



Ad perpetuam rei memoriam II.

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

Editors:
Gergely Gosztonyi
Anna Zanathy

2019

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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 law¹.

ELTE Law School joined the competition in 2015 at the South-East European Regional Round². 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, 2019.

The Editors

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

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

Memorial for Applicants 2017/2018

REBEKA, ERDŐSI - GERGELY, GOSZTONYI - ANDREA, KOVÁCS -
ANDRÁS, MOZSOLITS - FLÓRA, SZALAI - ATTILA, TATÁR

**THE 2017-2018 MONROE E. PRICE
INTERNATIONAL MEDIA LAW MOOT COURT COMPETITION**

Niam Peaps & Scoops

(Applicants)

v.

Federal Republic of Turtonia

(Respondent)

MEMORIAL FOR APPLICANTS

Word Count for Argument Section: 4,944

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II. LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
ArCHR	Arab Charter on Human Rights
CJEU	Court of Justice of the European Union
Compromis	The 2017/2018 Price Media Law Moot Court Competition Case
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EECD	European Electronic Commerce Directive
EU	European Union
FoE	Freedom of Expression
Honourable Court	Universal Court of Human Rights
IA	The Information Act of 2006 of the Federal Republic of Turtonia
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
NTDS	Notice-and-Takedown System
ODPA	The Online Dignity Protection Act of 2015 of the Federal Republic of Turtonia

OSCE	Organisation for Security and Co-operation in Europe
Para(s)	Paragraph(s)
Court	The Court of Federal Republic of Turtonia
ToS	Terms of Service
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee

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IV. STATEMENT OF RELEVANT FACTS

Socio-Political Background

Federal Republic of Turtonia is a small country with a democratically elected government and an ethnically homogeneous population.¹ Turtonia is a member of the United Nations and has ratified the International Covenant on Civil and Political Rights (ICCPR).² Turtonia has a civilian system and sets up a modern judiciary.³ The law adjudicated in court is primarily codal in nature.⁴ Appeals from trial courts are made directly to the Supreme Court which has discretion whether or not to hear appeal.⁵

In the past three years, Turtonia has seen a significant influx of immigrants from neighboring country Aquaria.⁶ Aquaria is also a democratic country, and the majority of its citizens share the same ethnicity and religion as the Turtonians.⁷ Aquarian immigrants has caused a furor among Turtonians, who claim that the immigrants have disrupted the economy and diluted the culture.⁸ Beginning in late 2015, a nationalist group, the Turton Power began demonstrating against the Turtonian Minister of Immigration, Wani Kola and calling for her resignation for

¹ Compromis, para 1.1

² Compromis, para 1.1

³ Compromis, para 2.2

⁴ Compromis, para 2.2

⁵ Compromis, para 2.2

⁶ Compromis, para 2.1

⁷ Compromis, para 2.1

⁸ Compromis, para 4.1

allowing Aquarians to enter the country.⁹ Kola is known for being a champion of immigration who believes in the success of the integration of Aquarians.¹⁰

Since 2015, a religious extremist group called True Religion has gained popularity in Aquaria.¹¹ True Religion is widely regarded as a terrorist organization in Turtonia, Aquaria and many other countries.¹² The radicals have attacked mainstream religious institutions and schools.¹³ The leader of the group, named Prinsov Parkta has been in hiding for some time to avoid arrest.¹⁴

Media platforms in Turtonia

Scoops, a Turtonian based social media platform, is the most popular in its category.¹⁵ Through the application, users build a profile that consists of a screen name, topics of interest and friends.¹⁶ Users can upload photos and videos and tag the posts with up to two topics of interest.¹⁷ When users hit “send”, the content will appear on the devices of friends of the poster and up to 20 other users, who have listed matching a topic of interest.¹⁸ These other 20 users are selected by an algorithm.¹⁹ The viewers of the post can dismiss the content or

⁹ Compromis, para 4.1

¹⁰ Compromis, para 4.1

¹¹ Compromis, para 3.1

¹² Compromis, para 3.2

¹³ Compromis, para 3.1

¹⁴ Compromis, para 3.2

¹⁵ Compromis, para 5.1

¹⁶ Compromis, para 5.1

¹⁷ Compromis, para 5.1

¹⁸ Compromis, para 5.1

¹⁹ Compromis, para 5.1

forward to their own friends and to another 20 people.²⁰ Every user has a publicly visible “influencer score”, that shows how many people have seen content from him or her.²¹

XYZ News is a well-respected, reliable and objective TV news network in Turtonia and neighbouring countries.²² XYZ maintains an account on Scoops.²³

TurtonTimes is a major print and online newspaper in Turtonia, which affiliated to the political party that opposes Kola’s party.²⁴

Niam Peaps’ post

Niam Peaps is a Turton Power member who, on May 1, created a Scoops account with the screen name “XYZ News12”.²⁵ Peaps has no connection with XYZ News.²⁶

At noon on May 2, Peaps posted an image that appeared to show Kola standing naked with the leader of True Religion. The photo appears to have been taken from outside the hotel room window. Peaps selected “XYZ News” as the Topic of Interest for the post and gave a caption to the post.

²⁰ Compromis, para 5.2

²¹ Compromis, para 5.3

²² Compromis, para 6.1

²³ Compromis, para 6.2

²⁴ Compromis, para 9.3

²⁵ Compromis, para 7.1

²⁶ Compromis, para 7.1

Aftermath

At 5:00pm on May 2, XYZ News' corporate department of public affairs released a statement and declared that XYZ News had no role in the post.²⁷ At the same time, Kola's office released a statement calling the post "a horrific lie with no basis in fact".²⁸

At 7:00pm on May 2, Kola' staff reported the post of Scoops through Scoops' online reporting form as a violation of Scoops Terms of Service.²⁹ Kola's staff selected the option of "a nude image of me shared without my consent" as the reason to request removal, however Kola's staff failed to complete the form.³⁰

On May 3, at 11:00am, Kola's legal counsel submitted a letter to Scoops, threatening a civil action for defamation and violation of privacy.³¹ Scoops removed the post and all shares of the post at 1:00pm on May 5.³²

On May 3, TurtonTimes ran a factual article about the post and also an opinion piece mentioning that the post coincided with growing dissatisfaction with Kola and that it was time for her to resign.³³ Further, the opinion piece cited that True Religion might begin to take root in Turtonia.³⁴

On May 4 and May 5, protesters gathered outside Kola's office calling for her resignation which was by far the largest, numbering more than 100. Many held signs criticizing Kola,

²⁷ Compromis, para 9.1

²⁸ Compromis, para 9.1

²⁹ Compromis, para 9.2

³⁰ Compromis, para 9.2

³¹ Compromis, para 9.2

³² Compromis, para 9.2

³³ Compromis, para 9.3

³⁴ Compromis, para 9.3

also some of them had slogans related to the post of Peaps. Kola resigned from office on May 10 without public statement.

Legal basis

In 2015, the Online Dignity Protection Act of 2015 was passed in response to a growing problem of Non Consensual Sharing of Intimate Images after two separate suicides of Turtonian teenage girls in February 2013 and March 2014.³⁵ Knowingly distributing a non-consensual shared image of another person shall be punishable by a term of imprisonment or a fine.³⁶

The Information Act of 2006 was passed in order to preserve the integrity of the democratic process and safeguard the peace.³⁷ A violation of IA shall punishable by fine, imprisonment or both.³⁸

Prosecutions

Peaps was identified through a Turtonian criminal search warrant, then prosecuted and convicted of the following offences in Turtonia. Distributing an image of Kola in violation of the ODPa, Peaps was sentenced to a two-year imprisonment. Inciting violence, or being reckless as to whether violence was incited, through false information in violation of Section 1(b) of the IA, Peaps was sentenced to a fine equivalent of 100,000 USD.³⁹

³⁵ Compromis, para 10.1

³⁶ Compromis, para 10.2

³⁷ Compromis, para 11.1

³⁸ Compromis, para 11.2

³⁹ Compromis, para 12.1

Scoops was prosecuted and convicted of the following offenses in Turtonia. Distributing an image of Kola in violation of the ODPa, Scoops was sentenced to a fine equivalent to 200,000 USD. Knowingly communicating false information in violation of Section 1(a) of the IA, Scoops was sentenced to a fine equivalent of 100,000 USD.⁴⁰

⁴⁰ Compromis, para 13.1

V. STATEMENT OF JURISDICTION

Niam Peaps and Scoops (Applicants) have applied to the Universal Freedom of Expression Court, the special Chamber of the Universal Court of Human Rights hearing issues relating to the right of freedom of expression under Article 19 of the UDHR and Article 19 of the ICCPR.

Both Niam Peaps' sentence and Scoops' fine were declined to be considered by Turtonia's Supreme Court, exhausting their domestic appeals. This Honourable Court has jurisdiction as the final arbiter over all regional courts where parties have exhausted all domestic remedies.

Niam Peaps and Scoops (Applicants) request this Honourable Court to issue a judgement in accordance with relevant international law, including the UDHR, the ICCPR, conventions, jurisprudence developed by relevant courts, and principles of international law.

VI. QUESTIONS PRESENTED

The questions presented, as clarified by this Honourable Court, are as follows:

1. Whether Turtonia's prosecution of Peaps under the ODPa violates international principles including Article 19 of UDHR and Article 19 of ICCPR?
2. Whether Turtonia's prosecution of Scoops under the ODPa violates international principles including Article 19 of UDHR and Article 19 of ICCPR?
3. Whether Turtonia's prosecution of Peaps under the IA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?
4. Whether Turtonia's prosecution of Scoops under the IA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?

VII. SUMMARY OF ARGUMENTS

A. Freedom of expression is the cornerstone of progression, therefore the conflict with other fundamental rights is indispensable. If Turtonia would like to enact a restriction on free speech, law must be prescribed. However, prosecution of Niam Peaps under the ODPa was not prescribed by law since the Act failed to define the terms and did not have adequate safeguards.

The prosecution had a legitimate aim, but since it did not have a pressing social need, it was unlawful. First of all, the image is a part of public interest, since Wani Kola is a well-known person. Secondly, Wani Kola known as pioneer of immigrant politics, therefore doubts had been raised regarding her duties.

In addition, prosecution of Peaps was not proportionate. The Court sentenced Peaps to a two-year imprisonment under the ODPa, however imprisonment for defamation is never an appropriate penalty.

B. Internet freedom is an indispensable tool to shield the right to freedom of expression, however more governments than ever before targeting social media. Turtonia's prosecution of Scoops was not prescribed by law since ODPa made impossible for Scoops to foresee the consequences arising from it.

The prosecution was unjustified since there was no pressing social need to fine Scoops. First, Scoops is a passive intermediary as it does not have a substantial degree of control over its user content. Second, Scoops has taken all the necessary measures to prevent the unlawful content on its platform. Third, Scoops was not in the position to distribute the image by disregarding a substantial risk as the company was not notified properly.

Additionally, the fine of USD 200,000 was disproportionate since the liability of the actual author served as a sensible alternative to the liability of Scoops and such a huge fine on Scoops could easily lead to a more severe censorship, thus the judgment would have a chilling effect on freedom of expression.

- C. The Turtonian government enacted the IA in order to safeguard the States' democracy and peace. However, the prosecution of Peaps' under the IA is not consistent with the international principles. First of all, the IA is not prescribed by law since the text of IA is overly vague and fails to adequately warn the citizens.

Secondly, the seriousness of the post's topic had the legitimate aim to be shared with the public, even if it is part of Kola's private life.

Thirdly, Peaps' prosecution was unnecessary in a democratic society, because it did not correspond with pressing social need. Plus, the amount of fine is disproportionate and easily can freeze the free speech of society.

- D. Turtonia's prosecution of Scoops under the IA was not prescribed by law since its provisions were lacking the sufficient precision to enable Scoops to regulate its conduct which eventually lead to arbitrary interpretation.

The prosecution was unjustified since there was no pressing social need to fine Scoops. First, Scoops played a merely passive role. Second, technology experts of intermediaries cannot judge the unlawfulness of a post. Third, Scoops was not notified properly, thus it could not act in order to remove the disputed post.

Lastly, the fine was disproportionate. The sum of USD 100,000 was disproportionate, because other states impose less severe fines on intermediaries, thus this judgment could be a huge blow to the free and open internet.

VIII. ARGUMENT

1. TURTONIA'S PROSECUTION OF PEAPS UNDER THE ODPA VIOLATES HIS RIGHT TO FREEDOM OF EXPRESSION

Freedom of Expression⁴¹ constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress⁴² and for each individual's self-fulfilment.⁴³

The presented case focuses on how or whether the right of expressing views freely should be restricted in the name of a public figure's right to privacy.

1. Niam Peaps' prosecution was not prescribed by law

The ECtHR stated in *The Sunday Times v the United Kingdom (No 1)*⁴⁴ that there are two requirements which are needed to find a restriction justifiable. "Firstly, the law must be adequately accessible and [...] also, a norm cannot be regarded as a "law" unless it is

⁴¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 19; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19; European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 1932 (ECHR) art 10; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) (ACHR) art 13; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (ACHPR) art 9; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) (ArCHR) Art 32

⁴² *Handyside v the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) [49]; *The Sunday Times v the United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) [65]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1956) [41] *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [78]

⁴³ *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 and 36448/02 (ECtHR, 22 October 2007) [45]; *Frankowicz v Poland* App no 53025/99 (ECtHR, 4 May 2009) [38]; *Herrera Ulloa v Costa Rica* IACtHR (2004) Serious C No 107 [113],[126]; *Law Offices of Ghazi Suleiman v Sudan* App no 228/99 (AfComHPR, 2003) [48]; *Kenneth Good v Republic of Botswana* App no 313/05 (ACmHPR, 2010) [197]; Case C-368/95 *Familiapress v Heinrich Bauer Verlag* ECLI:EU:C:1997:325 [26]

⁴⁴ *The Sunday Times v the United Kingdom (No 1)* App no 6538/74 (ECtHR, 26 April 1979) [49]

formulated with sufficient precision to enable the citizen to regulate his conduct”. Otherwise it can cause judicial arbitrary and judges may interpret regulations broadly.

In case of the ODPA, Applicants submit that it was not a precisely formulated act, because of the following reasons.

a) The ODPA is not sufficiently precise

While the ODPA in Section 2. attempts to delineate the definitions of “distribute” and “image” through a non-exhaustive list, Applicants submit that it fails to define the terms.

The “other reproduction” grants the Court a certain discretion to decide whether something is an image or not, it must therefore also provide procedural protection against arbitrary use of that discretion. In this present case, the Court has extensive discretion regarding which illustrations they qualify as images.

b) The ODPA does not have adequate safeguards

Besides a sufficiently precise drafting, this criterion also requires legal basis and adequate safeguards. Applicants submit that prosecution of Peaps under the ODPA did not have adequate safeguards. The judiciary system of Turtonia has only one level, as appeals from trial courts are made directly to the three-judge Supreme Court which has discretion whether or not to hear an appeal. The Supreme Court declined to consider Peaps’ appeal, thereby leaving Peaps without any kind of legal domestic remedy which is an essential safeguard in every democratic country.

ODPA⁴⁵ established exemption from liability for disclosures made in the public interest including the reporting of unlawful conduct. Kola's alleged romance with the leader of a terrorist group undisputedly falls within the scope of the Act, thus there was no legal basis to prosecute Peaps.

2. Peaps' prosecution has legitimate aim

Applicants acknowledge the growing problem of non-consensual sharing of intimate images. However, information is the oxygen of democracy.⁴⁶ In addition, the importance of public interest has been emphasized under international law.⁴⁷ Public interest includes situations where the benefits of disclosure outweigh the harm.⁴⁸ Accordingly, the image⁴⁹ showing Kola with her secret lover who is the leader of a terrorist group is undisputedly a matter of public interest. Since privacy laws shall not inhibit the dissemination of information of public interest,⁵⁰ prosecution of Peaps does not pursue a legitimate aim.

⁴⁵ Compromis, para 10.2 Section 3 (b)

⁴⁶ Article 19, 'The Public's Right to Know, Principles on Freedom of Expression' 1 <<https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>>

⁴⁷ European Council of Europe, Recommendation CM/Rec(2014)7 of 30 April 2014 on the protection of whistleblowers' 5; African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa, principles IV (2), XII (2); Inter-American Commission on Human Rights, Inter-American Declaration of Principles on Freedom of Expression, Principle 10

⁴⁸Article 19, 'The Public's Right to Know, Principles on Freedom of Expression' 1 <<https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>> accessed: 22 November 2017

⁴⁹ Compromis, para 8.2

⁵⁰ African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa, Principles 4 (2), 12 (2); Inter-American Commission on Human Rights, Inter-American Declaration of Principles on Freedom of Expression, Principle 10

3. Peaps' prosecution was not necessary

To decide whether a restriction is necessary in a democratic society, the existence of a “pressing social need” must exist for which it is not enough if the restriction is “useful”, “reasonable” or “desirable”.⁵¹ Here the balancing between the right to FoE and the right to respect for private life shall be done, for which the ECtHR laid down the following five criteria:⁵²

Contribution to the public debate of general interest

The ECtHR has previously agreed with the Finnish Courts that information concerning a minister's private life may contribute to the public debate if it contains elements of general public interest.⁵³ In this present case, Kola's alleged affair with the leader of a foreign terrorist group is a matter of public interest, as she is the Minister of Immigration.⁵⁴ The circumstances of the publication constitute a legitimate public interest, as there has been an ongoing debate on Kola's immigration policy.⁵⁵ Moreover, the allegation of giving out visas in exchange for sex by a politician presupposes the violation of a law. The allegation of such violation may constitute a matter of legitimate public interest.⁵⁶

How well-known the person is and the subject of the report

⁵¹ IACtHR 'Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Article 13, 29 of the American Convention on Human Rights) (13 November 1985); Advisory Opinion OC-5/85, Series A No 5 [46]

⁵² *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [89]

⁵³ *Ruusunen v Finland* App no 7359/10 (ECtHR, 14 January 2014) [49]

⁵⁴ *Compromis*, para 4.1

⁵⁵ *Björk Eidsdóttir v Iceland* App no 46443/09 (ECtHR, 10 July 2012) [67]

⁵⁶ *Tonsbergs Blad AS and Haukom v Norway* App no 510/04 (ECtHR, 1 March 2007) [87]

Kola is a politician and this way the certain aspects of her private life may be of public interest especially if these are related to her function as a public person.⁵⁷ The limit of public interest is whether the sole purpose of the article is to satisfy the curiosity of a particular readership.⁵⁸

In the case of *Oberschlick v Austria*⁵⁹ it was declared that the limits of acceptable criticism are accordingly wider regarding a politician acting in his public capacity than in relation to a private individual. The former inevitably and knowingly lays him open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.

The scope for restrictions under Article 10 of the Convention on “political speech or on debate on questions of public interest” and that “the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician” stated by the ECtHR in case of *Sürek v Turkey*.⁶⁰

The ECtHR also stated in *Von Hannover v Germany*⁶¹ that a state has to assess certain aims in case of restricting the right to FoE. It must be determined how well-known the person is, since public figures and everyday people have different expectation of privacy. Regarding balancing free speech and privacy, public interest of disclosures is determinative. Public interest includes debating on political matters and public officials as well as everyday

⁵⁷ *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [91]

⁵⁸ *Von Hannover v Germany* (No 1) App no 59320/00 (ECtHR, 24 June 2004) [65]

⁵⁹ *Oberschlick v Austria* App no 11662/85 (ECtHR, 23 May 1991) [59]

⁶⁰ *Sürek v Turkey* (No 1) App no 26682/95 (ECtHR, 8 July 1999) [62]

⁶¹ *Von Hannover v Germany* (No 1) App no 59320/00 (ECtHR, 24 June 2004) [77];

Von Hannover v Germany (No 2) App no 60641/08 (ECtHR, 7 February 2012) [110]

activities of public figures. Therefore if Kola has intimate relationship with the leader of a terrorist group, it does not matter if it is part of her private life due to the fact it affects her duties as well as has impact on the public.

Prior conduct of the person concerned

Kola is known for being a champion of immigrants who believes that they can contribute to the Turtonian society, therefore doubts has been raised regarding her duties.⁶²

Method of obtaining the information and its veracity

To raise the question whether false information had been disseminated, it should be examined whether the post was a value judgement or a statement of facts. Only the latter can be subject to criminal procedure and verified whether it was true.⁶³ This image shall qualify as a 'statement of facts' as it is used as evidence to increase the credibility of the post.⁶⁴ As it was only a reproduction of said image,⁶⁵ the effect of standard proof cannot be required.⁶⁶

Content, form and consequences of the publication

The ECtHR declared in *Cantoni v France* that in case of statutory definitions there will often be grey areas at the interpretation of definitions and it is the task of the courts to interpret

⁶² Compromis, para 4.1

⁶³ *Tristán Donoso v Panamá* IACtHR (2009) Series C No 193 [124]

⁶⁴ *Fontevécchia and D'Amico v Argentina* IACtHR (2011) Series C No 238 [68]

⁶⁵ Compromis, para 12.3 2

⁶⁶ *Herrera Ulloa v Costa Rica* IACtHR (2004) Series C No 107 [132]

them.⁶⁷ In case of false information, the unlawful nature can only be determined after the unsuccessful verification of the fact contained.

There had been protests against Kola before the post was published,⁶⁸ although there were 100 people attending the one following the post's publication, it can still be considered as a small number of people. Moreover, most of the signs appearing at the protest on May 4 and 5 were not related to Peaps' post.⁶⁹

Peaps' penalty is not proportionate

In violation of the ODP, Peaps was sentenced to two years' imprisonment and no fine.⁷⁰ Under international principles, imprisonment for defamation, particularly against a public figure⁷¹ is considered disproportionate, therefore it is a violation of FoE⁷² that is never an appropriate penalty.⁷³ Even if it is applied by a state, it should be used only as a last resort,⁷⁴ when there is a serious threat to the enjoyment of other human rights.⁷⁵ The exceptional

⁶⁷ *Cantoni v France* App no 17862/91 (ECtHR, 11 November 1996) [32]

⁶⁸ *Compromis*, para 9.4

⁶⁹ *Compromis*, para 9.4

⁷⁰ *Compromis*, para 12. 1 1

⁷¹ *Lohé Issa Konaté v Burkina Faso* Comm no 004/2013 (ACmHRP, 2014) [141]

⁷² *Herrera Ulloa v Costa Rica* IACtHR (2004) Series C No 107 [124]-[135]; *Palamara Iribarne v Chile* IACtHR (2005) Series C No 135 [63]; *Canese v Paraguay* IACtHR (2004) Series C No 111 [104]

⁷³ UNHRC 'General Comment No 34: Article 19 (Freedom of Opinions and Freedom of Expression)' [47]

⁷⁴ *Trisant Donoso v Panama* IACtHR (2009) Series C No 193 [20]

⁷⁵ *Gavrilovic v Moldavia* App no 25464/05 (ECtHR, 15 December 2009) [60]

circumstances justifying a prison term are for example, the case of hate speech or incitement to violence⁷⁶ that creates “a clear and present danger”.⁷⁷

In the present case,⁷⁸ protesters had appeared from time to time outside Kola’s office throughout her three years in office. After the post, the number of the protesters was only a bit higher and most of the signs were still unrelated to the content.⁷⁹ Thus, Applicants submit that the punishment was disproportionate since there was no exceptional circumstance that would have justified the prison term. Instead of criminal proceedings, civil proceedings should be preferred in defamation cases.⁸⁰

II. TURTONIA’S PROSECUTION OF SCOOPS UNDER THE ODPA VIOLATES ITS RIGHT TO FREEDOM OF EXPRESSION

Scoops is a social media platform⁸¹ storing information provided by its users, thus is qualified as a hosting service provider⁸² that acts as an intermediary.⁸³ As the ECtHR⁸⁴ pointed out FoE

⁷⁶ *Cumpăna and Mazare v Romania* App no 33348/96 (ECtHR, 1 December 2004) [115]; *Mahmudov and Agazade v Azerbaijan* App no 38577/04 (ECtHR, 18 December 2008) [50]

⁷⁷ *Karataş v Turkey* App no 23168/94 (ECtHR, 8 July 1999) Concurring Opinion of Judge Bonello, *Schenck v United States* 249 U.S. 47 (1919)

⁷⁸ Compromis, para 12. 2

⁷⁹ Compromis, para 9.4

⁸⁰ *Lehideux et Isorni v France* App no 55/1997/839/1045 (ECtHR, 23 September 1998) [57]; *Radio France and Others v France* App no 53984/00 (ECtHR, 30 March 2004) [40]; *Raichinov v Bulgaria* App no 47579/99 (ECtHR, 20 April 2006) [50]; *Kubaszewski v Poland* App no 571/04 (ECtHR, 2 February 2010) [45]; *Mahmudov and Agazade v Azerbaijan* App no 35877/04 (ECtHR, 18 December 2008) [50]; *Lyashko v Ukraine* App no 21040/02 (ECtHR, 10 August 2006) [41]; *Fedchenko v Russia* App no 33333/04 (ECtHR, 11 February 2010); *Aleksandr Krutov v Russia* App no 15469/04 (ECtHR, 3 December 2009); *Lombardo et al v Malta* App no 7333/06 (ECtHR, 24 April 2007)

⁸¹ Compromis, para 5.1

⁸² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) Article 14

guarantees to “everyone”, including legal persons. Consequently, Scoops and its users possess the right to FoE.

Exercise of FoE⁸⁵ is one of the essential foundations of a democratic society.⁸⁶ Internet freedom is an indispensable tool to shield that right, however Internet freedom has declined for the sixth consecutive year, with more governments than ever before targeting social media.⁸⁷

Applicants submit that Scoops’ FoE guaranteed under international conventions⁸⁸ had been interfered by the Court’s decision. Moreover, such interference with Scoops’ FoE under the IA violates ICCPR and UDHR,⁸⁹ since it does not pass the three-part cumulative test.

⁸³ Case C-360/10 [2012] SABAM v Netlog ECLI:EU:C:2012:85 [27-28]; The Economic and Social Role of Internet Intermediaries 9 <<https://www.oecd.org/internet/ieconomy/44949023.pdf>> accessed: 22 November 2017

⁸⁴ *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994) [35]; *Autronic AG v Switzerland* App no 12726/87 (ECtHR, 22 May 1990) [47]

⁸⁵ Universal Declaration of Human Rights [UDHR] (10 December 1948) UNGA Res 217 A(III) Article 19; International Covenant on Civil and Political Rights [ICCPR] (16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 19; European Convention on Human Rights [ECHR] (adopted 4 November 1950, entered into force 3 September 1953) Article 10; African Charter on Human and Peoples’ Rights [ACHPR] (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M.58 (1982) Article 9; American Convention on Human Rights [ACHR] (adopted 22 November 1969, entered into force 18 July 1978) 08/27/79 no 17955 (ACHR) [13]

⁸⁶ UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (16 May 2011) A/HRC/17/27 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf> accessed: 23 November 2017

⁸⁷ Freedom House ‘Silencing the Messenger: Communication Apps under Pressure’ (Freedom Net 2016) 1 <https://freedomhouse.org/sites/default/files/FOTN_2016_BOOKLET_FINAL.pdf> accessed: 22 November 2017

⁸⁸ ICCPR Article 19 (3); UDHR Article 19

⁸⁹ ICCPR Article 19 (3); UDHR Article 19

1. Scoops prosecution was not prescribed by law

For a prosecution to be prescribed by law, an act must be sufficiently precise.⁹⁰ However, in this present case ODPa⁹¹ uses so vague terms that it makes impossible for Scoops to foresee the consequences arising from ODPa.

For example, ODPa defines the term “distribute” that includes only active conducts such as “transferring, publishing or reproducing”.⁹² However, as Scoops is a merely passive intermediary,⁹³ it cannot be expected from the company to even consider the possibility of being classified as a distributor according to ODPa. Applicants note that even if Scoops might be regarded as distributor, it must have been under the impression of being exempted from its obligation based on Section 3.b of ODPa.

Moreover, ODPa determines the category of image including photographs, films, videotapes, recording, digitals, or other reproduction.⁹⁴ In this present case, Kola’s head was photoshopped onto pornographic material engaged in sexual intercourse. These so-called face swap pictures are digitally manipulated photographs that do not fall under the scope of ODPa.

As it is seen, the Act includes vague terms and non-exhaustive lists which can lead to abuse and arbitrary decisions.

⁹⁰ Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1 October 1995) [1.1] UNHRC ‘General Comment No 34’ (2011) UN Doc CCCPR/C/GC/34 [25]

⁹¹ Compromis, 10.2

⁹² Compromis, 10.2 2. a

⁹³ Council Directive (EC) 178/1 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] L178/1

⁹⁴ Compromis, 10.2 2. b

2. Scoops prosecution did not have a legitimate aim

As stated above,⁹⁵ the prosecution did not have a legitimate aim.

3. Scoops prosecution was not necessary

Interference must be an option of last resort and is necessary in a democratic society if it a) corresponds to a pressing social need and b) it is proportionate to the legitimate aim pursued.

a) The interference does not correspond to a pressing social need

According to the ECtHR⁹⁶ and the CJEU,⁹⁷ the following factors may be considered to determine intermediary liability: i) the nature of the intermediary; ii) the nature of its user content, iii) measures taken by the intermediary.

i) The nature of the intermediary

Applicants submit that Scoops is a passive intermediary as its conduct is merely automatic and technical,⁹⁸ however it loses protection⁹⁹ if it establishes a substantial degree of editorial

⁹⁵ Arguments 2.2

⁹⁶ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) [85]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [142]-[143]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [69]; *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [28]

⁹⁷ C-236/08 *Google France, Google Inc v Louis Vuitton Malletier SA* EU:C:2010:159 (CJEU, 23 March 2010) [113]- [114]; *L'Oréal SA v eBay* C-324/09 (CJEU, 12 July 2011) [111]- [113]

⁹⁸ C-236/08 *Google France, Google Inc v Louis Vuitton Malletier SA* EU:C:2010:159 (CJEU, 23 March 2010) [113]- [114]

⁹⁹ EU study 'The New rules for a new age? November 2009 Legal analysis of a Single Market for the Information Society' 8 <www.ec.europa.eu/information_society/newsroom/cf/document.cfm?doc_id=835> accessed: 20 November 2017

control over its user content.¹⁰⁰ In the case of *Delfi AS v Estonia*, once a comment was posted, the author could not modify or delete it, solely the news portal had the ability to do it. Therefore it was considered an active intermediary and deemed liable for clearly unlawful content.¹⁰¹

However, in this present case Scoops did not create or practice editorial control over its content.¹⁰² The fact that it occasionally removed unlawful content¹⁰³ cannot challenge Scoops' passive role, and therefore cannot prevent it from being exempt from liability.¹⁰⁴

ii) The nature of its user content

Applicants acknowledge that distributing an image of another person who is identifiable and whose intimate parts are exposed, without legitimate purpose can cause harm.¹⁰⁵ However, the picture in question is undisputedly digitally manipulated since the naked body was taken from a free pornography site.¹⁰⁶ Further, the photo concerned the alleged romance of Parkta and Kola whose conduct had already generated numerous criticism. Hence, there was a public interest as legitimate purpose to inform citizens of Turtonia. Even if it was a manifestly illicit

¹⁰⁰ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [144]-[146]; *Kaschke v Gray* [2010] EWHC 690 [186]

¹⁰¹ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [128], [144]-[146]

¹⁰² Compromis, 5

¹⁰³ Compromis, 9.2

¹⁰⁴ *Kashcke v Gray and Hilton* (2010) EWHC 1907; *Karim v Newsquest Media Group Ltd* [2009] EWHC 3205

¹⁰⁵ Mary Anne Franks 'Drafting An Effective "Revenge Porn" Law: A Guide for Legislators' 1 (*Cyber Civil Rights Initiative* (22 September 2016) <<https://www.cybercivilrights.org/guide-to-legislation/>> accessed: 20 November 2017

¹⁰⁶ Compromis, para 12.3 2

image and there was no public interest, intermediaries must not be expected to evaluate the legality of the image.¹⁰⁷

iii) Measures taken by the intermediary

Applicants submit that Scoops has taken all the necessary measures to prevent the illicit content on its platform. Firstly, Scoops has prepared a ToS¹⁰⁸ in which it specifies that they do not allow harmful and malicious content such as non-consensual sharing of intimate image. Secondly, Scoops has created a NTDS¹⁰⁹ so that unlawful content can be removed. Scoops is liable under the ODPa¹¹⁰ if knowingly distributes a sexually explicit image of another person without consent. Forasmuch intermediaries are not obliged to monitor their platform seeking illegal content,¹¹¹ Scoops knowingly distributes an unlawful image if only being notified about it, however fails to act properly. It is true that Kola's staff sent a request of removal by starting to fill out the form, however, failed to complete it.¹¹² Therefore Scoops was not notified in time, thus could not act accordingly.

Even if Scoops knowingly distributed an illicit image under the ODPa, Applicants highlight that this Act does not apply to disclosure made in the public interest.¹¹³ As stated above,¹¹⁴

¹⁰⁷ The Manila Principles on Intermediary Liability (24 March 2015)

¹⁰⁸ Compromis, para 9.2

¹⁰⁹ Compromis, para 9.2

¹¹⁰ Compromis, para 10.2 1

¹¹¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1 [15]

¹¹² Compromis, para 9.2

¹¹³ Compromis, para 10.2 3. b

¹¹⁴ Arguments 1. 2

the alleged romance was a matter of public interest¹¹⁵ therefore Scoops should be exempted from liability.

Therefore Applicants submit the followings: Scoops was not in the position to distribute the image by disregarding a substantial risk as the company was not notified properly. Even if it was, the image does not fall under the scope of ODPa since it was a digitally manipulated one with the body of another person. Even if the image fell under the scope of ODPa, Scoops should be exempted from liability because the disclosure was made in the public interest.

Lastly, intermediaries should not judge whether a content is lawful or not,¹¹⁶ because restriction on FoE falls within the competence of courts. However, if intermediaries judge it, it is likely to act too quickly to remove the content that can lead to censorship.¹¹⁷

b) The interference is not proportionate to the legitimate aim pursued

The principle of proportionality implies that an interference cannot be overbroad and it must be the least intrusive instrument amongst those which might achieve their protective function.¹¹⁸ Scoops was sentenced to a fine equivalent to 200,000 USD.¹¹⁹ Applicants submit that the fine is disproportionate for the following reasons:

¹¹⁵ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [72]

¹¹⁶ Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017) FOM.GAL/3/17

¹¹⁷ Declaration on freedom of communication on the Internet; <<https://www.article19.org/data/files/medialibrary/38355/Joint-Declaration-on-Freedom-of-Expression-and-Countering-Violent-Extremism-2016.pdf>> accessed 22 November 2017

¹¹⁸ *Shelton v Tucker* 364 US (1960) [479], [488]

¹¹⁹ Compromis, para 13.1 1

First, Scoops is a passive intermediary.¹²⁰ On the contrary, in the case of *Delfi AS v Estonia*, an active intermediary was sentenced to a fine equivalent to only 320 €. ¹²¹ As well as in other similar cases, intermediaries¹²² were sentenced to much lesser fines.

Secondly, in the case of *Index v Hungary*,¹²³ since the unlawful content on the platform of the intermediary could be regarded as a matter of public interest, the company was not held liable.

Thirdly, liability of the actual author served as a sensible alternative to the liability of Scoops in a case like the present one. As the author's identity was revealed by Scoops, Kola could bring a claim against Peaps.¹²⁴

Erroneously censoring user content on social media is already a well-known phenomenon.¹²⁵ However, such a huge fine on Scoops could easily lead to a more severe censorship, thus the judgment would have a chilling effect on FoE.

III. TURTONIA'S PROSECUTION OF PEAPS UNDER THE IA VIOLATES HIS RIGHT TO FREEDOM OF EXPRESSION

Applicants submit that the restriction on Peaps' FoE under the IA is not consistent with Turtonia's international obligations. The IA fails the three-part cumulative test regarding

¹²⁰ Arguments 2.3

¹²¹ *Delfi AS v Estonia* App no 64569/09 (ECtHR 16 June 2015) [160]

¹²² *Lancelotti v Facebook* IACtHR (2016) Series C No 524

¹²³ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [72]

¹²⁴ *Delfi AS v Estonia* App no 64569/09 (ECtHR 16 June 2015) [147]

¹²⁵ Alice Ross and Julia Carrie Wong 'Facebook deletes Norwegian PM's post as 'napalm girl' row escalates

<<https://www.theguardian.com/technology/2016/sep/09/facebook-deletes-norway-pms-post-napalm-girl-post-row>> accessed: 23 November 2017

ICCPR Article 19.¹²⁶ First, the IA was not prescribed by law, since it does not fulfil the preconditions stated in international obligations. Secondly, IA does not pursue a legitimate aim. Finally, the restriction of IA is not necessary and it imposes disproportionate and wrongful penalties.¹²⁷

1. Peaps' prosecution was not prescribed by law

According to the following judgement of the ECtHR, a legal instrument is considered as prescribed by law, if it accomplishes two requirements: the law must be adequately accessible, and formulated with a sufficient precision to enable citizens to regulate their conduct and they must be able to foresee the consequences what a given action may entail.¹²⁸

Turtonian government passed the IA in order to preserve the integrity of the democratic process and safeguard the peace of Turtonia.¹²⁹ In fact, the prosecution based on the regulation was not prescribed by law as the IA is imprecise, and there is no legal basis to prosecute Peaps. Furthermore, the term of “violence” does not appear in the text of IA.¹³⁰ The IA is imprecise as the scope of the terms “civil unrest”, “hatred” and “damage the national unity” is overly vague. As drafted, the IA is not prescribed by law since it fails to adequately warn Turtonian citizens of what their punishment might be due to undefined language.¹³¹

¹²⁶ ICCPR Article 19

¹²⁷ UNHRC ‘General Comment No 34’ (2011) UN Doc CCCPR/C/GC/34 [25]-[35]

¹²⁸ *The Sunday Times v the United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) [50]; *Hashman and Harrup v the United Kingdom* App no 25594/94 (ECtHR, 25 November 1999) [31]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]

¹²⁹ Compromis, 11.1

¹³⁰ Compromis, 11.2

¹³¹ Compromis, 11.2

2. Peaps' prosecution lacks legitimate aim

International covenants declare the legitimate aims in pursuit of which rights might be limited by the State.¹³² These are the rights for the reputation of others, the protection of national security, public order, public health or morals.¹³³ However, there must be a fair balance between the restrictions and the right of FoE.¹³⁴

In the landmark cases of *Axel Springer v Germany*¹³⁵ and *Von Hannover v Germany (No 2)*,¹³⁶ it was declared that an attack on a person's reputation must attain a certain level of seriousness. The criteria which are relevant when balancing the right to FoE against the right to respect private life are: the contribution to a debate of general interest, how well known the person concerned is and what the subject of the report is, his or her prior conduct, the method of obtaining the information and its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed.

Furthermore, in *Krone Verlag GmbH & Co. KG v Austria*,¹³⁷ the ECtHR stated that the fact of being a politician brought an individual into the sphere of public life with the attendant consequences. The Court also recognised the public's right to information, including facts concerning private life, even where the individual concerned held no public office.

¹³² ICCPR Article 19 (3), ECHR Article 10 (2), ACHR Article 13 (2)

¹³³ ICCPR Article 19 (3), ACHR Article 13 (2)

¹³⁴ *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECtHR, 10 November 2015) [83]-[93]

¹³⁵ *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [83], [89]-[95]

¹³⁶ *Von Hannover v Germany (no 2)* App no 40660/08 and 60641/08 (ECtHR, 26 June 2012) [108]- [113]

¹³⁷ *Krone Verlag GmbH & Co. KG v Austria* App no 34315/96 (ECtHR, 26 February 2006); *Von Hannover v Germany (No 1)* App no 59320/00 (ECtHR, 24 June 2004) [62], [76]

As the ECtHR stated in *Ólaffson v Iceland*,¹³⁸ even if the determinations were defamatory, the concerned person is in the public interest and the seriousness of the post's topic had the legitimate aim to be shared with the public, even if it is part of his private life. Furthermore, there was an opportunity to react to the allegations.

In this present case, Kola as the Turtonian Minister of Immigration¹³⁹ has to accept the consequences of holding a public role and has narrower private life sphere than a normal citizen. The citizens of Turtonia have the right to know what the Minister does in her free time, especially if it affects her work because she is a democratically elected member of the government.

3. Peaps' prosecution was not necessary

The prosecution was unnecessary, because there is no link between the expression and violent event. Applicants submit that the prosecution of Peaps was unnecessary in a democratic society, because it did not correspond to a pressing social need.¹⁴⁰ The principle whether an interference with FoE is “necessary in a democratic society” is well established in the ECtHR's case-law.¹⁴¹ According to *Chauvy and Others v France*,¹⁴² it must be determined whether the interference in question was “proportionate to the legitimate aims pursued” and

¹³⁸ *Ólaffson v Iceland* App no 58493/13 (ECtHR, 16 June 2017) [62], [76]

¹³⁹ Compromis, para 4.1

¹⁴⁰ *Kurier Zeitungsverlag und Druckerei GmbH v Austria* App no 1593/06 (ECtHR, 19 June 2012) [47]

¹⁴¹ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [131-132]; *Węgrzynowski and Smolczewski v Poland* App no 33846/07 (ECtHR, 16 July 2013) [51]; *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 August 2011) [63]

¹⁴² *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 September 2004) [70]

whether the reasons are “relevant and sufficient”. In addition, the State has to prove necessity: direct or immediate connection between the expression and the threat.¹⁴³

The prosecution of Peaps relies on the incitement of violence,¹⁴⁴ however, there were no disturbances in connection with Peaps’ post. In this present case, the only significant sign of influence was a peaceful protest on May 4 and 5 in front of Kola's office where most of the signs were unrelated to the post.¹⁴⁵ Subsequently, there is no direct or immediate link between Peaps' post and the violence against Aquarians.¹⁴⁶

Turtonia passed on a disproportionate 100,000 USD fine, generating a chilling effect for Turtonians. UNHCR states clearly in its own general comment that defamation laws do not serve the aim of stifling the FoE and the application of criminal law should only be countenanced in the most serious cases and imprisonment is never an appropriate penalty.¹⁴⁷

The ECtHR found that a long suspended imprisonment is not proportionate to the legitimate aim pursued.¹⁴⁸ The ECtHR also considered that the unusually severe sanction imposed in the case must have had a chilling effect on the Applicant and other people.

The length of imprisonment and the amount of fine in IA is a chimera for Turtonian society, because the unnecessary and contrary language of the law provokes a chilling effect. Furthermore, the fine of 100,000 USD, in this present case, exceeds the amount recognized as

¹⁴³ UNHRC ‘General Comment No 34’ (2011) UN Doc CCCPR/C/GC/34 [35]

¹⁴⁴ Compromis, 12.1

¹⁴⁵ Compromis, 9.4

¹⁴⁶ Compromis, 9.5

¹⁴⁷ UNHRC ‘General Comment No 34’ (2011) UN Doc CCCPR/C/GC/34 [47]

¹⁴⁸ *Taranenko v Russia* App no 19554/05 (ECtHR, 13 October 2014) [90]

proportionate in relevant case-law.¹⁴⁹ Therefore, the imposition of such fine obviously infringes the principle of proportionality.

In conclusion, Applicants submit that Peaps' prosecution under the IA violates international principles, including Articles 19 of UDHR and Article 19 of the ICCPR. Peaps' expressions in his post are covered by the scope of FoE. As clearly stated above, restrictions imposed under the IA are not permissible limitations under the three-part cumulative test. Firstly, they were not prescribed by law. Secondly, restrictions were not pursuant to the legitimate aim. Thirdly, restrictions were not necessary and proportionate in a democratic society.

Therefore, Applicants submit that the measures taken by the government were not necessary as they were not under pressing social need.

IV. TURTONIA'S PROSECUTION OF SCOOPS UNDER THE IA VIOLATES ITS RIGHT TO FREEDOM OF EXPRESSION

1. The interference is not prescribed by law

Applicants submit that Turtonia's interference with Scoops under the IA was not prescribed by law, since the provisions of the IA are neither sufficiently precise to foresee the consequences of actions, nor provide sufficient safeguards against abusive restrictive measures.¹⁵⁰

¹⁴⁹ *Ólaffson v Iceland* App no 58493/13 (ECtHR, 16 June 2017) [61]; *Cojocaru v Romania* App no 32104/06 (ECtHR, 10 February 2015) [33]

¹⁵⁰ Council of Europe: Guide to Human Rights for internet users (2014) 15 [47] <<https://rm.coe.int/16804d5b31>> accessed: 22 November 2017

In the present case, the IA¹⁵¹ establishes vague terms, such as “information known to be false”, “public hatred” and “expeditiously remove”. Even though the ECtHR has acknowledged in *Lindon, Otchakovsky-Laurens and July v France*¹⁵² that many laws are inevitably couched in terms which are vague and whose interpretation and application are questions of practice, the ECtHR always reiterates that an Act must be formulated with sufficient precision to enable the citizen to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.¹⁵³ The Applicants submit that the notion of “false information” is too vague to preclude subjective and arbitrary interpretation, as a consequence any legal prohibition of “false information” would inevitably create a chilling effect on the media¹⁵⁴ thus it is incompatible with international standards for restrictions on FoE.¹⁵⁵

In addition, the subjective nature of “hatred” could undermine legal certainty and may open the door to arbitrary application.¹⁵⁶ Furthermore, the requirement of expeditious removal is overly vague and broad, because neither IA, nor relevant case-law provide any interpretation

¹⁵¹ Compromis, 11. 2 1. a

¹⁵² *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; *Centro Europa 7 S.r.l. and Di Stefano v Italy* App no 38433/09 (ECtHR, 07 June 2012) [141]

¹⁵³ *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* App no 24699/94 (ECtHR, 03 June 2009) [52]; *Rotaru v Romania* App no 28341/95 (ECtHR, 28 June 2001) [52]; *Gawęda v Poland* App no 26229/95 (ECtHR, 14 March 2002) [39]; *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) [30]

¹⁵⁴ Article 19 ‘Social Media and “Fake News” from a free speech perspective’ (Article 19, 25 November 2016) <<https://www.article19.org/resources.php/resource/38572/en/social-media-and-%E2%80%9Cfake-news%E2%80%9D-from-a-free-speech-perspective>> accessed: 20 November 2017

¹⁵⁵ Joint Declaration on Freedom of Expression and Countering Violent Extremism (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 3 May 2016) [2 a]

¹⁵⁶ Article 19 ‘Legal analysis on European Commission’s Code of Conduct for Countering Illegal Hate Speech Online and the Framework Decision’ (June 2016) 7 <<https://www.article19.org/data/files/medialibrary/38430/EU-Code-of-conduct-analysis-FINAL.pdf>> accessed: 18 November 2017

of the term or any guidance how it should be conducted.¹⁵⁷ On the contrary, other acts impose liability only after the intermediary failed to remove the unlawful content within a reasonable time¹⁵⁸ or within the time stated in a court order.¹⁵⁹

In conclusion, the provisions of the IA were lacking the sufficient precision to enable Scoops to regulate his conduct which eventually lead to arbitrary interpretation.¹⁶⁰

2. The interference does not pursue a legitimate aim

As stated above, the interference does not pursue a legitimate aim.

3. The interference is not necessary in a democratic society

An interference must be an option of last resort and is necessary in a democratic society if it
a) corresponds to a pressing social need and b) is proportionate to the legitimate aim pursued.

¹⁵⁷ Dzimitry Miskevich, '*Comparative Analysis of online intermediary liability regimes in US and EU*' (CEU 2012) 19

¹⁵⁸ Anti-Fake News Act of 2017 Section 3 (PH)

¹⁵⁹ Law No 12.965 of 2014 of the Establishment of Principles, Guarantees, Rights and Obligations for the Use of the Internet in Brazil

¹⁶⁰ *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000); *Gawęda v Poland* App no 26229/95 (ECtHR, 14 March 2002); *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000); *Kopp v Switzerland* App no 13/1997/797/1000 (ECtHR, 25 March 1998)

a) *The interference does not corresponds to a pressing social need as Scoops was not in the position to knowingly communicate false information*

As stated above,¹⁶¹ the following elements may be taken into consideration to determine intermediary liability: i) the nature of the intermediary; ii) the nature of its user content; iii) measures taken by the intermediary.

i) *The nature of the intermediary*

Scoops is a social media platform¹⁶² that does not create its content, but represents a hosting service for user-generated content.¹⁶³ As such, Scoops plays a merely passive role.

ii) *The nature of its user content*

Applicants acknowledge that the content was capable to defame. However, in cases of defamation, legal assessment of their content is very difficult.¹⁶⁴ Scoops is liable for posts containing information that they know to be false or they are aware of fact or circumstances that make the infringement apparent and their conduct is deliberate.¹⁶⁵ As only statement of facts can be proved to be false,¹⁶⁶ posts containing value judgements do not fall within IA's

¹⁶¹ Arguments 2. 3

¹⁶² Compromis, para 5.1

¹⁶³ Article 19 'Internet Intermediaries: Dilemma of Liability' (2013) <http://www.article19.org/data/files/Intermediaries_ENGLISH.pdf> accessed: 21 November 2017

¹⁶⁴ EU study on the New rules for a new age? Legal analysis of a Single Market for the Information Society (November 2009) 33 <www.ec.europa.eu/information_society/newsroom/cf/document.cfm?doc_id=835> accessed: 22 November 2017

¹⁶⁵ Compromis, para 11.2

¹⁶⁶ *Tristán Donoso v Panamá* IACtHR (2009) Series C No 193 [124]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [46]

scope of application.¹⁶⁷ However, technology experts of intermediaries cannot judge the unlawfulness of a post¹⁶⁸ and indirectly to do the delicate balancing of interest required when limiting the FoE. First, because they lack the necessary judiciary qualifications, and second, because they are more probable to err on the side of caution.¹⁶⁹ In conclusion, the protection of the users' FoE requires from Scoops not to have the authority to decide on the removal of their posts.

iii) Measures taken by the intermediary

Immunity from liability ceases to exist under the IA¹⁷⁰ if Scoops is being notified about the illegal content or observes it and fails to remove it expeditiously. In *L'Oréal SA v eBay International AG*,¹⁷¹ the CJEU stated that actual knowledge is deduced where a diligent economic operator can identify the illegality in question thus can act accordingly. Therefore a "notice" that is sent to an intermediary must be sufficiently precise and substantiated.¹⁷²

Considering the above in this present case Scoops was not notified properly, thus it could not act accordingly.

¹⁶⁷ Compromis, para 11.2

¹⁶⁸ Article 19 'Internet Intermediaries: Dilemma of Liability' 12 (2013) <http://www.article19.org/data/files/Intermediaries_ENGLISH.pdf> accessed 21 November 2017

¹⁶⁹ Article 19 'Background Paper on Freedom of Expression and Internet Regulation' (19-20 November 2001) 10 <<https://www.article19.org/data/files/pdfs/publications/freedom-of-expression-and-internet-regulation.pdf>> accessed 14 November 2017

¹⁷⁰ Compromis, para 11.2, 3 (c)

¹⁷¹C-324/09 *L'Oréal SA v eBay International AG*, [2011] ECR I-06011 [120]

¹⁷²Commission, Online services, including e-commerce, in the Single Market, Accompanying the document, COM (2011) 942 25

Firstly, in order to be notified to remove illegal content, Scoops uses an online reporting form. Kola's staff sent a request for removal by starting to fill the form, however, failed to complete it.¹⁷³

Secondly, after Kola's legal counsel submitted a letter to Scoops, its employees saw the post.¹⁷⁴ However, this simple notification about a defamatory nature did not affect that Scoops had actual knowledge of unlawful content or awareness of facts or circumstances from which it would have been apparent that the information was unlawful.¹⁷⁵

Thirdly, even positive knowledge of the defamatory meaning alone should not suffice to hold the intermediary liable; the information may be true, or the original author may have other defences available the intermediary is not aware of.¹⁷⁶

The NTDS¹⁷⁷ system that is used by Scoops, by lacking the opportunity to appeal a takedown incentivises intermediaries to remove content, rather than investing resources to investigate the validity of the request. Further, risk a lawsuit,¹⁷⁸ which can lead to the censoring of legitimate expression¹⁷⁹ and to silence online critics.¹⁸⁰ Furthermore, having examined the

¹⁷³Compromis, para 9.2

¹⁷⁴ Clarifications, 7

¹⁷⁵ *Tamiz v Google Inc* [2013] EWCA Civ 68 (QB) [59]; *Bunt v Tilley* [2006] EWHC 407 (QB) [72]; *Davison v Habeeb and Others* [2011] EWHC 3031 (QB) [59]; *Kaschke v Gray* [2010] EWHC 690 (QB) [100]

¹⁷⁶Jan Oster, 'Liability of Internet Intermediaries for Defamatory Speech – An Inquiry into the Concepts of 'Publication' and 'Innocent Dissemination' 24 <<http://www.archive.legalscholars.ac.uk/edinburgh/restricted/download.cfm?id=336>> accessed: 23 November 2017

¹⁷⁷ First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (21 November 2003) COM(2003) 702

¹⁷⁸ Rebecca MacKinnon, Elonnai Hickok, Allon Bar, Hae Lim (eds), *Fostering Freedom Online: The Role of the Internet Intermediaries in World Trends in Freedom of Expression and Media Development* (UNICEF 2015) [93], [105]- [106]

¹⁷⁹ Center for Democracy and Technology 'Intermediary Liability: Protecting Internet Platforms for Expression and Innovation' (Center for Democracy and Technology, April 2010) <[https://www.cdt.org/files/pdfs/CDT-Intermediary%20Liability%20\(2010\).pdf](https://www.cdt.org/files/pdfs/CDT-Intermediary%20Liability%20(2010).pdf)> accessed 23 November 2017; Emily Barabas 'Internet Defamation Double Whammy in The UK: New Court Decision Plus New Legislation Threaten' (Center for Democracy and

practice in countries that impose liability on intermediaries demonstrates that such indirect methods of control are as dangerous for FoE and others rights as direct government censorship.

Also, it is worth to notice that international bodies have also criticised NTDS system as they lack clear legal basis¹⁸¹ and does not require judicial intervention for the removal of unlawful content.¹⁸² Hence, some states only impose liability on intermediaries if they fail to take down content that was prescribed by a court order.¹⁸³

It can be disputed whether removal 50 hours after the submission was not expeditious. However, the form was not completed, Scoops had no actual knowledge about defamation, the increasing amount of request to remove material,¹⁸⁴ the unprecedented rate at which users

Technology, 27 February 2013) 28 <<https://cdt.org/blog/internet-defamation-double-whammy-in-the-uk-new-court-decision-plus-new-legislation-threaten-online-free-expression/>> accessed: 22 November 2017

Corey Omer 'Intermediary liability for harmful speech: Lessons from abroad' Harvard Journal of Law & Technology Volume 28, Number 1 Fall 2014, 289, 295. <<http://jolt.law.harvard.edu/articles/pdf/v28/28HarvJLTech289.pdf>> accessed: 22 November 2017

Rebecca Ong, 'Internet Intermediaries, The Liability for Defamatory Postings in China and Hong Kong', (2013) 29 Computer L and Sec. Rev. 274, 281 <https://www.researchgate.net/publication/257102065_Internet_intermediaries_The_liability_for_defamatory_postings_in_China_and_Hong_Kong> accessed: 22 November 2017

¹⁸⁰ Nart Villeneuve, 'Evasion Tactics: Global online censorship is growing, but so are the means to challenge it and protect privacy' (November 2007) 74-76 <<http://www.nartv.org/mirror/evasiontactics-indexoncensorship.pdf>> accessed: 22 November 2017

¹⁸¹ UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (16 May 2011) A/HRC/17/27 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf> accessed: 23 November 2017 [42]

¹⁸² UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (16 May 2011) A/HRC/17/27 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf> accessed: 23 November 2017 [47]

¹⁸³ Law No 12.965 of 2014 of the Establishment of Principles, Guarantees, Rights and Obligations for the Use of the Internet in Brazil

¹⁸⁴ Jeffrey Rosen 'The Delete Squad Google, Twitter, Facebook and the new global battle over the future of free speech' (New Republic, 29 April 2013) <<https://newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules>> accessed: 16 November 2017

generate and distribute content¹⁸⁵ and the fact that in other cases,¹⁸⁶ the unlawful material was available on the portal for weeks, but in this present case it was accessible only for four days.

b) The interference is not proportionate to the legitimate aim pursued

The principle of proportionality implies that an interference must not be overbroad and it must be the least intrusive instrument amongst those which might achieve their protective function.¹⁸⁷

In violation of the IA, Scoops was sentenced to a fine equivalent of 100,000 USD.¹⁸⁸ Applicants submit that the fine is disproportionate.

First, the active intermediary in the case of *Delfi AS v Estonia*¹⁸⁹ was obliged to pay 320€, despite the fact that the manifestly unlawful comments were available for six weeks on its portal. Likewise, Twitter was sentenced to an approximately 43,000 USD fine for failing to remove terrorist propaganda.¹⁹⁰ On the contrary, Scoops is a passive intermediary and the not manifestly unlawful content was accessible only for four days.

¹⁸⁵ 'Instagram-press, '700 million Instagram' (26 April 2017) <<https://instagram-press.com/blog/2017/04/26/700-million/>> accessed 22 November 2017; Zephoria Digital Marketing 'The Top 20 Valuable Facebook Statistics' (1 November 2017) <<https://zephoria.com/top-15-valuable-facebook-statistics/>> accessed 20 November 2017; Mark Robertson '500 Hours of Video Uploaded to YouTube Every Minute' (13 November 2017) <<http://tubularinsights.com/hours-minute-uploaded-youtube/>> accessed 22 November 2017

¹⁸⁶*Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [19], [152]; *Pihl v Sweden* App no 74742/14 (ECtHR, 07 February 2017) [32]

¹⁸⁷*Shelton v Tucker* 364 US (1960) [479], [488]

¹⁸⁸ Compromis, para 13.1 2

¹⁸⁹*Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [15], [114], [160]

¹⁹⁰BBC 'Turkey fines Twitter over 'terrorist propaganda' (11 December 2015) <<http://www.bbc.com/news/technology-35072321>> accessed: 22 November 2017

The fine could be seen disproportionate as Acts of other countries impose much less severe fines on intermediaries.¹⁹¹

When intermediaries are liable for the content created by others, they will strive to reduce their liability risk,¹⁹² whereas harsh sanctions exert a significant chilling effect on the right to FoE. Such fine can be a huge blow to the free and open internet. Scoops may self-censor,¹⁹³ err on the side of caution therefore take down material that may be perfectly legitimate and lawful.¹⁹⁴ These consequences would be extremely damaging since social media is an indispensable tool for promoting social justice and political liberty.¹⁹⁵

Unlike, in civil penalties for defamation, the law should give preference to the use of non-pecuniary remedies, including for example, apology, rectification and clarification.¹⁹⁶

¹⁹¹ The Copyright Act of 2001 (KE) <<http://www.kenyalaw.org/Downloads/Acts/Copyright%20Act.pdf>> [38]

¹⁹²Center for Democracy and Technology ‘Intermediary Liability: Protecting Internet Platforms for Expression and Innovation’ (Center for Democracy and Technology, April 2010) 4 <[https://www.cdt.org/files/pdfs/CDT-Intermediary%20Liability \(2010\).pdf](https://www.cdt.org/files/pdfs/CDT-Intermediary%20Liability%20(2010).pdf)> accessed: 23 November 2017

¹⁹³U.S. Department of State, ‘Country Reports on Human Rights Practices, Thailand’ (2009) <<https://www.state.gov/j/drl/rls/hrrpt/2009/eap/136010.htm>> accessed: 22 November 2017

¹⁹⁴ Article 19 ‘Internet Intermediaries: Dilemma of Liability’ [12] (2013) <http://www.article19.org/data/files/Intermediaries_ENGLISH.pdf> accessed: 21 November 2017

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IX. PRAYER FOR RELIEF

In the light of arguments advanced and authorities cited, the Applicants respectfully request this Honourable Court to adjudge and declare that:

1. Turtonia's prosecution against Peaps under the IA violated his right to Freedom of Expression according to Article 19 of ICCPR.
2. Turtonia's prosecution against Scoops under the IA violated its right to Freedom of Expression according to Article 19 of ICCPR.
3. Turtonia's prosecution against Peaps under the ODPA violated his right to Freedom of Expression according to Article 19 of ICCPR.
4. Turtonia's prosecution against Scoops under the ODPA violated its right to Freedom of Expression according to Article 19 of ICCPR.

On behalf of Niam Peaps and Scoops,

302A

Agents for the Applicants

Memorial for Respondent 2017/2018

REBEKA, ERDŐSI - GERGELY, GOSZTONYI - ANDREA, KOVÁCS -
ANDRÁS, MOZSOLITS - FLÓRA, SZALAI - ATTILA, TATÁR

**THE 2017-2018 MONROE E. PRICE
INTERNATIONAL MEDIA LAW MOOT COURT COMPETITION**

Niam Peaps & Scoops

(Applicants)

v.

Federal Republic of Turtonia

(Respondent)

MEMORIAL FOR RESPONDENT

Word Count for Argument Section: 4,972

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II. LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CJEU	Court of Justice of the European Union
Compromis	The 2017/2018 Price Media Law Moot Court Competition Case
Court	The Court of the Federal Republic of Turtonia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EECD	European Electronic Commerce Directive
EU	European Union
FoE	Freedom of Expression
Honourable Court	Universal Court of Human Rights
IA	The Information Act of 2006 of the Federal Republic of Turtonia
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
NTDS	Notice-and-Takedown System
ODPA	The Online Dignity Protection Act of 2015 of the Federal Republic of Turtonia
OSCE	Organisation for Security and Co-operation in Europe

Para(s)	Paragraph(s)
ToS	Terms of Service
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Committee

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IV. STATEMENT OF RELEVANT FACTS

Socio-political background

Turtonia has a democratically elected government and is a member of the United Nations and has ratified the International Covenant on Civil and Political Rights (ICCPR).¹ Regarding Turtonia's jury system, the law adjudicated in court comes from the Turtonia Codes and Turtonia law is primarily codal in nature. Appeals from trial courts are made directly to the three-judge Supreme Court which has discretion whether or not to hear an appeal.²

As in the past three years, Turtonia has seen an influx of immigrants from neighboring country Aquaria.³ Moreover, many Turtonians claim that the immigrants have disrupted the economy and diluted the culture.⁴

A religious extremist terror group called True Religion is widely regarded as a terrorist organization in Aquaria, Turtonia, and many other countries (including members of the UN Security Council) and has gained popularity with some young people in Aquaria and has attacked mainstream religious institutions and schools, including murdering a dozen people on a university campus.⁵

Wani Kola, the Turtonian Minister of Immigration, is known for being a champion of immigration who believes Aquarian immigrants can contribute meaningfully to the Turtonian

¹ Compromis, para 1.1

² Compromis, para 2.2

³ Compromis, para 2.1

⁴ Compromis, para 4.1

⁵ Compromis, para 3.1

society. She has been subjected to harassment and abuse online, and one person – a member of Turton Power – has been convicted of attempting to assault her in a public place.⁶

Scoops and Peaps

Scoops is the most popular social media platform. Users can upload photos and videos with up to 200 words of text and tag the post with up to two topics of interest. When they hit “send,” the content will appear on the screens of the devices of friends of the poster and up to 20 other users who have listed a matching topic of interest. These 20 other users are selected by an algorithm. Scoops also uses human review to assist the algorithm in reaching the right users who may be interested in the content. Scoops CEO said: “Whether people are sharing news, an opinion, or just the latest gossip, we want people to hear it first on Scoops”.⁷

XYZ News is a well-respected TV news network in Turtonia for being a reliable and objective news source.⁸ Niam Peaps is a Turton Power member who created a Scoops account on May 1, with the screen name “XYZ News12”, however, he had no affiliation with XYZ News.⁹

The matter in question

At noon on May 2, Peaps used the “XYZ News12” account to post an image that appeared to show Kola standing naked in a hotel room. She is facing another individual who appears to be

⁶ Compromis, para 4.1

⁷ Compromis, paras 5.1, 5.3

⁸ Compromis, para 6.1

⁹ Compromis, para 7.1

Parkta, the leader of True Religion. The photo appears to have been taken from outside the hotel room window, and neither person in the image appears to be aware of the camera.¹⁰

The „XYZ News12” account had no friends.¹¹ Within the first hour of appearing, the post reached more than 10,000 people.¹²

By 5:00pm, XYZ Media’s corporate department of public affairs released a statement, declaring that XYZ Media had no role in the post and no connection to the XYZ News12 account. At the same time, Kola’s office released a statement calling the post “a horrific lie with no basis in fact,” and asserting that Kola's head had been photoshopped onto a stranger's body in the image.¹³

In the wake of the post, Kola received harassment and death threats online and offline, including threatening phone calls at her office. On May 2 at 7:00pm, Kola’s staff reported the post to Scoops through Scoops’ online reporting form selecting “a nude image of me shared without my consent” as the reason to request removal. Scoops responded with an electronic message that read, “Thanks for letting us know. Before we can remove this image, we need you to please enter your name and check the box below to certify that you are the person depicted in this image.” On May 3, Kola’s legal counsel submitted a letter to Scoops, threatening a civil action for defamation and violation of privacy. Scoops removed the post and all shares of the post 50 hours after the submission of the complaint. At that point, it had 21,000 shares and 145,000 views.¹⁴

¹⁰ Compromis, para 8.1

¹¹ Compromis, para 8.3

¹² Compromis, para 8.4

¹³ Compromis, para 9.1

¹⁴ Compromis, para 9.2

On May 4 and May 5, protesters gathered outside Kola's office calling for her resignation which was by far the largest, numbering more than 100. Many held signs criticizing Kola, also some of them had slogans related to the post of Peaps, also two Aquarian immigrants were beaten to death by an angry mob of at least 10 people that were yelling anti-Aquarian epithets.¹⁵

Legal basis, procedure

The Online Dignity Protection Act of 2015 was passed in response to a growing problem of Non Consensual Sharing of Intimate Images (commonly known as "revenge porn").¹⁶

The Information Act of 2006 was passed after the distribution of fake documents, which purported to be real, private documents.¹⁷

In Peaps' prosecution it was declared that Parkta's figure in the image had been photoshopped from a video of Parkta speaking to True Religion followers. By publishing the image on Scoops, Peaps knowingly distributed an image of Kola appearing to show her intimate parts. At the time Peaps distributed the image, he knew or consciously disregarded a substantial and unjustified risk that Kola had not consented to the disclosure. Peaps was not entitled to protection under section (3)(b) of the ODPa.¹⁸

Distributing an image of Kola in violation of the ODPa, Peaps was sentenced to a two-year imprisonment. Inciting violence, or being reckless as to whether violence was incited through

¹⁵ Compromis, paras 9.4, 9.5

¹⁶ Compromis, para 10.1

¹⁷ Compromis, para 11.1

¹⁸ Compromis, para 12.3

false information in violation of Section 1(b) of the IA, Peaps was sentenced to a fine equivalent of 100,000 USD.¹⁹

In Scoops' prosecution it was declared that Scoops received notice of the image when Kola's staff reported the image as "a nude image of me shared without my consent." After that report, Scoops knew or consciously disregarded a substantial and unjustified risk that Kola had not consented to the disclosure. Scoops failed to remove the post within a reasonable time.²⁰

Distributing an image of Kola in violation of the ODPA, Scoops was sentenced to a fine equivalent to 200,000 USD. Knowingly communicating false information in violation of Section 1(a) of the IA, Scoops was sentenced to a fine equivalent of 100,000 USD.²¹

¹⁹ Compromis, para 12.1

²⁰ Compromis, para 13.2

²¹ Compromis, para 13.1

V. STATEMENT OF JURISDICTION

Federal State of Turtonia (Respondent) has approached the Universal Freedom of Expression Court, the special Chamber of the Universal Court of Human Rights hearing issues relating to the right of freedom of expression under Article 19 of the UHDR and Article 19 of the ICCPR.

Both Niam Peaps' sentence and Scoops' fine have been upheld in Turtonia's Supreme Court, exhausting their domestic appeals. This Honourable Court has jurisdiction as the final arbiter over all regional courts where parties have exhausted all domestic remedies.

Federal State of Turtonia (Respondent) requests this Honourable Court to issue a judgement in accordance with relevant international law, including the UDHR, the ICCPR, conventions, jurisprudence developed by relevant courts, and principles of international law.

VI. QUESTIONS PRESENTED

The questions presented, as certified by this Honourable Court, are as follows:

1. Whether Turtonia's prosecution of Peaps under the ODPa violates international principles including Article 19 of UDHR and Article 19 of ICCPR?
2. Whether Turtonia's prosecution of Scoops under the ODPa violates international principles including Article 19 of UDHR and Article 19 of ICCPR?
3. Whether Turtonia's prosecution of Peaps under the IA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?
4. Whether Turtonia's prosecution of Scoops under the IA violates international principles including Article 19 of UDHR and Article 19 of ICCPR?

VII. SUMMARY OF ARGUMENTS

- A. Turtonia's prosecution of Niam Peaps under the ODPa does not violate his right to freedom of expression. The Act is prescribed by law, as it is sufficiently precise with the foreseeable consequences of the restrictions. It contains adequate safeguards as the Turtonian legal system allows appeals and the prosecution is based on a properly legislated legal instrument. Peaps' prosecution pursued the legitimate aim of protecting people from non-consensual sharing of nude images. Peaps' prosecution was necessary to protect the values of a democratic society. Turtonia followed a pressing social need as the significant community strain led to the resignation of Wani Kola, the Turtonian Minister of Immigration, and the tragic death of two Aquarians. Moreover, the manipulated image was published on a social media platform and humiliated a well-known person, who already faced harassment and abuse both online and offline. Peaps' penalty was proportionate to his crime as the post went viral on the public media and eroded the principles of the Turtonian society.
- B. Turtonia's prosecution of Scoops under the ODPa does not violate its right to freedom of expression. Firstly, the ODPa is clear, specific and narrowly drawn as Scoops can see the consequences arising from it. Even if they were not clear enough, as a professional company, Scoops could also have sought legal advice. Secondly, the ODPa has legitimate aim, namely the protection of people from being victim of non-consensual sharing of nude images. Thirdly, the prosecution was necessary because Scoops is an active intermediary, thus it should have acted promptly in response to the notification in order to avoid liability. Finally, the prosecution was proportionate as other states impose more severe punishment on intermediaries and the fine reflected the economic capacity of Scoops.

C. Turtonia's prosecution of Peaps under the IA does not violate his right to freedom of expression. First of all, the IA meets the requirement of being "prescribed by law", as the law was formally enacted by the Turtonian government in 2006, after the distribution of false documents in the Turtonian Elections in 2005. Furthermore, the wording of the law is sufficiently precise and foreseeable, as Peaps could reasonably know the consequences of his activity. Secondly, the prosecution pursues a legitimate aim of protecting public order, including the social benefit of Turtonian citizens. Thirdly, the prosecution was necessary in a democratic society, because the heated situation in Turtonia posed a threat to the citizens' well-being. The disinformation of Peaps resulted in hatred against Kola and violence against two innocent Aquarian immigrants. Plus, the restrictions are proportionate since the amount of fine shows a fair balance between the interests of the community and the protection of the individuals.

D. Turtonia's prosecution of Scoops under the IA does not violate its right to freedom of expression. First of all, the prosecution was prescribed by law, since it was foreseeable that a media publisher running a social media platform for an economic purpose could be held liable under the IA for storing clearly unlawful content. Secondly, it pursued a legitimate aim namely the respect of the rights or reputations of others. Thirdly, Scoops is an active intermediary and obtained knowledge of the unlawful material, however, failed to remove it within a reasonable time. Lastly, the fine was proportionate as the Court took the international practice into consideration and it applied less severe consequences.

VIII. ARGUMENTS

1. TURTONIA'S PROSECUTION OF PEAPS UNDER THE ODPA DOES NOT VIOLATE HIS RIGHT TO FREEDOM OF EXPRESSION

Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.²²

In order to ensure that everyone can exercise his right properly, the State must adopt different kind of norms in case protected values conflict. Exercising human rights can only be limited by the exercise of another fundamental right. The presented case highlights that it is the State's obligation to set the boundaries for its citizens regarding the exercise of their rights while simultaneously ensuring other people's right to act in the same way.

Respondent suggests to apply a three-part cumulative test to Niam Peaps' prosecution. It should be examined whether it was prescribed by law, had a legitimate aim, and if it was necessary and proportionate.

1. Prosecution of Peaps is prescribed by law

A norm is prescribed by law if the following requirements are met:

- a) it is sufficiently precise;
- b) it contains adequate safeguards; and
- c) prosecutions based on it have a legal basis.²³

²² H. Fenwick, G. Phillipson, *Media Law under the human rights act* (Oxford, 2006)

²³ *Silver and Others v the United Kingdom* App no 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [85]–[90]; *Malone v the United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [67]–[68]; *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012) [57]–[59]

The ECtHR stated that there are two requirements which are needed to find a restriction justifiable. “Firstly, the law must be adequately accessible and [...] also, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able [...] to foresee the consequences which a given action may entail. Those consequences need to be foreseeable with absolute certainty”.²⁴ Otherwise, it can cause judicial arbitrary and judges’ interpretation of the regulations might be too broad.

In case of the ODPa, Respondent submits that it is a precisely formulated Act for the following reasons:

a) The ODPa is sufficiently precise

The ODPa is sufficiently precise as Peaps could foresee the limits and consequences of sharing Kola’s nude image on Scoops. Respondent submits that laws need not be absolutely precise to “keep pace with changing circumstances”.²⁵ Therefore, given the continuous development of online data, the ODPa had to be drafted in broader terms.

The Act properly defines its aim, concept, exceptions and penalty. Every provision is strictly regulated, therefore the norm guarantees its accurate adaptation.

²⁴*The Sunday Times v the United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]

²⁵ *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) [40]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) [71], [75]

b) Adequate safeguards

The “law must indicate with sufficient clarity the scope of any [...] discretion and the manner of its exercise”.²⁶ Respondent submits that prosecution of Peaps under the ODPa had adequate safeguards.

The right to appeal is an adequate safeguard.²⁷ Turtonia’s jury system allows appeals from trial courts to be reconsidered by the Supreme Court. Its supervision therefore grants legal remedy against the judgement of a trial court.²⁸

c) Prosecution of Peaps had a legal basis

Peaps’ prosecution was based on the ODPa, which is a properly legislated Act in Turtonia, therefore Respondent submits that prosecutions may be based on it.

2. The ODPa has legitimate aim

A fundamental right may only be restricted for rightful purposes. In case of the ODPa, this purpose is to protect people from being victim of non-consensual sharing of their nude image. Respondent emphasizes the existence of this legitimate aim.

²⁶ *Malone v the United Kingdom* App no 8691/79 (ECtHR, 2 August 1984) [68]; *Liu v Russia* (No 2) App no 29157/09 (ECtHR, 26 July 2011) [88]; *Silver and Others v the United Kingdom* App nos 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75, 7136/75 (ECtHR, 25 March 1983) [90]

²⁷ *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1978) [56]; *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010) [72]; *Gürtekin and Others v Cyprus* App nos 60441/13, 68206/13 and 68667/13 (ECtHR, 11 March 2014) [28]

²⁸ Compromis, para 2.2

3. The prosecution under ODPa was necessary

To decide whether the restriction is necessary in a democratic society, the existence of a “pressing social need” is essential, for which it is not enough if the restriction is “useful”, “reasonable” or “desirable”.²⁹ Here the balance between the right to FoE and the right to respect for private life must be examined, for which the ECtHR has laid down the following five criteria:³⁰

Contribution to the public debate of general interest

Peaps said during his prosecution that he wanted to illustrate the text of his post with a picture.³¹ The purpose of an illustration is to increase the credibility of the information in text,³² but in this case the only purpose of posting the picture was to increase the embarrassment of Kola³³ as it was a photoshopped image.³⁴

How well-known the person is and the subject of the report

Respondent does not argue that Kola is a public figure as she holds a public office, therefore she might be considered as a well-known person. The subject of the report, however,

²⁹ IACtHR ‘Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 of the American Convention on Human Rights)’ (13 November 1985), Advisory Opinion OC-5/85, Series A No 5 [46]

³⁰ *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [89]

³¹ *Compromis*, para 12.2

³² *Fontevécchia and D’Amico v Argentina* IACtHR (2011) Series C No 238 [68]

³³ *Mosley v the United Kingdom* App no 48009/08 (ECtHR, 10 May 2011) [115], [130]

³⁴ *Compromis*, para 12.2

regarding the image does not have any connection with her public duties, as it was very intimate.

Prior conduct of the person concerned

Kola is known for being a champion of immigration who believes immigrants can contribute meaningfully to the Turtonian society.³⁵ However, her work has never raised doubts before, and no factual basis can be stated that would verify the need of showing her intimate parts to make a statement of her activities.

Method of obtaining the information and its veracity

Information concerning the private life of a politician can be divided into two groups: value judgements and statements of facts. This division is applicable to pictures as well.³⁶ As it required a legal proceeding to find that the picture had been photoshopped³⁷ and it had been used as an illustration, not as evidence verifying the information stated,³⁸ it must be judged as a statement of facts, thus verification is required.³⁹

If the Honourable Court decides that the picture complies with the criteria above,⁴⁰ it must be considered that by sharing this image, Peaps exercises a “public watchdog” of similar to the

³⁵ Compromis, para 4.1

³⁶ *News Verlags GmbH & Co. KG v Austria* App no 31457/96 (ECtHR, 11 January 2000)

³⁷ Compromis, para 12.3

³⁸ Compromis, para 12.2

³⁹ *Kimel v Argentina*, IACtHR (2008) Series C No 177 [79]

⁴⁰ Arguments, 1. 3

press, as it draws attention to matters of public interest.⁴¹ In this situation Applicant should have made reasonable efforts to verify the truthfulness of the statements as it would not have required any particular efforts.⁴²

Peaps maintained that he did a quick online search and had found the picture published on Turton Power's website.⁴³ The content of the website was publicly accessible, and as a member of Turton Power, there was a higher chance that he saw the content of the website, and also he could reach the content regardless of his membership.⁴⁴ In this situation, he did not act in good faith,⁴⁵ as with due diligence should have known that the picture was fake.

His bad faith is proven by that he deliberately chose a screen name that would urge other users to share his post and believe its content. He also said that he decided to use the image to "illustrate the relationship for my Scoops friends", but "XYZ News12" account had no friends.⁴⁶

The display of the concerned image infringes Kola's right to privacy as it arouses her embarrassment.⁴⁷

⁴¹ *Animal Defenders International v the United Kingdom* App no 48876/08 (ECtHR, 22 April 2013) [103]

⁴² *Madžlis Islamske Zajednice Brcko and Others v Bosnia and Herzegovina* App no 17224/11 (ECtHR, 27 June 2017) [115]

⁴³ Compromis, para 12.2

⁴⁴ Clarifications, para 6

⁴⁵ *Fressoz and Roire v France* App no 29183/95 (ECtHR, 21 January 1999) [54]

⁴⁶ Compromis, para 8.3

⁴⁷ Compromis, 9.2

Content, form and consequences of the publication

The degree of infringement depends on whether the content is available for a smaller amount of people or nationwide.⁴⁸ The ECtHR established that the nationwide publication of content can infringe a person's privacy to a greater degree than the previous publication of the same content in a media that has more limited circulation.⁴⁹

By publishing the image of Kola, Peaps knowingly influenced a mass of people, as when Scoops removed the post, it has already had 21,000 shares and 145,000 views. It also resulted in protests, as people gathered outside of Kola's office demanding her resignation. Although small groups of protestors appeared from time to time, the protests on May 4 and 5 were by far the largest, with 100 participants. Moreover, their slogans were clearly related to Peaps' post.⁵⁰

Respondent submits that Peaps' disclosure of the image was clearly harmful to the dignity of Kola, as the exercise of FoE did not justify the deliberate use of knowingly false expression which could lead to civil unrest and hatred,⁵¹ moreover clearly impugned the respectability of the minister.

Further, in this specific picture, she was naked and in a state of reduced self-control,⁵² which is the core of the right to privacy and as both privacy and FoE deserve equal appreciation.⁵³ Kola has been subjected to harassment and abuse online.⁵⁴ In the wake of the post, Kola

⁴⁸ *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) [94]

⁴⁹ *Karhuvaara and Iltalehti v Finland* App no 53678/00 (ECtHR, 16 November 2004) [47]

⁵⁰ *Compromis*, paras 9.2, 9.4

⁵¹ *Compromis*, paras 9.4, 9.5

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

⁵³ Council of Europe Parliamentary Assembly Resolution 1165 'Right to Privacy' (1998) [11]

⁵⁴ *Compromis*, para 4.1

received harassment and death threats both online and offline, including threatening phone calls at her office.

Between the time of the legal complaint's submission and the post's removal, 50 hours elapsed.⁵⁵ In the *Ceylan v Turkey* a concurring opinion stated that "to support a finding of clear and present danger [...] it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that".⁵⁶ As mentioned above, serious violence was expected.⁵⁷

The ODPa fulfills the requirement of proportionality

The Court sentenced Peaps to two years' imprisonment under the ODPa. Respondent submits that in view of the consequences of publishing the image, the judgement of the Court was proportionate.⁵⁸ The consequences, which make the penalty proportionate, are the following:

Peaps' post not only caused protests and triggered the resignation of Kola, but it also resulted in the death of two Aquarian immigrants.⁵⁹

The Court determined that the image was photoshopped, however, users of Scoops still could have believed it was real as not everyone has the ability to identify false images.

⁵⁵ Compromis, para 9.2

⁵⁶ *Ceylan v Turkey* App no 23556/94 (ECtHR, 8 July 1999) Concurring opinion of Judge Bonello

⁵⁷ Compromis, para 4.1

⁵⁸ Hayden Smith 'People who send revenge porn to victims' family to face toughest sentence' (*The Independent*, 29 March 2017) [12] <<http://www.independent.co.uk/news/uk/crime/revenge-porn-sentence-jail-time-family-friends-a7656621.html>> accessed: 22 November 2017

⁵⁹ Compromis, paras 9.5, 9.6

Also, Peaps was not only aware of the fact that he disclosed a false picture, but deliberately violated Scoops' ToS that specifically stipulates that no harmful and malicious content such as non-consensual sharing of intimate images is allowed, which he had agreed to.⁶⁰

Further, Peaps created a Scoops account with the screen name "XYZ News12", although, he has no affiliation with XYZ News by any means.⁶¹

The ODPa states that its violation shall be punishable by a term of imprisonment not to exceed five years. Respondent declares that the term of Peaps' imprisonment did not even reach half of the impossible sentence, and for the three ruined lives, acting in bad faith and the deliberate violation of ToS, his two-year imprisonment is proportionate.⁶²

Respondent submits that for the aforementioned reasons, Peaps' prosecution was necessary.

2. TURTONIA'S PROSECUTION OF SCOOPS UNDER THE ODPa DOES NOT VIOLATE ITS RIGHT TO FREEDOM OF EXPRESSION

Scoops is a social media platform⁶³ storing information provided by its users, thus is qualified as a hosting service provider⁶⁴ that acts as an intermediary.⁶⁵ As the ECtHR pointed out in

⁶⁰ Compromis, para 9.2

⁶¹ Compromis, para 7.1

⁶² 'Tougher penalties for revenge porn offenders who attempt to magnify victim's humiliation' (*ITV*, 30 March 2017) [7] <<http://www.itv.com/news/2017-03-30/tougher-penalties-for-revenge-porn-offenders-who-attempt-to-magnify-victims-humiliation/>> accessed: 22 November 2017;

Marc Montgomery 'Canada's cyberbullying and revenge porn law applies to adults too' (Radio Canada International, 30 April 2015) <<http://www.rcinet.ca/en/2015/04/30/canadas-cyberbullying-and-revenge-porn-law-applies-to-adults-too/>> accessed: 22 November 2017

⁶³ Compromis, para 5.1

⁶⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market OJ L 178/1, art 14 [1]

Casado Coca v Spain, FoE guarantees “everyone”, including legal persons.⁶⁶ Consequently, Scoops and its users are granted the right to FoE.

Although the right to FoE⁶⁷ is an essential foundation of a democratic society,⁶⁸ this right is not absolute. Thus, it can be limited under international law.⁶⁹ Respondent submits that although Turtonia’s prosecution of Scoops under the IA interferes with the FoE of Scoops’ and its users, it is a justified interference under Article 19(3) of the ICCPR and Article 29(2) of UDHR, since it (1) is prescribed by law, (2) pursues a legitimate aim and (3) it is necessary in a democratic society, and it is proportionate.⁷⁰

⁶⁵ Case C-360/10 *SABAM v Netlog* EU:C:2012:85 [27]-[28]; Karine Perset ‘The Economic and Social Role of Internet Intermediaries’ (2010) OECD Digital Economy Papers, No 171 9 <<http://www.oecd-ilibrary.org/docserver/download/5kmh79zszs8vb-en.pdf?expires=1511262260&id=id&accname=guest&checksum=14E1C7430197AAA4B14CCEEF9EA686C2>> accessed: 22 November 2017

⁶⁶ *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994) [35]; *Autronic AG v Switzerland*, App no 12726/87 (ECtHR, 22 May 1990) [47]

⁶⁷ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Article 19; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 19; European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) (ECHR) Article 10; African Charter on Human and Peoples’ Rights (ACHPR) (adopted 27 June 1971, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5, 21 I.L.M.58 (1982) Article 9; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 08/27/79 no 17955 (ACHR) Article 13

⁶⁸ *Von Hannover v Germany* (No 1) App no 59320/00 (ECtHR, 24 June 2004) [58]

⁶⁹ ICCPR Article 19 3; UNHRC ‘General Comment No 34: Article 19 (Freedoms of Opinions and Expression)’ (12 September 2011) UN Doc CCPR/C/GC/34 [21]

⁷⁰ *The Sunday Times v the United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [42]

1. The prosecution of Scoops was prescribed by law

This requirement implies that law must be accessible, unambiguous, drawn narrowly in order to enable individuals to foresee whether a particular action is unlawful.⁷¹ ODPa is clear, specific and narrowly drawn enough, therefore Scoops could foresee that its failure to regulate manifestly unlawful content fulfils the criterion of deliberate disclosure in Section 1. Even if the consequences were not clear enough, as a professional company, Scoops could also have sought legal advice.⁷²

2. The ODPa has legitimate aim

There is an increasing recognition that the non-consensual dissemination of illegal images, as a form of gendered hate speech that harms and silences women is a human rights issue.⁷³ Imposing liability on intermediaries like Scoops for hosting intimate images that has been shared non-consensually ensures the respect of the rights or reputations of others.⁷⁴ Especially because the growth of social media facilitates the distribution of such material,⁷⁵ the phenomenon commonly known as “revenge porn” has already become a world-wide issue.⁷⁶

⁷¹ Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1 October 1995) 1.1

⁷² *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [129]

⁷³ UN Broadband Commission for Digital Development Working Group on Broadband and Gender, ‘Cyber Violence against Women and Girls: A World-Wide Wake-Up Call’ (Report 2005)

⁷⁴ ICCPR Art 19 3 (a)

⁷⁵ Jack Simpson ‘Revenge porn: What is it and how widespread is the problem?’ (*The Independent* 2 July 2014) <<http://www.independent.co.uk/news/uk/home-news/what-is-revenge-porn-9580251.html>> accessed: 22 November 2017

⁷⁶ Mary Anne Franks, ‘Drafting An Effective “Revenge Porn” Law: A Guide for Legislators’ (Cyber Civil Rights Initiative, 22 September 2016) 1 <<https://www.cybercivilrights.org/guide-to-legislation/>> accessed: 20 November 2017

This is obviously applicable to Turtonia as well, as the ODPa was passed in response to this growing problem.⁷⁷

3. The prosecution of Scoops under the ODPa was necessary

Interference is necessary in a democratic society if it a) corresponds to a pressing social need and b) it is proportionate to the legitimate aim pursued.⁷⁸

a) *The interference corresponds to a pressing social need*

According to the ECtHR⁷⁹ and the CJEU,⁸⁰ the following factors may be considered to determine intermediary liability: i) the nature of the intermediary, ii) the nature of its user content, iii) measures taken by the intermediary.

i) *The nature of the intermediary*

Firstly, Respondent submits that Scoops is an active intermediary⁸¹ as it runs on a commercial basis,⁸² exercises a substantial degree of control over the content published on its portal⁸³ and

⁷⁷ Compromis, para 10.1

⁷⁸ *Lingens v Austria* App no 9815/828 (ECtHR, 8 July 1986) [39]-[40]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [131]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [54]; *Hertel v Switzerland* App no 59/1997/843/1049 (ECtHR, 25 August 1998) [46]; *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) [87]; *Zana v Turkey*, App no 69/1996/688/880 (ECtHR, 25 November 1997) [51]; UNHRC ‘General Comment No 34: Article 19 (Freedom of Opinions and Expression)’ (12 September 2011) UN Doc CCPR/C/GC/34 [22], [33]-[34]; *Mr Vladimir Velichkin v Belarus*, Communication No 1022/2001, UN Doc CCPR/C/85/D/1022/2001 (2005) [7.3]

⁷⁹ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013) [85], *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [142]-[143]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [69]; *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [28]

⁸⁰ Case C-236/08 *Google France, Google Inc v Louis Vuitton Malletier SA* EU:C:2010:159 [113]-[114]; Case C-324/09 *L’Oréal SA v eBay* EU:C:2011:474 [111]-[113]

obtains knowledge on whether some content is unlawful.⁸⁴ In this present case, when sharing content on Scoops, users can pay to boost their posts so that they reach more users.⁸⁵ Hence, Scoops runs on a commercial basis that imposes liability on it to regulate its content.⁸⁶

In addition, Scoops undoubtedly has a substantial degree of control over all of the content posted by its users as it has the right to remove it in accordance with its ToS.⁸⁷ Hence, similarly to the case of *Delfi AS v Estonia*,⁸⁸ the fact that Scoops did not create its content does not mean that it had no control over its user's content.

Lastly, on the basis of evidence presented at the trial, Kola's staff reported the image as "a nude image of me shared without my consent", thus the company obtained knowledge of its unlawful nature.⁸⁹ From that point, Scoops was considered as an active intermediary and should have acted promptly in response to the notification in order to avoid liability.⁹⁰ In summary, Respondent submits that a media platform is considered a "publisher" under the

⁸¹ Prof. dr. Patrick Van Eecke, Maarten Truyens 'EU study on the Legal analysis of a Single Market for the Information Society' <http://ec.europa.eu/information_society/newsroom/cf/document.cfm?action=display&doc_id=842> accessed: 23 November 2017

⁸² *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [112]-[113], [126], [144]

⁸³ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [145]

⁸⁴ Case C-236/08 *Google France, Google Inc v Louis Vuitton Malletier SA* EU:C:2010:159 [120]

⁸⁵ Compromis, para 5.1

⁸⁶ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [112]-[113], [126], [144]-[146]

⁸⁷ Compromis, para 9.2

⁸⁸ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [144]

⁸⁹ Compromis, para 13.2 1

⁹⁰ *Byrne v Deane* [1937] 1 KB 818, at 830; *Godfrey v Demon Internet Ltd* [1999] EWHC QB 240 (23rd April, 1999); *Tamiz v Google Inc* [2013] EWCA Civ 68 [13]-[14], [23]-[25], [36]

scope of the law on defamation after having been notified that defamatory content is displayed on its platform.⁹¹

ii) *The nature of its user content*

Applicant may submit that Scoops cannot have the authority to decide on the FoE of a person. However, Scoops had the obligation to prevent the publication of unlawful content according to Section 1 of the ODP. The disclosure of sexually explicit images without consent and for no legitimate purpose could cause immediate, devastating and irreversible harm,⁹² as it entailed harassment against Kola both offline and online. As the ECtHR stated that the imposition on a company of an obligation to remove from its website without delay after publication, content that is clearly unlawful even if it was a digitally manipulated, cannot be considered a disproportionate interference with its FoE.⁹³

iii) *Measures taken by the intermediary*

Even though Scoops has taken some measures (NTDS, ToS) to prevent the disclosure of non-consensual intimate images, in the present case, it failed to protect Kola's right to privacy for the following reasons:

Firstly, Kola was unable to submit the proper form as the image was not a nude picture of her but a digitally manipulated one.⁹⁴ The number of digitally manipulated images is increasing.⁹⁵

⁹¹ *Byrne v Deane* [1937] 1 KB 818, at 830; *Davison v Habeeb and Others* [2011] EWHC 3031 (QB) [47]; *Tamiz v Google* [2013] EWCA Civ 68 [27]; *Sadiq v Baycorp (NZ) Ltd.* [2008] case no CIV 2007-404-6421 [48]

⁹² Mary Anne Franks, 'Drafting An Effective "Revenge Porn" Law: A Guide for Legislators' (*Cyber Civil Rights Initiative*, 22 September 2016) 8 <<https://www.cybercivilrights.org/guide-to-legislation/>> accessed: 20 November 2017

⁹³ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [153]

⁹⁴ *Compromis*, para 12.3 3

As the most popular social media platform,⁹⁶ Scoops should have been aware of this phenomenon, but as it is seen, it did not grant any protection to Kola who therefore could not complete the form.⁹⁷

Secondly, Respondent submits that Scoops' NTDS was not capable to grant enough protection to Kola as the post was still available for 66 hours even though Scoops had been notified.

Unlike Scoops, other online intermediaries are beginning to take the threat and damage⁹⁸ that revenge porn could cause much more seriously. For example Twitter⁹⁹ offers a detailed form that users can fill out to report abuse, whilst Reddit¹⁰⁰ directs its users to contact them via email.

⁹⁵ Kashmira Gander 'The people who photoshop friends and family onto porn' (*The Independent*, 13 October 2016) <<http://www.independent.co.uk/life-style/love-sex/porn-photoshopping-4chan-family-friends-superimposed-into-sex-scenes-world-a7358706.html>> accessed: 22 November 2017

⁹⁶ Compromis, para 5.1

⁹⁷ Compromis, para 9.2

⁹⁸ 'Italy grapples with suicide of woman taunted over online sex video' (*The Guardian*, 16 September 2016)

<<https://www.theguardian.com/world/2016/sep/16/italy-grapples-with-suicide-of-woman-taunted-over-online-sex-video>> accessed: 23 November 2017; Natalie Corner 'Family of revenge porn teen who committed suicide over online blackmail beg others not to suffer in silence' (*Mirror*, 12 November 2015) <<http://www.mirror.co.uk/tv/tv-news/family-revenge-porn-teen-who-6813481>> accessed: 23 November 2017

⁹⁹ Twitter, *I'm Reporting Exposed Private Information* (2017) Twitter Help Center <https://support.twitter.com/forms/private_information> accessed: 20 November 2017

¹⁰⁰ Reddit, *What Is Involuntary Pornography and Glorification of Sexual Violence?* Reddit Help <<https://reddit.zendesk.com/hc/en-us/articles/205704725-What-is-involuntary-pornography>> accessed: 20 November 2017

b) *The interference is proportionate to the legitimate aim pursued*

The principle of proportionality implies that an interference cannot be overbroad, and it must be the least intrusive instrument amongst those that might achieve their protective function.¹⁰¹

In violation of the ODP, Scoops was sentenced to a fine equivalent to 200,000 USD.¹⁰²

Other states may impose more severe fines on intermediaries,¹⁰³ arrest¹⁰⁴ or sentence¹⁰⁵ the executives of the intermediaries to imprisonment, threaten to block¹⁰⁶ or block intermediaries.¹⁰⁷

¹⁰¹ *The Sunday Times v the United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [59]; *Barthold v Germany* App no 8734/79 (ECtHR, 25 March 1985) [59]; *Ricardo Canese v Paraguay*, IACtHR (2004) Series C No 111 [96]; *Herrera Ulloa v Costa Rica* IACtHR (2004) Series C No 107 [121]-[123]; IACtHR 'Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 of the American Convention on Human Rights)' (13 November 1985), Advisory Opinion OC-5/85, Series A No 5 [46]; UNHRC 'General Comment No 34: Article 19 (Freedom of Opinions and Expression)' (12 September 2011) UN Doc CCPR/C/GC/34 [34]; UNHRC 'General Comment No 27: Article 12 (Freedom of Movement)' (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9

¹⁰² Compromis, para 13.1 1

¹⁰³ Cara McGoogan 'Facebook hit with €1.2m fine in Spain for breaking privacy laws' (*The Telegraph*, 11 September 2017) <<http://www.telegraph.co.uk/technology/2017/09/11/facebook-hit-12m-fine-spain-breaking-privacy-laws/>> accessed 22 November 2017; Patrick Evans 'Will Germany's new law kill free speech online?' (*BBC News*, 18 September 2017) <<http://www.bbc.com/news/blogs-trending-41042266>> accessed: 18 November 2017

¹⁰⁴ Marilia Brocchetto 'Brazilian police arrest Google exec over online videos' (*CNN*, 27 September 2012) <<http://edition.cnn.com/2012/09/26/tech/brazil-google/index.html>> accessed: 22 November 2017; Jane Wakefield 'Google bosses convicted in Italy' (*BBC News*, 24 February 2010) <<http://news.bbc.co.uk/2/hi/8533695.stm>> accessed: 22 November 2017

¹⁰⁵ Bill of the Anti-Fake News Act of 2017 of the Philippines, SB No 1942 of 2017 s (3); Act on Computer Crime of Thailand, BE 2550 (2007) (Thailand) s 14

¹⁰⁶ Ed Davies 'Indonesia drops threat to block WhatsApp Messenger: official' (*Reuters*, 7 November 2017) <<https://www.reuters.com/article/us-facebook-whatsapp-indonesia-ban/indonesia-drops-threat-to-block-whatsapp-messenger-official-idUSKBN1D70KT?il=0>> accessed: 12 November 2017

¹⁰⁷ Eric Talmadge 'North Korea announces blocks on Facebook, Twitter and YouTube' (*The Guardian*, 1 April 2016) <<https://www.theguardian.com/world/2016/apr/01/north-korea-announces-blocks-on-facebook-twitter-and-youtube>> accessed 22 November 2017; Napier Lopez 'Brazil has blocked WhatsApp for the third time in a year' (*TNW*, 19 July 2016) <<https://thenextweb.com/apps/2016/07/19/brazil-blocked-whatsapp/>> accessed 22 November 2017; Bill Marczak 'Leading Bahraini ISPs are Blocking Telegram Traffic' (*Bahrain Watch*, 28 June 2016) <<https://bahrainwatch.org/blog/2016/06/28/leading-bahraini-isps-are-blocking-telegram-traffic/>> accessed 22 November 2017; Uganda: Blanket ban on social media on election day is disproportionate (*Article 19*, 18 February 2016) <<https://www.article19.org/resources.php/resource/38260/en/uganda-blanket-ban-on-social-media-on-election-day-is-disproportionate>> accessed: 22 November 2017

Additionally, under the European Union competition law, the payable fine is limited to the annual turnover of the company,¹⁰⁸ and it reflects its economic capacity.¹⁰⁹

Similarly, the ECtHR also considers the size of intermediaries in hosting content when imposing liability.¹¹⁰ In the case of *Pihl v Sweden*,¹¹¹ the website was not held liable as it was unknown to the wider public. Thus, it was unlikely that it would be widely read. However, in the case of *Delfi AS v Estonia*,¹¹² the news portal was held liable since it was one of the biggest Internet media portals of Estonia.

In this present case, Respondent submits that the fine equivalent to 200,000 USD was proportional since Scoops had an annual revenue of USD 100 million, and it is the most popular social media platform.¹¹³ Respondent states that the fine would force Scoops to prepare an online report form that is more detailed, thus it would grant more effective protection.

3. TURTONIA'S PROSECUTION OF PEAPS DOES NOT VIOLATE ITS RIGHT TO FREEDOM OF EXPRESSION UNDER THE IA

As stated above, FoE is not an absolute right and may be restricted under principles of international law. The fabricated and malicious post of Peaps resulted in a lawful prosecution

¹⁰⁸ European Commission, 'Fines for breaking EU Competition Law' (Europa.eu, November 11) 1 <http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf> accessed 22 November 2017; Commission, 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003' (2006) OJ C 210/2 [32]; Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L 1/1, art 23

¹⁰⁹ Case T-201/04 *Microsoft Corp v Commission of the European Communities* T-201/04 2007 II-03601 [1363]

¹¹⁰ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015), *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017)

¹¹¹ *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [31], [37]

¹¹² *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [117], [144]

¹¹³ Compromis 5.1

under the IA. Respondent submits that Turtonia has properly prosecuted Peaps, because it (1) was prescribed by law (2) pursued a legitimate aim and (3) the prosecution was necessary and proportionate in a democratic society.¹¹⁴

1. IA meets the requirement of “prescribed by law”

Limitations of FoE must be both materially and formally provided by the law.¹¹⁵ As it was stated by the ECtHR, regarding restrictions two requirements flow from the expression in order to be considered as “prescribed by law”, namely a) the law must have a basis in domestic law and must be adequately accessible and b) it must be sufficiently precise, consequently foreseeable.¹¹⁶

a) IA has its basis in domestic law and adequately accessible

The IA was passed in response to the distribution of fake documents, in order to safeguard the peace.¹¹⁷ With the acceptance of IA, Turtonian legislators responded to the growing political tensions and saved the integrity of democratic values.¹¹⁸ Restrictions formulated in IA were established prior to the post of Peaps, therefore, Peaps’ prosecution is unquestionably founded in domestic law.

¹¹⁴ UNGA Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2013) A/HRC/23/40 [28]

¹¹⁵ *Kimel v Argentina*, IACtHR (2008) Series C No 177 [63]

¹¹⁶ *The Sunday Times v the United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]

¹¹⁷ Compromis, para 11.1

¹¹⁸ Compromis, para 11.1

As the ECtHR stated, a citizen must have an indication that is adequate in the circumstances of the legal rules applicable in a given case.¹¹⁹ In this present case, IA is accessible as the government has formally enacted it.

b) The text of IA sufficiently precise and foreseeable

The second requirement that must meet the standards of “prescribed by law” is sufficiency and foreseeability. However, “experience shows that the absolute sufficiency is unattainable, the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague”.¹²⁰ Further, the level of precision required in domestic legislation depends on the content of the instrument, the field it is designed to cover and the number of addresses.¹²¹

In this present case, Turtonian government was sufficiently precise, as one could easily understand the meaning of “civil unrest”, “hatred” and “damage the national unity” in IA.¹²²

In conclusion, Respondent submits that Peaps’ prosecution under the IA was prescribed by law. Peaps could reasonably foresee that knowingly or recklessly communicating false information to the public would constitute an offense. Moreover, Peaps desecrated the right to anonymity when he created and published the post on his misleading “XYZ News12” account

¹¹⁹*The Sunday Times v the United Kingdom* (No 1) App no 6538/74 (ECtHR, 26 April 1979) [49]

¹²⁰*Olsson v Sweden* (No 1) App no 10465/83 (ECtHR, 24 March 1988) [61] (a); *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) [29]

¹²¹*Metropolitan Church of Bessarabia and Others v Moldova* App no 45701/99 (ECtHR, 13 December 2001) [109]

¹²² Compromis, para 11.1

on Scoops, without any affiliation to the popular and well-respected news network, XYZ News.¹²³

2. IA pursues a legitimate aim

Restrictions may be justified in the interests of the protection of public order and social benefit.¹²⁴ In accordance with their domestic and international legal obligations and duties, State actors should take care to ensure that they disseminate reliable and trustworthy information, including the matters of public interest, such as security.¹²⁵

In this present case, True Religion, a religious extremist group, is highly regarded as a terrorist organization.¹²⁶ Considering the history of political scandals and civil unrest in Turtonia, any information that relates to a terrorist group has the possibility to terrify the society via the media. Furthermore, Peaps used the media to destroy the credibility of Kola and create a hysteria against the Aquarian immigrants with the intent to incite civil unrest.

Therefore, Respondent emphasizes that the prosecution of Peaps pursues the legitimate aim of protecting public order, including the social benefit of citizens.

¹²³ Compromis, paras 6-8

¹²⁴ ICCPR Article 19 (3b)

¹²⁵ Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017) FOM.GAL/3/17 [2] (d)

¹²⁶ Compromis, para 3.2

3. IA is necessary in a democratic society

Interference is necessary in a democratic society if it a) corresponds to a pressing social need and b) the restrictions are proportional.

a) IA corresponds with the pressing social need

Necessity must meet the requirement of pressing social need.¹²⁷ The practice of ECtHR let the margin of appreciation as State authorities' responsibility, because they are better at appraising the pressing social need and gauging the necessity of a limitation on fundamental rights.¹²⁸

The revolution of information has transformed the landscape of journalism. The raising questions are who is considered a journalist and what is journalism in our age when all citizens can publish freely across different platforms of communications.¹²⁹ As it stated in the UN General Comment No 34, "anyone, who engage in forms of self-publication (...) on the Internet or elsewhere, is part of the wide range of actors of journalism."¹³⁰ Moreover, following the IACtHR judgement, "the profession of journalism – the thing journalists do – involves, precisely, the seeking, receiving and imparting of information (...) consequently

¹²⁷*Rubins v Latvia* App no 79040/12 (ECtHR, 1 June 2015) [76]; *Karttunen v Finland* App no 1685/10 (ECtHR, 10 May 2011) [19]; *Observer and Guardian v the United Kingdom* App no 13585/88 (ECtHR, 26 November 1991) [59]; *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [39]

¹²⁸*S. and Marper v the United Kingdom* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) [102]; *Chassagnou and Others v France* App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999) [113]

¹²⁹ Aidan White, 'A new vision of values, accountability and mission for journalism' in: Tarlach McGonagle and Yvonne Donders (eds), *The United Nations and Freedom of Expression and Information* (Cambridge University Press, 2015) 350

¹³⁰ UNHRC 'General Comment No 34: Article 19 (Freedom of Opinions and Expression)' (12 September 2011) UN Doc CCPR/C/GC/34 [44]

requires a person to engage in activities that define or embrace the FoE which the Convention guarantees.”¹³¹

Another major contemporary challenge is the growing prevalence of disinformation (“fake news”), which could pose a real harm to the modern trustworthy media and the core values of a democratic society. According to the adopted joint declaration, the general prohibitions on the dissemination of information are incompatible with international standards for restrictions on freedom of expression and should be abolished.¹³²

Peaps, a Turton Power member utilized the immigrant influx and the threat of terrorist group, True Religion, to create fake news regarding Kola. The content of the post is fictitious and untrue, the negligent author even misspelled the name of the terrorist group leader,¹³³ who had been responsible for the death of twelve people in the Aquarian terror attack.¹³⁴

Respondent submits that the situation in Turtonia meets the necessity requirement since the social unrest, hatred and violence pose a threat to the citizens’ health.¹³⁵ Further, there is a connection between the post of Peaps and the civil unrest of Turtonian citizens. Peaps used lurid, seductive language in his post with a tasteless and manipulated image, which led the people to the streets. In addition, the words of the post were displayed on the signs during the largest demonstration against Kola. The upset civilians took revenge on two innocent

¹³¹IACtHR ‘Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 of the American Convention on Human Rights)’ (13 November 1985) Advisory Opinion OC-5/85, Series A No 5 [72]

¹³² Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017) FOM.GAL/3/17 para 2 (a)

¹³³ Compromis, paras 3.2 and 8.3

¹³⁴ Compromis, para 3.1; Clarifications, para 5

¹³⁵ Compromis, para 9.5

immigrants that led to a tragedy.¹³⁶ Hence, the restriction should be considered a response to the pressing social need to safeguard public safety.

b) The restriction was proportionate

Respondent submits that Peaps' prosecution under the IA was proportionate. The requirement of proportionality means that legislator could not go further than necessary to achieve the protective function,¹³⁷ and must have a fair balance between the general interest of the community and the interest of individuals.¹³⁸ Furthermore, civil law rules on liability for false and defamatory statements are legitimate only if defendants are given a full opportunity and fail to prove the truth of those statements, and also benefit from other defences.¹³⁹

The fine imposed on Peaps under IA was proportionate. The 100,000 USD fine that was sentenced on Peaps is remarkably lower in comparison to the maximum penalty given in Section 1(b) of the IA. The post went viral on Scoops, the most popular social media platform in Turtonia,¹⁴⁰ reaching a large amount of people. Considering those facts, smaller amount of fine would not have been enough to prevent the future abusers.

Respondent submits that the restrictions respond to a pressing social need and Peaps' post is related to the violent events breaking out after its disclosure. Therefore, the restrictions were necessary and proportionate.

¹³⁶ Compromis, para 9.5

¹³⁷ UNHRC 'General Comment No 34: Article 19 (Freedom of Opinions and Expression)' (12 September 2011) UN Doc CCPR/C/GC/34 [34]

¹³⁸ *Özgür Gündem v Turkey* App no 23144/93 (ECtHR, 16 March 2000) [43]

¹³⁹ Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017) FOM.GAL/3/17 [2] (b)

¹⁴⁰ Compromis, para 5.1

4. TURTONIA’S PROSECUTION OF SCOOPS UNDER THE IA DOES NOT VIOLATE ITS RIGHT TO FREEDOM OF EXPRESSION

Prosecution of Scoops under the IA interferes with Scoops’ and its users FoE, however, it is a justified interference, as it passes the three-part cumulative test.

1. Interference is prescribed by law

Turtonia’s prosecution of Scoops under the IA was prescribed by law since the provisions of the IA are accessible, sufficiently precise and foreseeable.¹⁴¹

Firstly, the prosecution is based on the IA that is a national legal act passed by the Turton government.¹⁴² As the ECtHR has pointed out in several cases, such prosecution is regarded as „prescribed by law”.¹⁴³

Secondly, Respondent acknowledges that the IA uses vague terms such as “information knows to be false”, “public hatred” or “expeditiously remove”.¹⁴⁴ However, law must be able to keep pace with changing circumstances¹⁴⁵ therefore many laws are necessarily couched in

¹⁴¹ UNHRC ‘General Comment No 34: Article 19 (Freedom of Opinions and Expression)’ (12 September 2011) UN Doc CCPR/C/GC/34 [25]; *The Sunday Times v the United Kingdom* App no 6538/74 (ECtHR, 26 April 1979)

¹⁴² Compromis, para 11.1

¹⁴³ *Zana v Turkey*, App no 69/1996/688/880 (ECtHR, 25 November 1997) [47]; *Karataş v Turkey* App no 23168/94 (ECtHR, 8 July 1999) [39]-[40]; *Robert W. Gauthier v Canada*, Communication no 633/1995 UN Doc CCPR/C/65/D/633/1995 (1999) [13.5]

¹⁴⁴ Compromis, para 11.2 1

¹⁴⁵ *RTBF v Belgium* App no 50084/06 (ECtHR, 29 March 2011) [103]; *Feldek v Slovakia* App no 29032/95 (ECtHR, 12 July 2001) [56]

term that are vague.¹⁴⁶ To underline this statement, Respondent submits that very similar expressions are used in other Acts all around the world.¹⁴⁷ In addition, by carrying on a professional activity, it can be expected to take special care in assessing the risk of unlawful content that such activity entails.¹⁴⁸ Scoops as the most popular social media platform had a profit of USD 100 million last year.¹⁴⁹ Thus, Scoops should have been familiar with the legislation and case-law, and could also have sought legal advice.¹⁵⁰

Therefore, the provisions of the IA unambiguously establish that FoE may be limited and have been prepared with sufficient precision.¹⁵¹ Hence, it was foreseeable¹⁵² that a media publisher running a social media platform for an economic purpose could be held liable under domestic law for storing clearly unlawful content.¹⁵³

¹⁴⁶*Lindon, Otchakovsky-Laurens and July v France* App nos 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; *Centro Europa 7 S.R.L. and Di Stefano v Italy* App no 38433/09 (ECtHR, June 2012) [141]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [121]

¹⁴⁷ Counter-Terrorism Act 2008 of the United Kingdom part 1 s 6 (2) (b); Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1, art 14. 1 (a); Digital Millennium Copyright Act of 1998 of the United States [512] (c) (1) (A) (iii); Act on Computer Crime of Thailand, BE 2550 (2007) s 14

¹⁴⁸ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [122]; *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 and 36448/02 (ECtHR, 22 October 2007) [41]; *Cantoni v France* App no 45/1995/551/637 (ECtHR, 15 November 1996) [35]; *Chauvy and Others v France* App no 64915/01 (ECtHR, 29 June 2004) [43]-[45]

¹⁴⁹ Compromis, para 5.1

¹⁵⁰ *Delfi AS v Estonia* App no 64569/09 (ECtHR 16 June 2015) [129]

¹⁵¹ *Leonardus Johannes Maria de Groot v the Netherlands*, Communication No 578/1994, UN Doc CCPR/C/54/D/578/1994 (1995)

¹⁵² *Verein gegen Tierfabriken Schweiz (VgT) v Switzerland* App no 24699/94 (ECtHR, 28 June 2001) [52]; *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000) [50]; *Gawęda v Poland* App no 26229/95 (ECtHR, 14 March 2002) [22]; *Maestri v Italy* App no 39748/98 (ECtHR, 17 February 2004) [20]

¹⁵³ *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [51]

2. Interference pursues a legitimate aim

Respondent submits that the interference pursues a legitimate aim, namely the respect of the rights or reputations of others.¹⁵⁴

3. Interference is necessary in a democratic society

Interference is necessary in a democratic society if it a) corresponds to a pressing social need and b) it is proportionate to the legitimate aim pursued.¹⁵⁵

a) The interference corresponds to a pressing social need

As highlighted above¹⁵⁶ the elements that impose liability on intermediaries, Respondent submits that Scoops is an active intermediary since i) runs on a commercial basis,¹⁵⁷ ii) exercises a substantial degree of control over its content¹⁵⁸ and iii) obtains knowledge of its manifestly unlawful nature.¹⁵⁹

¹⁵⁴ ICCPR Article 19 3 (a)

¹⁵⁵ *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986) [39]-[40]; *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [131], *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [54], *Hertel v Switzerland* App no 59/1997/843/1049 (ECtHR, 25 August 1998) [46]; *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) [87]; *Zana v Turkey* App no 18954/91 (ECtHR, 25 November 1997) [51]; *Mr. Vladimir Velichkin v Belarus*, Communication No 1022/2001, UN Doc CCPR/C/85/D/1022/2001 (2005) [7.3]; UNHRC ‘General Comment No 34: Article 19 (Freedom of Opinions and Expression)’ (12 September 2011) UN Doc CCPR/C/GC/34 [22], [33]-[34]

¹⁵⁶ Arguments, 2. 3

¹⁵⁷ Arguments, 2. 3

¹⁵⁸ Arguments, 2. 3

¹⁵⁹ Arguments, 2. 3

i) The nature of its user content

Respondent submits that the post must be considered defamatory as it damaged Kola's reputation and the author did not take reasonable steps to ensure the accuracy of the publication.¹⁶⁰ Moreover, the fabricated content¹⁶¹ amounted to fake news since it was designed solely to deceive, harm and influence politics. In conclusion, the establishment of its unlawful nature did not require any linguistic or legal analysis since the remarks were on its face manifestly unlawful.¹⁶²

ii) Measures taken by the intermediary

In accordance with the EEC Directive,¹⁶³ the IA specifies¹⁶⁴ that once an intermediary becomes aware of the infringing material and removes it expeditiously, it cannot be held liable. After obtaining knowledge on the illegal content, Scoops has taken it down, however the action was taken only 50 hours after the submission of the complaint.¹⁶⁵

¹⁶⁰Media Legal Defence Initiative, International Press Institute, 'Freedom of Expression, Media Law and Defamation' (February 2015) [21-22]
<<http://www.mediadefence.org/sites/default/files/resources/files/MLDI.IPI%20defamation%20manual.English.pdf>> accessed 22 November 2017; Council of Europe, 'Resolution 1577 Towards decriminalisation of defamation'(2007) [7]

¹⁶¹Claire Wardle 'Fake news. It's complicated.' (*First Draft*, February 16, 2017)
<<https://firstdraftnews.com/fake-news-complicated/>> accessed: 10 November 2017

¹⁶² *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [117]

¹⁶³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1, Art 14. 1. (a)

¹⁶⁴ Compromis, para 11.2

¹⁶⁵ Compromis, para 9.3

In other cases,¹⁶⁶ after having notified, the unlawful content was removed sooner. Further, in the case of *Pihl v Sweden*¹⁶⁷ where the infringing comment was taken down the day after the request had been submitted, the ECtHR¹⁶⁸ stated that “had the comment been more severe nature, the association could have been found responsible for not removing it sooner”. In another case, it was stated that given the gravity of the remarks, “reasonable time” would equate to “immediately.”¹⁶⁹

The manifestly illegal content having 145,000 views in a small country as Turtonia caused harassment, death threats, forceful demonstrations and led to a racist attack.¹⁷⁰ In addition, in light of the above-mentioned case-law and some regulations¹⁷¹ require removal within 24 hours, Respondent submits that the removal 50 hours after the submission cannot be considered expeditious removal.

Spreading of “fake news” on social media is a worldwide phenomenon¹⁷² that could harm individual reputations,¹⁷³ roil politics¹⁷⁴ and consumers are also likely to believe false stories that do not fit their ideological preferences.¹⁷⁵

¹⁶⁶ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [18]-[19]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) [15]; *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [37]

¹⁶⁷ *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [37]

¹⁶⁸ *Pihl v Sweden* App no 74742/14 (ECtHR, 9 March 2017) [36]

¹⁶⁹ *Pritchard v Van Nes* [2016] BCSC 686 [109]

¹⁷⁰ Compromis, paras 1.1, 9.2, 9.4, 9.5

¹⁷¹ Act to Improve Enforcement of the Law in Social Networks of Germany (entered into force: on 1 October 2017) Section 3 (2) 2; Commission, ‘Code of conduct on countering illegal hate speech online’ (May 2016) 2 See also: European Commission, ‘Security Union: Commission steps up efforts to tackle illegal content online’ (Europa.eu, 28 September 2017) <http://europa.eu/rapid/press-release_IP-17-3493_en.htm> accessed: 22 November 2017

¹⁷² Craig Silverman ‘This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook’ (*BuzzFeed News*, 16 November 2016) <https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.wgJmd76RDL#.hcNL4GEIWg> accessed: 22 November 2017; Kate Connolly, Angeliqe Chrisafis, Poppy McPherson, Stephanie Kirchgaessner, Benjamin Haas, Dominic Phillips, Elle Hunt, Michael Safi ‘Fake news: an insidious trend that’s fast becoming a global

Recently, intermediaries like Facebook and Google have been taking steps to fight against fake news.¹⁷⁶ For example, Facebook is working with fact-checking organizations¹⁷⁷ and the flag false articles as “disputed by third party fact-checkers”, show fewer potentially false articles in users’ news feeds, and help users avoid accidentally sharing false articles by notifying them that a story is “disputed by third parties” before they share it.¹⁷⁸ Further, on Twitter, the blue verified badge lets people know that an account of public interest is authentic.¹⁷⁹

Even if the distribution of false information was a well-known phenomenon in Turtonia,¹⁸⁰ Scoops did nothing to root it out on its platform. Additionally, as the Scoops CEO

problem’ (*The Guardian*, 2 December 2016) <<https://www.theguardian.com/media/2016/dec/02/fake-news-facebook-us-election-around-the-world>> accessed: 22 November 2017

¹⁷³ Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda (The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 3 March 2017) FOM.GAL/3/17; Lida Citroën ‘Sharing Fake News Can Hurt Your Reputation’ (*Entrepreneur*, 17 March 2017) <<https://www.entrepreneur.com/article/290087>> accessed: 22 November 2017

¹⁷⁴Krithika Varagur ‘Fake News Roils Indonesian Politics’ (*Voanews*, 16 December 2016) <<https://www.voanews.com/a/fake-news-roils-indonesian-politics/3638752.html>> accessed: 22 November 2017; Alex Murray ‘US election: Fake news becomes the news’ (*BBC*, 7 November 2016) <<http://www.bbc.com/news/world-us-canada-37896753>> accessed: 22 November 2017; Compromis, para 11.1

¹⁷⁵Craig Silverman, Jeremy Singer-Vine ‘Most Americans Who See Fake News Believe It, New Survey Says’ (*BuzzFeed News*, 7 December 2016) <https://www.buzzfeed.com/craigsilverman/fake-news-survey?utm_term=.uo4NA1W7kY#.xd5WMGBmDR> accessed: 22 November 2017

¹⁷⁶Nick Wingfield, Mike Isaac, Katie Benner ‘Google and Facebook Take Aim at Fake News Sites’ (*The New York Times*, 14 November 2016) <<https://www.nytimes.com/2016/11/15/technology/google-will-ban-websites-that-host-fake-news-from-using-its-ad-service.html>> accessed: 22 November 2017; Monroe E. Price: Free Expression, Globalism and the New Strategic Communication, (Cambridge University Press 2015) [35]

¹⁷⁷Laura Hazard Owen ‘Clamping down on viral fake news, Facebook partners with sites like Snopes and ads new user reporting’ (*Niemanlab*, 15 December 2016) <<http://www.niemanlab.org/2016/12/clamping-down-on-viral-fake-news-facebook-partners-with-sites-like-snopes-and-adds-new-user-reporting/>> accessed: 22 November 2017

¹⁷⁸Hunt Allcott, Matthew Gentzkow ‘Social Media and Fake News in the 2016 Election’ (2017) Volume 31, Number 2, Journal of Economic Perspectives 211, 233 <<https://web.stanford.edu/~gentzkow/research/fakenews.pdf>> accessed: 22 November 2017

¹⁷⁹ ‘About verified accounts’ (Twitter) <<https://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/119135-about-verified-accounts>> accessed: 22 November 2017

¹⁸⁰ Compromis, paras 5.1-5.3, 11.1

admitted,¹⁸¹ the “influencer score” created an incentive for posters to share, among others, the latest gossips.

In summary, Respondent states that Scoops knowingly communicated false information as even after obtaining knowledge of the manifestly unlawful content, it failed to remove false information expeditiously.

b) The interference is proportionate to the legitimate aim pursued

As stated above,¹⁸² the interference must be the least intrusive instrument among those that might achieve their protective function.¹⁸³

In violation of the IA, Scoops was sentenced to a fine equivalent of 100,000 USD.¹⁸⁴

Respondent submits that the fine was proportionate for the following reasons:

- a) The fine reflected the size of the company¹⁸⁵ and its economic capacity,¹⁸⁶
- b) The amount of the fine would not affect Scoops operation radically,¹⁸⁷

¹⁸¹ Compromis, para 5.3

¹⁸² Arguments, 2. 3

¹⁸³ UNHRC ‘General Comment No 34: Article 19 (Freedoms of Opinions and Expression)’ (12 September 2011) UN Doc CCPR/C/GC/34 [34]; UNHRC ‘General Comment No 27: Article 12 (Freedom of Movement)’ (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 [14]; *Ricardo Canese v Paraguay*, IACtHR (2004) Series C No 111 [96]; *Herrera Ulloa v Costa Rica* (IACtHR 2 July, 2004) Series C no 107 [121]-[123]; IACtHR ‘Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)’ (13 November 1985) Advisory Opinion OC-5/85, Series A No 5 [46]; *The Sunday Times v the United Kingdom* App no 6538/74 (ECtHR, 26 April 1979) [59]; *Barthold v. Germany* App no 8734/79 (ECtHR, 25 March 1985) [59]

¹⁸⁴ Compromis, para 13.1 2

¹⁸⁵ Arguments, 2.3

¹⁸⁶ Compromis, para 5.1

¹⁸⁷ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [161]

c) The Court took the international practice¹⁸⁸ into consideration, moreover, it applied less severe consequences.¹⁸⁹

¹⁸⁸ Arguments, 2.3

¹⁸⁹ Arguments, 2.3

IX. PRAYER FOR RELIEF

For the foregoing reasons, the Federal Republic of Turtonia respectfully requests this Honourable Court to adjudge and declare the following:

1. Turtonia's prosecution against Peaps under the IA did not violate his right to Freedom of Expression according to Article 19 of ICCPR.
2. Turtonia's prosecution against Scoops under the IA did not violate its' right to Freedom of Expression according to Article 19 of ICCPR.
3. Turtonia's prosecution against Peaps under the ODPA did not violate his right to Freedom of Expression according to Article 19 of ICCPR.
4. Turtonia's prosecution against Scoops under the ODPA did not violate its' right to Freedom of Expression according to Article 19 of ICCPR.

On behalf of Federal Republic of Turtonia,

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Agents for the Respondent