as regards its rapidity

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<sup>121</sup> HRC, 'General Comment 34' (12 September 2011) UN Doc ICCPR/C/GC/34 paras 15. and 39.

<sup>122</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 62.; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 113.

<sup>123</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 134.; *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) para 31.

<sup>124</sup> *L'Oreal SA v eBay* C-324/09 (CJEU, 12 July 2011) paras 110. and 116.

<sup>125</sup> Compromis, para 17.

<sup>126</sup> *Payam Tamiz v Google Inc* [2013] EWCA Civ 68 [24]; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 112.

<sup>127</sup> Compromis, para 14.

<sup>128</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 155.

and proportionality which shall be applied by an internet service provider.<sup>129</sup> In this case, where threats to the physical integrity of others were made,<sup>130</sup> the right and interest of others imposed SeeSey's liability and without notification the defamatory content would have been deleted with no delay.<sup>131</sup> Furthermore, after the civil order regarded as notification SeeSey did not take down the infringing material this conduct contributed to SeeSey's liability.<sup>132</sup>

#### VII.4.3.3. Liability of the actual authors as an alternative to SeeSey's liability

The Government could not have taken any claim against the actual authors of the comments because no special measure was taken by SeeSey considering the registration to the social media platform due to the fact that anyone was able to create a profile and comment,<sup>133</sup> not even age limit was applied and it was SeeSey's choice to allow such registration.<sup>134</sup> It would be difficult to identify the identity of the authors and would also be disproportionate to put the onus of identification of the users on the injured person. It is also notable that the State, namely Amostra has to exercise positive obligation of defending the right to protection of reputation under ICCPR and UDHR.<sup>135</sup>

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<sup>129</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 91.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 159.

<sup>130</sup> Compromis, para 20.

<sup>131</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 159.

<sup>132</sup> *Byrne v Deane* [1937] 1 KB 818

<sup>133</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 91.

<sup>134</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 91.; Compromis, para 6.

<sup>135</sup> *Von Hannover v Germany (No. 2)* App nos. 40660/08 and 60641/08 (ECtHR, 7 Feb 2012) para 42.; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 91.

The importance of anonymity on internet is an outstanding value<sup>136</sup> and it has to be balanced between the right to freedom of expression and the right to respect of private life.<sup>137</sup> SeeSee as a publisher has to take responsibility considering the vulnerability of users<sup>138</sup> and the high number of the authors. Furthermore no editing tools, but SeeSee had to power to remove the comments,<sup>139</sup> and thus SeeSee exercised sufficient control to manage content, and be held liable for it.<sup>140</sup>

It is not disproportionate to interfere with SeeSee's right to freedom of expression with suing SeeSee for redress in such defamation proceedings, as it is in a better financial situation than the defamers, shielding the users.<sup>141</sup>

#### VII.4.3.4. Consequences of the comments for the Parties

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<sup>136</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 92.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 147.; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt. v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 79. *Jersild v Denmark* App no 15890/89 (ECtHR, 23 September 1994) para 35; *Thoma v Luxembourg* App no 38432/97 (ECtHR, 29 March 2001) para 62; *Verlagsgruppe News GmbH v Austria* App no. 76918/01 (ECtHR, 14 December 2006) para 31.; *Print Zeitungsverlag GmbH v Austria* App no. 26547/07 (ECtHR, 10 October 2013) para 39.; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 135.

<sup>137</sup> *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) para 87.

<sup>138</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 147.

<sup>139</sup> *Compromis*, para 7.

<sup>140</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 89.

<sup>141</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 151.; *KroneVerlags GmbH & Co. KG v Austria (no. 4)* App no 72331/01 (ECtHR, 9 November 2006) para 32.;

As SeeSey is the single source of the article in Amostra, the platform reached a wide range of residents<sup>142</sup> with unlawful speech knowingly SeeSey was the most frequently used internet platform in Amostra.<sup>143</sup> It follows from the special nature of the internet, information was made public will remain public and circulate all over<sup>144</sup> implying more harm than before, thus worldwide deletion is in need for protection of others' rights.<sup>145</sup> As a long term consequence SeeSey did not have to change its business model, it remained popular and run on commercial basis.<sup>146</sup>

The conduct of SeeSey did not comply with SIA,<sup>147</sup> therefore the restricting order was inevitable, corresponded to a pressing social need,<sup>148</sup> the examination of such 'need' left to the domestic courts a certain margin of appreciation. Therefore it cannot be stated that the consequences namely the take down and a public apology exceeded the margin of appreciation of the domestic jurisdiction.<sup>149</sup>

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<sup>142</sup> Compromis, para 19.

<sup>143</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 89.

<sup>144</sup> *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) para 92.

<sup>145</sup> *Aleksey Ovchinnikov v Russia* App. no 24061/04, (ECtHR, 16 December 2012) para 50.

<sup>146</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 161.

<sup>147</sup> Compromis, paras 10. and 24.

<sup>148</sup> *Gündüz v Turkey* App no 35071/97 (ECtHR, 4 December 2003) para 38.; *Sunday Times v UK (No1)* App no 6538/74 (ECtHR, 26 April 1979) para 62.

<sup>149</sup> *Nilsen and Johnsen v Norway* App no 23118/93 (ECtHR, 25 November 1999) para 43.; *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 139.

From the perspective of Amostra, the Government has only technical ability to block the entire system of SeeSey,<sup>150</sup> which not just disproportionate measure of the comments but would violate other non-author users' right to freedom of expression, thus SeeSey was the only one who can make the infringing comments disappear.<sup>151</sup>

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<sup>150</sup> Compromis, para 5.

<sup>151</sup> *Delfi AS v Estonia* App no 40287/98 (ECtHR, 16 June 2015) para 145.

## **VIII. PRAYER / RELIEF SOUGHT**

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

1. Amostra did not violate Ballaya's right to freedom of expression by prosecuting her for article under SIA.

2. Amostra did not violate Ballaya's right to freedom of expression by prosecuting her under ESA.

3. Amostra does have jurisdiction to obtain and enforce the civil order against SeeSey in Amostra and Sarranto.

4. Amostra did not violate SeeSey's right to freedom of expression and by applying for a civil order under SIA.

Respectfully submitted 2 December 2016, 304 Counsel for the Respondent