

**Amicus Curiae Brief in  
Case No. 202/Pid.Sus/2023/PN Jkt.Tim**

**I. Interest Statement of the International Commission of Jurists as an *Amicus***

1. The International Commission of Jurists (**ICJ**), composed of 60 eminent judges and lawyers from all regions of the world, works to advance respect for the rule of law and the promotion and protection of human rights globally. The ICJ holds consultative status at the Council of Europe, the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization and the African Union. The ICJ also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union. Established in 1952, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political, and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.
2. To achieve its aims, the ICJ conducts research and advocacy at the national, regional and global levels through qualitative legal analysis and collaboration with domestic justice sector actors. The ICJ respectfully submits its legal analysis in its capacity as an *Amicus Curiae* (friend of the Court) to the East Jakarta District Court in Case No. 202/Pid.Sus/2023/PN Jkt.Tim.
3. The ICJ provides submissions to the East Jakarta District Court in the present case of charges against Haris Azhar (**Defendant**). The Defendant has been charged with criminal defamation under article 27(3) of the Law No. 11 of 2008 on Electronic Information and Transactions (**ITE Law**) and article 310(1) of the Indonesian Criminal Code (**KUHP**); and spreading false statements which “may cause chaos within society” under article 14(2) of Law No. 1 of 1946 on Criminal Law Regulations (**Law 1/1946**). The complaint was filed by the Indonesian Coordinating Minister for Maritime and Investment Affairs, Luhut Binsar Pandjaitan. The complaint concerns a YouTube video where the Defendant discussed research results from a report by nine civil society organizations, regarding allegations of the involvement of Indonesian army officials and retirees in plans to exploit gold in the Blok Wabu area in Intan Jaya, Papua. The video specifically drew attention to allegations relating to Luhut Binsar Pandjaitan, scrutinizing potential conflicts of interest due to his position as the Coordinating Minister for Maritime and Investment Affairs.
4. The objective of the ICJ in this brief is to assist the Court by providing information and analysis with a view to clarifying the nature and scope of Indonesia’s international legal obligations relating to the right to of freedom of expression and information, protected under international law. The ICJ respectfully requests that the East Jakarta District Court interpret Indonesia’s laws in line with Indonesia’s obligations under international human rights law.

**II. Indonesia’s International Human Rights Obligations**

5. Under the general principle of law of *pacta sunt servanda* and general principles governing the law of treaties, Indonesia is bound to apply in good faith all treaties to which it is a party.<sup>1</sup> Furthermore, Indonesia may not rely on provisions of its internal law to justify a failure to meet a treaty obligation.<sup>2</sup>
6. Indonesia acceded to the International Covenant on Civil and Political Rights (**ICCPR**) on

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<sup>1</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, article 26 (“VCLT”), available at: <https://www.refworld.org/docid/3ae6b3a10.html>; UN Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 3, available at: <https://www.refworld.org/docid/478b26ae2.html> (“CCPR/C/21/Rev.1/Add.13”).

<sup>2</sup> VCLT, articles 26 and 27; CCPR/C/21/Rev.1/Add.13, para. 4.

23 February 2006. States that are parties to the ICCPR have an obligation to respect and ensure the full range of human rights contained in the articles of the Covenant. These include, among others, the right to freedom of expression and information (article 19) and the right to privacy (article 17).

7. The United Nations (**UN**) Human Rights Committee is the supervisory body composed of independent experts established by the ICCPR to review periodic reports of States to assess compliance with the ICCPR and to provide the authoritative interpretation concerning the scope and content of specific rights and provisions of the ICCPR. These interpretations are contained in reviews of State Parties' Periodic Reports, jurisprudence on individual communications, and General Comments on specific rights provisions.<sup>3</sup>
8. The obligation to ensure that the rights contained in the ICCPR are guaranteed and protected is not limited to the legislative and executive branches of government, but must also effectively be discharged by Indonesia's judiciary. In its authoritative General Comment No. 31 on the nature of the general legal obligations of State Parties under the ICCPR, the UN Human Rights Committee affirmed that:

The obligations of the Covenant in general ... are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party.<sup>4</sup>

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.<sup>5</sup>

These principles were reaffirmed by the UN Human Rights Committee with regard to State obligations to guarantee the right to freedom of expression and information under article 19 of the ICCPR.<sup>6</sup>

9. One of the earliest resolutions of the UN General Assembly, adopted at its first session in 1946, declared that freedom of information, which includes freedom to impart and receive information, "is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated".<sup>7</sup> Two years later, freedom of expression was enshrined as article 19 of the Universal Declaration of Human Rights, adopted in 1948.<sup>8</sup> In 1993, all States of the world affirmed their recognition of the right in the Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights.<sup>9</sup> The UN

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<sup>3</sup> Pursuant to Article 40(4) of the ICCPR, States Parties agreed to establish the UN Human Rights Committee and grant it the power, among others, to formulate general comments as it considers appropriate. Consequently, since it was created, the UN Human Rights Committee has built up a considerable body of interpretative jurisprudence through the review of periodic reports, adjudication of individual communications, and in the form of its General Comments. It is widely accepted that, in the exercise of its judicial functions, judicial bodies should ascribe "great weight" to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. This principle has been affirmed by the International Court of Justice. See International Court of Justice, *Ahmadou Sadio Diallo Case (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, paras. 66-68, available at: <https://www.icj-cij.org/files/case-related/103/103-20101130-JUD-01-00-EN.pdf>.

<sup>4</sup> CCPR/C/21/Rev.1/Add.13, para. 4.

<sup>5</sup> CCPR/C/21/Rev.1/Add.13, para. 8.

<sup>6</sup> UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, 12 September 2011 ("CCPR/C/GC/34"), para. 7, available at: <http://www.refworld.org/docid/4ed34b562.html>.

<sup>7</sup> UN General Assembly Resolution 59(I), 14 December 1946, available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/59\(I\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59(I)).

<sup>8</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), art. 19, available at: <https://www.refworld.org/docid/3ae6b3712c.html>.

<sup>9</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23, 12 July 1993, paras. 22 and 67, available at: <https://www.refworld.org/docid/3ae6b39ec.html>.

Human Rights Council has adopted repeated resolutions since 2008 reaffirming the importance of the effective exercise of the right to freedom of opinion and expression.<sup>10</sup>

10. Most recently in 2022, the UN Human Rights Council adopted a resolution reaffirming that the right to freedom of expression and information:<sup>11</sup>

constitutes one of the essential foundations of democratic societies and for sustainable development, including the 2030 Agenda for Sustainable Development, and that it is critical to combating corruption and disinformation, strengthening democracy, the rule of law and good governance, and that the effective exercise of the right to freedom of opinion and expression is an important indicator of the level of protection of other human rights and freedoms [...]

11. Since 1999, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (**UN Special Rapporteur on freedom of expression**), together with the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, has issued annual Joint Declarations on freedom of expression, reaffirming its central role for human rights and fundamental freedoms.<sup>12</sup>

12. Indonesia's compliance with its international human rights obligations is indispensable for ensuring respect for the rule of law. In the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels adopted in 2012, Member States reaffirmed that:<sup>13</sup>

human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.

As a member of the Human Rights Council, Indonesia voted in favour of Human Rights Council Resolution 19/36 on human rights, democracy and the rule of law, which also reaffirmed the interdependent and mutually reinforcing nature of "democracy, development and **respect for all human rights**" [emphasis added].<sup>14</sup> The Resolution affirms that "democracy includes respect for [...] freedom of opinion and expression".<sup>15</sup>

### III. The Right to Freedom of Expression and Information in International Law

13. All States Parties to the ICCPR have the obligation to ensure that all people subject to their jurisdiction enjoy the rights protected by the treaty, including freedom of expression and information. Article 2 provides:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion,

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<sup>10</sup> See Human Rights Council resolutions 7/36 of 28 March 2008, 12/16 of 12 October 2009, 16/4 of 24 March 2011, 23/2 of 13 June 2013, 25/2 of 27 March 2014, 34/18 of 24 March 2017, 38/7 of 5 July 2018, 39/6 of 27 September 2018, 43/4 of 19 June 2020 and 44/12 of 16 July 2020.

<sup>11</sup> UN Human Rights Council Resolution 50/15, *Freedom of opinion and expression*, UN Doc. A/HRC/RES/50/15, 8 July 2022 ("A/HRC/RES/50/15"), available at: <https://undocs.org/A/HRC/RES/50/15>.

<sup>12</sup> UN OHCHR, "Resources: Special Rapporteur on freedom of expression and opinion", available at: <https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/resources>.

<sup>13</sup> UN General Assembly Resolution 67/1, *Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels*, UN Doc. A/RES/67/1, 24 December 2012 ("A/RES/67/1"), para 5, available at: <https://undocs.org/A/RES/67/1>.

<sup>14</sup> UN Human Rights Council Resolution 19/36, *Human rights, democracy and the rule of law*, UN Doc.

A/HRC/RES/19/36, 23 March 2012 ("A/HRC/RES/19/36"), available at: <https://undocs.org/A/HRC/RES/19/36>.

<sup>15</sup> A/HRC/RES/19/36, para. 1.

national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
14. As part of this general obligation, Indonesia has the particular obligation under the ICCPR to respect and ensure to all individuals under its jurisdiction the right to freedom of expression and information. Article 19 of the ICCPR provides:
1. Everyone shall have the right to hold opinions without interference.
  2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.
15. The UN Human Rights Committee has elaborated General Comment (No. 34) that sets out in detail the nature and scope of the right to freedom of expression and opinion and information in terms of article 19 of the ICCPR. In the General Comment, the Committee stresses that freedom of expression and opinion are "indispensable conditions" for the advancement of any person or society, as the free exercise of these rights facilitates the evolution and exchange of opinions, in turn enabling "principles of transparency and accountability" crucial for the promotion and protection of human rights.<sup>16</sup>

A. Limitations on the Right to Freedom of Expression and Information

16. While under certain narrow circumstances, a State may restrict the right to freedom of expression and information, any such restrictions must be strictly limited in accordance with ICCPR, article 19(3), which provides:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are **provided by law** and are **necessary**:

- a) For respect of the rights or reputations of others;
- b) For the protection of national security or of public order (*ordre public*), or of public health or morals. (emphasis added)

17. It is clear from the plain language of article 19 that any restrictions or limitations on the right to exercise freedom of expression must meet the conditions of legality (i.e. be "provided by law"), legitimate purpose (i.e. those listed in article 19(3)(a and b), necessity, and proportionality. In General Comment No. 34, the UN Human Rights Committee set out at greater length the operative implications of article 19(3), explaining that any such restriction on freedom of expression must meet a strict test of these four elements:<sup>17</sup>

- a. The restriction imposed must be **provided by law**, which is clear and accessible to everyone;<sup>18</sup> in particular, the law must be "formulated with sufficient precision to enable an individual to regulate his or her conduct" (emphasis added);<sup>19</sup>

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<sup>16</sup> CCPR/C/GC/34, paras. 2 - 3.

<sup>17</sup> CCPR/C/GC/34, especially paras. 21-36; See also, 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*, UN Doc. A/HRC/20/17, 4 June 2012 ("A/HRC/20/17"), paras. 64 and 81, available at: <http://www.refworld.org/docid/5008134b2.html> .

<sup>18</sup> A/HRC/20/17.

<sup>19</sup> CCPR/C/GC/34, para. 25.

- b. The restriction must be proven as **done for one of the recognized legitimate purposes** to protect the rights or reputation of others; and national security or public order, public health or morals (emphasis added);<sup>20</sup>
- c. The restriction must be proven as **necessary** for one of the recognized legitimate purposes (emphasis added); and
- d. The restriction must be proven **as the least restrictive and proportionate means** to achieve the purported aim (emphasis added).<sup>21</sup>

B. Defamation laws

18. Restrictions on freedom of expression provided under article 19(3)(a) “for the respect of rights and reputations of others” may be engaged to justify certain laws and other measures on defamation. Such measures, however, must be narrowly construed and are strictly subject to the tests of necessity and proportionality set out by the UN Human Rights Committee.
19. In this regard, the UN Human Rights Committee has assessed whether criminal defamation liability – as opposed to liability for civil defamation – is compatible with the requirements of necessity and proportionality set out in article 19. The Committee affirmed in 2005 that criminal sanctions are inappropriate in cases of defamation, stating that “the use of criminal rather than civil penalties ... constitutes a disproportionate means of protecting the reputation of others.”<sup>22</sup> The Committee, in General Comment No. 34, called on States parties to decriminalize defamation, and stressed that in any event “**imprisonment is never an appropriate penalty**” for defamation (emphasis added).<sup>23</sup>
20. The UN Special Rapporteur on freedom of expression, mandated by the UN Human Rights Council to examine and respond to questions relating to freedom of expression,<sup>24</sup> has expressed concern about the potential for criminal defamation laws to be abused, especially when issues affecting the public interest are involved.<sup>25</sup> The Special Rapporteur concluded that: “Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; **penal sanctions, in particular imprisonment, should never be applied**” (emphasis added).<sup>26</sup>
21. In its joint statement of 2 May 2023, the UN Special Rapporteur on freedom of expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information in Africa called on States to:<sup>27</sup>

Ensure that any restrictions on the right to freedom of expression comply with international human rights standards. Any restriction should be provided by law, serve one of the legitimate interests explicitly enumerated in international and

<sup>20</sup> A/HRC/20/17.

<sup>21</sup> A/HRC/20/17.

<sup>22</sup> UN Human Rights Committee, *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002 (2005), para. 3.9, available at: <https://www1.umn.edu/humanrts/undocs/1128-2002.html>.

<sup>23</sup> CCPR/C/GC/34, para. 47.

<sup>24</sup> UN Human Rights Council, *Resolution 34/18: Freedom of opinion and expression: mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc. A/HRC/34/L.27, 21 March 2017, available at: [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/34/L.27](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/L.27).

<sup>25</sup> A/HRC/20/17, paras. 78-88 and 97.

<sup>26</sup> UN Human Rights Council, *Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Abid Hussain*, UN Doc. E/CN.4/1999/64, 29 January 1999 (“E/CN.4/1999/64”), para. 28(h).

<sup>27</sup> <https://www.ohchr.org/sites/default/files/documents/issues/expression/activities/2023-JD-Media-Freedom-and-Democracy.pdf>.

regional human rights treaties, and be necessary and proportionate to protect that legitimate interest. States should regularly review and, where necessary, reform national laws to bring them into compliance with these standards. Restrictions on freedom of expression, for example in the interest of protecting the right to privacy, should include a public interest exception. **Criminal defamation and laws criminalising the criticism of State institutions and officials should be repealed.** Overall, legal frameworks should not be abused to illegitimately obstruct the work of independent media. (emphasis added)

22. Defamation laws, in particular penal defamation laws, should include the defence of truth.<sup>28</sup> The UN Human Rights Committee noted that the defence of truth “should not be applied with regard to those forms of expression that are not, of their nature, subject to verification”.<sup>29</sup>
23. Defamation laws should also recognize public interest in the subject matter as a defence since the ICCPR affords particularly strong protection to forms of expression on matters of public interest, including criticism of Governments and political leaders.<sup>30</sup> The UN Human Rights Committee has further clarified that “[a]t least with regard to comments about public figures, consideration should be given to **avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice**”.<sup>31</sup> Moreover, the UN Special Rapporteur on freedom of expression has stated that: “To require truth in the context of publications relating to matters of public interest is excessive; **it should be sufficient if reasonable efforts have been made to ascertain the truth**” (emphasis added).<sup>32</sup>

#### IV. Analysis of Article 27(3) of the ITE Law and Article 310 of the KUHP under International Human Rights Law

24. The ICJ respectfully requests the Court to ensure its interpretation of criminal defamation provisions under article 27(3) of the ITE Law and article 310 of the KUHP is consistent with Indonesia’s obligations under international human rights law, including in particular the ICCPR. The Court should also interpret these laws in conformity with the recommendations of the UN Human Rights Committee in its concluding observations on the initial report of Indonesia. The Committee there expressed concern that defamation provisions of the KUHP and the ITE Law have been improperly applied to stifle legitimate criticism of State officials.<sup>33</sup> The Committee recommended to Indonesia that it revise its defamation laws, in particular the ITE Law, to ensure that they are in compliance with article 19 of the ICCPR.<sup>34</sup>
25. Article 27(3) of the ITE Law provides for criminal liability for anyone who “intentionally and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of affronts and/or defamation”.<sup>35</sup> Under article 45(3), a person who commits an offense shall be punished with maximum

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<sup>28</sup> CCPR/C/GC/34, para. 47. For an example of a violation of article 19 through criminal conviction for defamation, see *Adonis v. Philippines*, CCPR/C/103/D/1815/2008/Rev.1, 26 October 2011.

<sup>29</sup> CCPR/C/GC/34, para. 47.

<sup>30</sup> CCPR/C/GC/34, paras. 34 and 47.

<sup>31</sup> CCPR/C/GC/34, para. 47.

<sup>32</sup> E/CN.4/1999/64, para. 28(d).

<sup>33</sup> UN Human Rights Committee, *Concluding Observations on the initial report of Indonesia*, UN Doc.

CCPR/C/IDN/CO/1, 21 August 2013 (“CCPR/C/IDN/CO/1”), para. 27, available at:

<https://www.ohchr.org/en/documents/concluding-observations/ccprcidnco1-concluding-observations-initial-report-indonesia>.

<sup>34</sup> CCPR/C/IDN/CO/1, para. 27. Furthermore, the UN Special Rapporteur on the situation of human rights defenders (**UN Special Rapporteur on human rights defenders**), UN Special Rapporteur on freedom of expression and UN Special Rapporteur on the rights to freedom of peaceful assembly and of association expressed concern at the pattern that the ITE Law is being used to threaten activists or human rights defenders for speaking out about the human rights situation in Indonesia. See: *Mandates of the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, UN Doc. AL IDN 8/2021, 20 October 2021, pp. 3-4, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26731>.

<sup>35</sup> Available at: <https://peraturan.bpk.go.id/Home/Details/37582/uu-no-19-tahun-2016>.

four years imprisonment and/or a fine of maximum Rp 750,000,000 (approximately USD 50,000).

26. Article 310 of the KUHP provides that:<sup>36</sup>

(1) The person who intentionally harms someone's honour or reputation by accusing him of something, with the clear intent to make the accusation known to the public, shall, being guilty of slander, be punished by maximum nine months imprisonment or a maximum fine of four thousand and five hundred rupiahs (approximately USD 0.31).<sup>37</sup>

(2) If this takes place by means of writings or portraits which are disseminated, shown or put up in public, then he/she shall, being guilty of libel, be punished by maximum one year and four months imprisonment or a maximum fine of four thousand and five hundred rupiahs (approximately USD 0.31).

(3) An act is not slander nor libel if the act was clearly carried out in the public interest or as an act of self-defence.

27. It is submitted that criminal defamation provisions do not accord with Indonesia's international human rights law obligations under articles 14(2) and 19 of the ICCPR on the following grounds:

- a. The provisions, in substantial part, are vague and overbroad, so that a reasonable person cannot know in advance how to regulate their conduct to avoid criminal liability for breaching the law.<sup>38</sup> Such vague and overbroad sections contravene the general principle of legality. The use of the terms "affront" in article 27(3) of the ITE Law, and "honour" in article 310 of the KUHP, which are not clearly defined in the law, allows for an extremely wide range of interpretation as to their scope and meaning.
- b. Relatedly, parts of these provisions go beyond the legitimate purposes for which the freedom of expression may be limited. While it may be limited to protect the rights and reputation of others, the protection from the nebulous harms of being "affronted" or "dishonoured" is not a permissible basis for restriction under the ICCPR. Just as those terms do not meet the test of legality, they also do not comply with the requirement of legitimate purpose.
- c. The provisions impose disproportionately harsh sanctions by applying criminal sanctions, as opposed to civil remedies. Both article 27(3) of the ITE Law and article 310 of the KUHP allow for punishment by way of imprisonment as well as a fine. The threat of criminal sanctions has a chilling effect on freedom of expression, making it inconsistent with the principle of proportionality.<sup>39</sup> In particular, the imposition of imprisonment is disproportionate and never an appropriate penalty.<sup>40</sup>
- d. The provisions inappropriately repress and criminalize the legitimate work of journalists and human rights defenders in informing the public and advocating for the protection of human rights. The broad drafting of these criminal defamation provisions allows for the broad targeting of individuals or organizations working under a genuine mandate to raise awareness of public interest issues. In addition, such prosecutions are likely to cause serious physical, psychological, emotional, financial, and/or reputational harm to those who share information about matters of public interest. They also impose legal proceedings that are long, complex and expensive, amounting to legal harassment, and in effect imposing a chilling effect on the exercise of free expression. In this connection,

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<sup>36</sup> Available at: <https://jdih.mahkamahagung.go.id/legal-product/kitab-undang-undang-hukum-pidana/detail>.

<sup>37</sup> The maximum amount has been adjusted to IDR4.500.000 (approximately USD300). See: Peraturan Mahkamah Agung Nomor 2 Tahun 2012 Penyesuaian Batasan Tindak Pidana Ringan dan Jumlah Denda dalam KUHP, article 3, available at: <https://peraturan.bpk.go.id/Home/Details/209445/perma-no-2-tahun-2012>.

<sup>38</sup> CCPR/C/GC/34, para 25.

<sup>39</sup> E/CN.4/1999/64, para. 28.

<sup>40</sup> CCPR/C/GC/34, para 47.

it should be noted that the Special Rapporteur on freedom of expression has previously stated that “it is critical to raise the public conscience to ensure that criminal laws are not used (or abused) to stifle public awareness and suppress discussion of matters of general or specific interest”.<sup>41</sup>

- e. The provisions risk violating the presumption of innocence (protected under article 14(2) of the ICCPR),<sup>42</sup> if the prosecution is not required to prove all elements of the offence, forcing the defendant to prove innocence. The Special Rapporteur on freedom of expression stated that “the onus of proof of all elements [of criminal defamation] should be on those claiming to have been defamed rather than on the defendant; **where truth is an issue, the burden of proof should lie with the plaintiff**”<sup>43</sup> (emphasis added). In at least one prior decision applying article 27(3) of the ITE Law, the Palopo District Court determined that the burden of proof to prove the truthfulness of the statement lay with the defendant, rather than requiring the prosecution to prove that the statements at issue were untrue.<sup>44</sup> Article 27(3) of the ITE Law and article 310 of the KUHP should not be interpreted in a manner that places the burden on the defendant to prove the truthfulness of allegedly defamatory statements.

28. The ICJ requests the Court to ensure that the defences of truth and public interest are available for both article 27(3) of the ITE Law and article 310 of the KUHP, in accordance with international law and standards:

- a. Article 27(3) of the ITE Law does not establish an explicit defence of truth. In this regard, the Court should interpret article 27(3) of the ITE Law in line with the Joint Decree of the Minister of Communication and Information Technology, the Attorney General, and the Chief of the Indonesian National Police on the Guidelines for the Implementation of the Electronic Information and Transaction Law (**Joint Decree**), which was signed on 23 June 2021.<sup>45</sup> While the Joint Decree is not legally binding, it serves as a set of guidelines on the implementation of the ITE Law. The Joint Decree establishes that an action is not a defamation offense if the content “is in the form of an assessment, opinion, evaluation result or if is a fact”. This guidance is in line with international human rights law.<sup>46</sup>
- b. Article 310 of the KUHP also does not provide for the defence of truth, and the courts have interpreted that the provision does not include such a defence.<sup>47</sup> The exclusion of the defence of truth within article 310 of the KUHP is inconsistent with international human rights law and standards.<sup>48</sup>
- c. While article 310(3) of the KUHP establishes public interest as a defence, article 27(3) of the ITE Law does not expressly recognize this defence. However, the Constitutional Court provided that the interpretation of article 27(3) of the ITE Law “cannot be

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<sup>41</sup> E/CN.4/1999/64, para. 28.

<sup>42</sup> Article 14(2) of the ICCPR. According to the UN Human Rights Committee’s General Comment 13: “By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.” UN Human Rights Committee, *General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, para. 7, available at: <http://www.refworld.org/docid/453883f90.html>

<sup>43</sup> E/CN.4/1999/64, para. 28(f).

<sup>44</sup> Pengadilan Negeri Palopo, *Putusan Nomor 46/Pid.Sus/2021/PN P/p*, p. 57, available at:

<https://putusan3.mahkamahagung.go.id/direktori/putusan/zaec4cc2adbe236e90cf303830353536.html>.

<sup>45</sup> Available at: <https://icjr.or.id/wp-content/uploads/2021/06/SKB-UU-ITE.pdf>. This Joint Decree was enacted with the aim of protecting individuals from unjust criminalization arising from overbroad interpretations of the provisions of the ITE Law. See: Kementerian Komunikasi dan Informatika Republik Indonesia, ‘SKB Pedoman Implementasi UU ITE Ditandatangani, Menko Polhukam Berharap Beri Perlindungan pada Masyarakat’, 23 June 2021, available at: <https://www.kominfo.go.id/content/detail/35229/skb-pedoman-implementasi-uu-ite-ditandatangani-menko-polhukam-berharap-beri-perlindungan-pada-masyarakat/0/berita>.

<sup>46</sup> CCPR/C/GC/34, para. 47.

<sup>47</sup> Hukumonline, “Pidana Penghinaan”, 15 May 2009, available at: <https://www.hukumonline.com/klinik/a/penghinaan-cl6865>.

<sup>48</sup> CCPR/C/GC/34, para. 47.



separated” from the legal norms within article 310 of the KUHP.<sup>49</sup> Based on this and international law and standards, article 27(3) of the ITE Law should be interpreted so that an act cannot be considered a defamation offense if it was carried out in the public interest. This public interest defence should be interpreted to ensure that legitimate acts of public criticism are not criminalized merely because they are considered to be insulting to a public figure.<sup>50</sup> The UN Human Rights Committee has provided that “[a]t least with regard to comments about public figures, consideration should be given to **avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice**” (emphasis added).<sup>51</sup>

## V. Analysis of Articles 14(2) and 15 of Law 1/1946 under International Human Rights Law

29. The ICJ respectfully submits that the Court should ensure its interpretation of articles 14(2) and 15 of Law 1/1946 is consistent with Indonesia’s obligations under international human rights law.
30. Under article 14(2) of Law 1/1946, anyone who broadcasts news or issues statements which may “cause chaos within society” where he/she reasonably suspected that the news or statement was false, may be sentenced to a maximum of three years imprisonment. The elucidation of article 14 defines “chaos” as something greater than inducing anxiety or shaking the hearts of the people.<sup>52</sup>
31. Article 15 of Law 1/1946 criminalizes anyone who broadcasts news which is “uncertain, excessive or incomplete”, where he/she reasonably suspected that the news may “cause chaos within society”, with maximum two years imprisonment. The elucidation of article 15 clarifies that this provision applies to news that have been broadcasted with additions or removals.
32. It is submitted that articles 14(2) and 15 of Law 1/1946 do not accord with Indonesia’s international human rights obligations on the following grounds:
  - a. The articles do not comply with the principle of legality under international human rights law by failing to specify what constitutes “false news or statements” and news that is “uncertain, excessive or incomplete”.<sup>53</sup> Prohibitions on the dissemination of information based on such vague and ambiguous terms are incompatible with international standards on freedom of expression,<sup>54</sup> as they may allow authorities to impermissibly apply them against journalists, political opponents and human rights defenders arbitrarily.<sup>55</sup> Moreover, the threshold of “reasonably suspected”, instead of requiring concrete intent to be proven, is far too low. This low threshold has the potential to criminalize someone for merely disseminating false information even without malicious intent regarding the truthfulness of the information for article 14(2), and criminalizing untrue statements made without intent to cause harm (article 15).
  - b. Article 14(2) establishes a low threshold for prosecution, merely requiring the prosecutor to prove that “he/she reasonably suspected that the news or statement was false” instead of proving beyond a reasonable doubt that the statement or news was *actually* false. This low threshold risks breaching the accused’s presumption of innocence as guaranteed by article 14(2) of the ICCPR.

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<sup>49</sup> Putusan Mahkamah Konstitusi Nomor 50/PUU-VI/2008, para. 3.17, available at: [https://www.mkri.id/public/content/persidangan/putusan/putusan\\_sidang\\_FINAL%20PUTUSAN%2050%20UU%20ITE%202008.pdf](https://www.mkri.id/public/content/persidangan/putusan/putusan_sidang_FINAL%20PUTUSAN%2050%20UU%20ITE%202008.pdf). The elucidation to article 27(3) of the ITE Law reaffirms this, providing that article 27(3) “refers to the provisions regulating defamation and/or slander within the KUHP”.

<sup>50</sup> CCPR/C/GC/34, para. 38.

<sup>51</sup> CCPR/C/GC/34, para. 47.

<sup>52</sup> Available at: <https://jdih.mahkamahagung.go.id/legal-product/uu-nomor-01-tahun-1946/detail>.

<sup>53</sup> A/HRC/47/25, para. 54.

<sup>54</sup> *Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda*, 3 March 2017, para. 2(a), available at: <https://www.osce.org/files/f/documents/6/8/302796.pdf>.

<sup>55</sup> A/HRC/47/25, para. 55.

- c. The provisions are also inconsistent with the principle of legitimate purpose, as the objective of preventing “caus[ing] chaos within society” is not one of those listed in article 19(3) of the ICCPR i.e. respect of the rights and reputations of others, or the protection of national security, public order (*ordre public*), public health or morals. The ICJ highlights that the prohibition of false information is not in itself a legitimate aim under international human rights law.<sup>56</sup>
  - d. The notion of preventing “chaos within society” cannot be equated with the legitimate purpose of “public order”. The UN Human Rights Committee has made clear that “[p]ublic order” refers to the sum of the rules that ensure the proper functioning of society, or the set of fundamental principles on which society is founded, which also entails respect for human rights”.<sup>57</sup>
  - e. Thus, in the context of another right protected in the ICCPR, the right to peaceful assembly, the Committee made clear that “States parties should not rely on a vague definition of “public order” to justify overbroad restrictions on the right of peaceful assembly. Peaceful assemblies can in some cases be inherently or deliberately disruptive and require a significant degree of toleration. “Public order” and “law and order” are not synonyms”.<sup>58</sup> This same principle and logic applies to freedom of expression. The provisions at issues fail to specifically define what constitutes “chaos within society” and the elucidation adopts a vague elaboration of “something greater than inducing anxiety or shaking the hearts of the people”. These vaguely defined terms risk criminalizing broad categories of expression, going well beyond a legitimate conception of public order and is thus inconsistent with the principle of legality.<sup>59</sup>
  - f. The imposition of criminal sanctions by articles 14(2) and 15 of Law 1/1945 is in contravention of the principles of necessity and proportionality, as they are serious interferences with freedom of expression that constitute disproportionate responses.<sup>60</sup>
33. Even if the Court were to apply articles 14(2) and 15 of Law 1/1946, the prosecution would need to establish that there was a “concrete and strong nexus” between the Defendant’s statement or news and the harm caused.<sup>61</sup> It is not enough to prove that the broadcasted statement or news was false, or that the statement or news may have caused harm. The prosecution must demonstrate that there was a reasonable probability that the content **caused** the resulting harm.
34. Furthermore, if the disseminated statement or news relates to matters of public interest, the terms “false, uncertain, excessive or incomplete news or statements” should not require the defendant to prove the absolute truth of the statement or news. Criminal sanctions should not be imposed if reasonable efforts have been made to ascertain the truth.<sup>62</sup>

## VI. Indonesia’s International Human Rights Obligations to Protect Human Rights Defenders

35. The ICJ submits that human rights defenders must be protected from abusive litigation aimed at curtailing the rights to freedom of expression and access to information, and other legitimate activities of human rights defenders. This includes strategic lawsuits against public participation (**SLAPP lawsuits**), which are undertaken with the principal objective or curtailing or deterring public criticism or opposition to certain activities of the entity of those initiating the legal action, including in the human rights area.<sup>63</sup>

<sup>56</sup> A/HRC/47/25, para. 40.

<sup>57</sup> UN Human Rights Committee, *General comment No. 37 (2020) on the right of peaceful assembly (article 21)*, UN Doc. CCPR/C/GC/37, 17 September 2020 (“CCPR/C/GC/37”), para. 44, available at: <https://www.undocs.org/CCPR/C/GC/37>.

<sup>58</sup> CCPR/C/GC/37, para. 44. See also CCPR/C/KAZ/CO/1, para. 26; and CCPR/C/DZA/CO/4, paras. 45–46.

<sup>59</sup> CCPR/C/GC/34, para. 25.

<sup>60</sup> A/HRC/47/25, para. 41.

<sup>61</sup> A/HRC/47/25, para. 54.

<sup>62</sup> E/CN.4/1999/64, para. 28(d).

<sup>63</sup> International Commission of Jurists, “Dictating the Internet: Curtailing Free Expression and Information

36. Human rights defenders are individuals or groups who act to promote, protect or strive for the protection and realization of human rights and fundamental freedoms through peaceful means.<sup>64</sup> The work of human rights defenders covers a broad range of fields, including actions to protect environmental and land rights as well as actions to fight against and expose corruption.<sup>65</sup>
37. States have adopted a number of international human rights instruments recognizing the special role of human rights defenders in the promotion, protection and implementation of international human rights. In particular, the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (**Declaration on Human Rights Defenders**)<sup>66</sup> affirms the right to engage in human rights education and advocacy and the corollary State duties to ensure the protection of human rights defenders. The Declaration on Human Rights Defenders reaffirms standards already enshrined in binding international law, including the ICCPR, the Charter of the United Nations and the UDHR. The Declaration on Human Rights Defenders was adopted in 1999 by consensus of the General Assembly and thus represents a unanimous commitment by all UN member States to its implementation. The Declaration affirms, among other things, that:
- a. “everyone has the right, individually and in association with others, **to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels**” (article 1, emphasis added);
  - b. “the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration” (article 12.2).
38. On 16 December 2021, the UN General Assembly adopted by consensus Resolution 76/174, which reaffirms the importance of the Declaration on Human Rights and that the respect, support and protection for the activities of human rights defenders “is essential to the overall enjoyment of human rights”.<sup>67</sup> The Resolution underlines that:

[...] domestic law and administrative provisions and their application should not hinder but **enable the work, both online and offline, of human rights defenders, including by avoiding any criminalization**, stigmatization,

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Online in Thailand”, April 2021, p. 45, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2021/06/Thailand-Dictating-the-Internet-FoE-Publication-2021-ENG.pdf>. See also: UN Human Rights Council, *The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders*, UN Doc. A/HRC/47/39/Add.2, 22 June 2021, para. 83, available at: <https://undocs.org/A/HRC/47/39/Add.2>.

<sup>64</sup> UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders*, UN Doc. A/73/215, 23 July 2018 (“A/73/215”), available at: <https://undocs.org/A/73/215>.

<sup>65</sup> UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders*, UN Doc. A/71/281, 3 August 2016 (“A/71/281”), available at: <https://undocs.org/A/71/281>; UN Human Rights Council, *At the heart of the struggle: human rights defenders working against corruption Report of the Special Rapporteur on the situation of human rights defenders, Mary Lawlor*, UN Doc. A/HRC/49/49, 28 December 2021, available at: <https://undocs.org/A/HRC/49/49>.

<sup>66</sup> UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: resolution / adopted by the General Assembly*, UN Doc. A/RES/53/144, 8 March 1999, available at: <http://www.refworld.org/docid/3b00f54c14.html>.

<sup>67</sup> UN General Assembly, *Implementing the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms through providing a safe and enabling environment for human rights defenders and ensuring their protection, including in the context of and recovery from the coronavirus disease (COVID-19) pandemic*, UN Doc. A/RES/76/174, 16 December 2021, available at: <https://undocs.org/A/RES/76/174>.

impediments, obstructions or restrictions thereof, contrary to the obligations and commitments of States under international human rights law. (emphasis added)

39. The ICJ considers that the lawsuit filed against the Defendant constitutes a SLAPP lawsuit, as it appears to have been filed to interfere with the Defendant's rights to freedom of expression.<sup>68</sup> The ICJ submits that the Court should interpret the abovementioned charges in light of the resolution by the Human Rights Council, adopted by consensus, for States to protect individuals from SLAPP lawsuits, including by adopting laws and policies that prevent and/or alleviate such cases and provide support to victims.<sup>69</sup>

40. The ICJ notes that in Indonesia, article 66 of Law No. 32 of 2009 on Environmental Protection and Management (**Law 32/2009**) stipulates that:<sup>70</sup>

Any person who defends the right to a good and healthy environment shall not be prosecuted based on criminal and civil lawsuits.

Since the statement concerned in the present case relates to the right to a healthy environment, and in view of Indonesia's obligation to protect human rights defenders from SLAPP lawsuits, the Court should consider applying article 66 of Law 32/2009.

## VII. Conclusion

41. It is respectfully submitted that, to ensure the good-faith discharge of Indonesia's international human rights obligations, criminal defamation and "false information" laws should be treated and construed in ways that ensure conformity with international human rights law, including the ICCPR, and standards as summarized above. It is incumbent on all branches of government, including the judiciary, to ensure respect for these obligations.

42. With regards to criminal defamation, the ICJ requests the East Jakarta District Court to consider:

- a. Avoiding the imposition of criminal sanctions for defamation as they would contravene the right to freedom of expression guaranteed by article 19 of the ICCPR. No form of imprisonment or detention is permissible under the ICCPR in cases of defamation.
- b. If criminal prosecution based on defamation does nonetheless take place, ensuring that the defences of truth and public interest are available, and avoiding penalizing untrue statements that have been published in error but without malice; and
- c. Scrupulously guarding the presumption of innocence, including by ensuring that no criminal conviction occurs without the prosecution proving beyond a reasonable doubt each element of the offence, including proving beyond a reasonable doubt that the defendant failed to make reasonable efforts to ascertain the truth of the statements.

43. With regards to articles 14(2) and 15 of Law 1/1946, the ICJ requests the Court to consider avoiding the imposition of criminal sanctions as the articles are vague and overbroad, based on an illegitimate purpose, and disproportionately and unnecessarily sanction expression, which will contribute to a chilling effect on freedom of expression.

44. Thus, the ICJ submits that the Court should ensure that laws restricting freedom of expression, including defamation and "false information" laws, are not interpreted or applied in ways that prevent or punish the exercise of the right of human rights defenders and journalists to protect the public interest by informing the public about possible human rights violations and advocating for improved protection of internationally protected rights. Any legal actions that impede the right to freedom of expression must be deemed unlawful

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<sup>68</sup> A/71/281, para. 64.

<sup>69</sup> UN Human Rights Council, *Resolution adopted by the Human Rights Council 51/9: The safety of journalists*, UN Doc. A/HRC/RES/51/9, 6 October 2022, para. 11(i), available at: <https://undocs.org/A/HRC/RES/51/9>.

<sup>70</sup> Available at: <https://peraturan.bpk.go.id/Home/Details/38771/uu-no-32-tahun-2009>.

where they do not comply with the strict requirements of legality, legitimate purpose, necessity, proportionality and non-discrimination.

**Amicus Curiae Brief in  
Case No. 203/Pid.Sus/2023/PN Jkt.Tim**

**I. Interest Statement of the International Commission of Jurists as an *Amicus***

1. The International Commission of Jurists (**ICJ**), composed of 60 eminent judges and lawyers from all regions of the world, works to advance respect for the rule of law and the promotion and protection of human rights globally. The ICJ holds consultative status at the Council of Europe, the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization and the African Union. The ICJ also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union. Established in 1952, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political, and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.
2. To achieve its aims, the ICJ conducts research and advocacy at the national, regional and global levels through qualitative legal analysis and collaboration with domestic justice sector actors. The ICJ respectfully submits its legal analysis in its capacity as an *Amicus Curiae* (friend of the Court) to the East Jakarta District Court in Case No. 203/Pid.Sus/2023/PN Jkt.Tim.
3. The ICJ provides submissions to the East Jakarta District Court in the present case of charges against Fatiah Maulidiyanty (**Defendant**). The Defendant has been charged with criminal defamation under article 27(3) of the Law No. 11 of 2008 on Electronic Information and Transactions (**ITE Law**) and article 310(1) of the Indonesian Criminal Code (**KUHP**); and spreading false statements which “may cause chaos within society” under article 14(2) of Law No. 1 of 1946 on Criminal Law Regulations (**Law 1/1946**). The complaint was filed by the Indonesian Coordinating Minister for Maritime and Investment Affairs, Luhut Binsar Pandjaitan. The complaint concerns a YouTube video where the Defendant discussed research results from a report by nine civil society organizations, regarding allegations of the involvement of Indonesian army officials and retirees in plans to exploit gold in the Blok Wabu area in Intan Jaya, Papua. The video specifically drew attention to allegations relating to Luhut Binsar Pandjaitan, scrutinizing potential conflicts of interest due to his position as the Coordinating Minister for Maritime and Investment Affairs.
4. The objective of the ICJ in this brief is to assist the Court by providing information and analysis with a view to clarifying the nature and scope of Indonesia’s international legal obligations relating to the right to of freedom of expression and information, protected under international law. The ICJ respectfully requests that the East Jakarta District Court interpret Indonesia’s laws in line with Indonesia’s obligations under international human rights law.

**II. Indonesia’s International Human Rights Obligations**

5. Under the general principle of law of *pacta sunt servanda* and general principles governing the law of treaties, Indonesia is bound to apply in good faith all treaties to which it is a party.<sup>1</sup> Furthermore, Indonesia may not rely on provisions of its internal law to justify a failure to meet a treaty obligation.<sup>2</sup>
6. Indonesia acceded to the International Covenant on Civil and Political Rights (**ICCPR**) on

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<sup>1</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, article 26 (“VCLT”), available at: <https://www.refworld.org/docid/3ae6b3a10.html>; UN Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, UN. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 3, available at: <https://www.refworld.org/docid/478b26ae2.html> (“CCPR/C/21/Rev.1/Add.13”).

<sup>2</sup> VCLT, articles 26 and 27; CCPR/C/21/Rev.1/Add.13, para. 4.

23 February 2006. States that are parties to the ICCPR have an obligation to respect and ensure the full range of human rights contained in the articles of the Covenant. These include, among others, the right to freedom of expression and information (article 19) and the right to privacy (article 17).

7. The United Nations (**UN**) Human Rights Committee is the supervisory body composed of independent experts established by the ICCPR to review periodic reports of States to assess compliance with the ICCPR and to provide the authoritative interpretation concerning the scope and content of specific rights and provisions of the ICCPR. These interpretations are contained in reviews of State Parties' Periodic Reports, jurisprudence on individual communications, and General Comments on specific rights provisions.<sup>3</sup>
8. The obligation to ensure that the rights contained in the ICCPR are guaranteed and protected is not limited to the legislative and executive branches of government, but must also effectively be discharged by Indonesia's judiciary. In its authoritative General Comment No. 31 on the nature of the general legal obligations of State Parties under the ICCPR, the UN Human Rights Committee affirmed that:

The obligations of the Covenant in general ... are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party.<sup>4</sup>

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.<sup>5</sup>

These principles were reaffirmed by the UN Human Rights Committee with regard to State obligations to guarantee the right to freedom of expression and information under article 19 of the ICCPR.<sup>6</sup>

9. One of the earliest resolutions of the UN General Assembly, adopted at its first session in 1946, declared that freedom of information, which includes freedom to impart and receive information, "is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated".<sup>7</sup> Two years later, freedom of expression was enshrined as article 19 of the Universal Declaration of Human Rights, adopted in 1948.<sup>8</sup> In 1993, all States of the world affirmed their recognition of the right in the Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights.<sup>9</sup> The UN

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<sup>3</sup> Pursuant to Article 40(4) of the ICCPR, States Parties agreed to establish the UN Human Rights Committee and grant it the power, among others, to formulate general comments as it considers appropriate. Consequently, since it was created, the UN Human Rights Committee has built up a considerable body of interpretative jurisprudence through the review of periodic reports, adjudication of individual communications, and in the form of its General Comments. It is widely accepted that, in the exercise of its judicial functions, judicial bodies should ascribe "great weight" to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. This principle has been affirmed by the International Court of Justice. See International Court of Justice, *Ahmadou Sadio Diallo Case (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, paras. 66-68, available at: <https://www.icj-cij.org/files/case-related/103/103-20101130-JUD-01-00-EN.pdf>.

<sup>4</sup> CCPR/C/21/Rev.1/Add.13, para. 4.

<sup>5</sup> CCPR/C/21/Rev.1/Add.13, para. 8.

<sup>6</sup> UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, 12 September 2011 ("CCPR/C/GC/34"), para. 7, available at: <http://www.refworld.org/docid/4ed34b562.html>.

<sup>7</sup> UN General Assembly Resolution 59(I), 14 December 1946, available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/59\(I\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59(I)).

<sup>8</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), art. 19, available at: <https://www.refworld.org/docid/3ae6b3712c.html>.

<sup>9</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23, 12 July 1993, paras. 22 and 67, available at: <https://www.refworld.org/docid/3ae6b39ec.html>.

Human Rights Council has adopted repeated resolutions since 2008 reaffirming the importance of the effective exercise of the right to freedom of opinion and expression.<sup>10</sup>

10. Most recently in 2022, the UN Human Rights Council adopted a resolution reaffirming that the right to freedom of expression and information:<sup>11</sup>

constitutes one of the essential foundations of democratic societies and for sustainable development, including the 2030 Agenda for Sustainable Development, and that it is critical to combating corruption and disinformation, strengthening democracy, the rule of law and good governance, and that the effective exercise of the right to freedom of opinion and expression is an important indicator of the level of protection of other human rights and freedoms [...]

11. Since 1999, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (**UN Special Rapporteur on freedom of expression**), together with the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, has issued annual Joint Declarations on freedom of expression, reaffirming its central role for human rights and fundamental freedoms.<sup>12</sup>

12. Indonesia's compliance with its international human rights obligations is indispensable for ensuring respect for the rule of law. In the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels adopted in 2012, Member States reaffirmed that:<sup>13</sup>

human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.

As a member of the Human Rights Council, Indonesia voted in favour of Human Rights Council Resolution 19/36 on human rights, democracy and the rule of law, which also reaffirmed the interdependent and mutually reinforcing nature of "democracy, development and **respect for all human rights**" [emphasis added].<sup>14</sup> The Resolution affirms that "democracy includes respect for [...] freedom of opinion and expression".<sup>15</sup>

### III. The Right to Freedom of Expression and Information in International Law

13. All States Parties to the ICCPR have the obligation to ensure that all people subject to their jurisdiction enjoy the rights protected by the treaty, including freedom of expression and information. Article 2 provides:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion,

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<sup>10</sup> See Human Rights Council resolutions 7/36 of 28 March 2008, 12/16 of 12 October 2009, 16/4 of 24 March 2011, 23/2 of 13 June 2013, 25/2 of 27 March 2014, 34/18 of 24 March 2017, 38/7 of 5 July 2018, 39/6 of 27 September 2018, 43/4 of 19 June 2020 and 44/12 of 16 July 2020.

<sup>11</sup> UN Human Rights Council Resolution 50/15, *Freedom of opinion and expression*, UN Doc. A/HRC/RES/50/15, 8 July 2022 ("A/HRC/RES/50/15"), available at: <https://undocs.org/A/HRC/RES/50/15>.

<sup>12</sup> UN OHCHR, "Resources: Special Rapporteur on freedom of expression and opinion", available at: <https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/resources>.

<sup>13</sup> UN General Assembly Resolution 67/1, *Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels*, UN Doc. A/RES/67/1, 24 December 2012 ("A/RES/67/1"), para 5, available at: <https://undocs.org/A/RES/67/1>.

<sup>14</sup> UN Human Rights Council Resolution 19/36, *Human rights, democracy and the rule of law*, UN Doc.

A/HRC/RES/19/36, 23 March 2012 ("A/HRC/RES/19/36"), available at: <https://undocs.org/A/HRC/RES/19/36>.

<sup>15</sup> A/HRC/RES/19/36, para. 1.



national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
14. As part of this general obligation, Indonesia has the particular obligation under the ICCPR to respect and ensure to all individuals under its jurisdiction the right to freedom of expression and information. Article 19 of the ICCPR provides:
1. Everyone shall have the right to hold opinions without interference.
  2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.
15. The UN Human Rights Committee has elaborated General Comment (No. 34) that sets out in detail the nature and scope of the right to freedom of expression and opinion and information in terms of article 19 of the ICCPR. In the General Comment, the Committee stresses that freedom of expression and opinion are “indispensable conditions” for the advancement of any person or society, as the free exercise of these rights facilitates the evolution and exchange of opinions, in turn enabling “principles of transparency and accountability” crucial for the promotion and protection of human rights.<sup>16</sup>

A. Limitations on the Right to Freedom of Expression and Information

16. While under certain narrow circumstances, a State may restrict the right to freedom of expression and information, any such restrictions must be strictly limited in accordance with ICCPR, article 19(3), which provides:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are **provided by law** and are **necessary**:

- a) For respect of the rights or reputations of others;
- b) For the protection of national security or of public order (*ordre public*), or of public health or morals. (emphasis added)

17. It is clear from the plain language of article 19 that any restrictions or limitations on the right to exercise freedom of expression must meet the conditions of legality (i.e. be “provided by law”), legitimate purpose (i.e. those listed in article 19(3)(a and b), necessity, and proportionality. In General Comment No. 34, the UN Human Rights Committee set out at greater length the operative implications of article 19(3), explaining that any such restriction on freedom of expression must meet a strict test of these four elements:<sup>17</sup>

- a. The restriction imposed must be **provided by law**, which is clear and accessible to everyone;<sup>18</sup> in particular, the law must be “formulated with sufficient precision to enable an individual to regulate his or her conduct” (emphasis added);<sup>19</sup>

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<sup>16</sup> CCPR/C/GC/34, paras. 2 - 3.

<sup>17</sup> CCPR/C/GC/34, especially paras. 21-36; See also, 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*, UN Doc. A/HRC/20/17, 4 June 2012 (“A/HRC/20/17”), paras. 64 and 81, available at: <http://www.refworld.org/docid/5008134b2.html> .

<sup>18</sup> A/HRC/20/17.

<sup>19</sup> CCPR/C/GC/34, para. 25.

- b. The restriction must be proven as **done for one of the recognized legitimate purposes** to protect the rights or reputation of others; and national security or public order, public health or morals (emphasis added);<sup>20</sup>
- c. The restriction must be proven as **necessary** for one of the recognized legitimate purposes (emphasis added); and
- d. The restriction must be proven **as the least restrictive and proportionate means** to achieve the purported aim (emphasis added).<sup>21</sup>

B. Defamation laws

18. Restrictions on freedom of expression provided under article 19(3)(a) “for the respect of rights and reputations of others” may be engaged to justify certain laws and other measures on defamation. Such measures, however, must be narrowly construed and are strictly subject to the tests of necessity and proportionality set out by the UN Human Rights Committee.
19. In this regard, the UN Human Rights Committee has assessed whether criminal defamation liability – as opposed to liability for civil defamation – is compatible with the requirements of necessity and proportionality set out in article 19. The Committee affirmed in 2005 that criminal sanctions are inappropriate in cases of defamation, stating that “the use of criminal rather than civil penalties ... constitutes a disproportionate means of protecting the reputation of others.”<sup>22</sup> The Committee, in General Comment No. 34, called on States parties to decriminalize defamation, and stressed that in any event “**imprisonment is never an appropriate penalty**” for defamation (emphasis added).<sup>23</sup>
20. The UN Special Rapporteur on freedom of expression, mandated by the UN Human Rights Council to examine and respond to questions relating to freedom of expression,<sup>24</sup> has expressed concern about the potential for criminal defamation laws to be abused, especially when issues affecting the public interest are involved.<sup>25</sup> The Special Rapporteur concluded that: “Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; **penal sanctions, in particular imprisonment, should never be applied**” (emphasis added).<sup>26</sup>
21. In its joint statement of 2 May 2023, the UN Special Rapporteur on freedom of expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information in Africa called on States to:<sup>27</sup>

Ensure that any restrictions on the right to freedom of expression comply with international human rights standards. Any restriction should be provided by law, serve one of the legitimate interests explicitly enumerated in international and

<sup>20</sup> A/HRC/20/17.

<sup>21</sup> A/HRC/20/17.

<sup>22</sup> UN Human Rights Committee, *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, U.N. Doc. CCPR/C/83/D/1128/2002 (2005), para. 3.9, available at: <https://www1.umn.edu/humanrts/undocs/1128-2002.html>.

<sup>23</sup> CCPR/C/GC/34, para. 47.

<sup>24</sup> UN Human Rights Council, *Resolution 34/18: Freedom of opinion and expression: mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc. A/HRC/34/L.27, 21 March 2017, available at: [https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/34/L.27](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/L.27).

<sup>25</sup> A/HRC/20/17, paras. 78-88 and 97.

<sup>26</sup> UN Human Rights Council, *Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Abid Hussain*, UN Doc. E/CN.4/1999/64, 29 January 1999 (“E/CN.4/1999/64”), para. 28(h).

<sup>27</sup> <https://www.ohchr.org/sites/default/files/documents/issues/expression/activities/2023-JD-Media-Freedom-and-Democracy.pdf>.

regional human rights treaties, and be necessary and proportionate to protect that legitimate interest. States should regularly review and, where necessary, reform national laws to bring them into compliance with these standards. Restrictions on freedom of expression, for example in the interest of protecting the right to privacy, should include a public interest exception. **Criminal defamation and laws criminalising the criticism of State institutions and officials should be repealed.** Overall, legal frameworks should not be abused to illegitimately obstruct the work of independent media. (emphasis added)

22. Defamation laws, in particular penal defamation laws, should include the defence of truth.<sup>28</sup> The UN Human Rights Committee noted that the defence of truth “should not be applied with regard to those forms of expression that are not, of their nature, subject to verification”.<sup>29</sup>
23. Defamation laws should also recognize public interest in the subject matter as a defence since the ICCPR affords particularly strong protection to forms of expression on matters of public interest, including criticism of Governments and political leaders.<sup>30</sup> The UN Human Rights Committee has further clarified that “[a]t least with regard to comments about public figures, consideration should be given to **avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice**”.<sup>31</sup> Moreover, the UN Special Rapporteur on freedom of expression has stated that: “To require truth in the context of publications relating to matters of public interest is excessive; **it should be sufficient if reasonable efforts have been made to ascertain the truth**” (emphasis added).<sup>32</sup>

#### IV. Analysis of Article 27(3) of the ITE Law and Article 310 of the KUHP under International Human Rights Law

24. The ICJ respectfully requests the Court to ensure its interpretation of criminal defamation provisions under article 27(3) of the ITE Law and article 310 of the KUHP is consistent with Indonesia’s obligations under international human rights law, including in particular the ICCPR. The Court should also interpret these laws in conformity with the recommendations of the UN Human Rights Committee in its concluding observations on the initial report of Indonesia. The Committee there expressed concern that defamation provisions of the KUHP and the ITE Law have been improperly applied to stifle legitimate criticism of State officials.<sup>33</sup> The Committee recommended to Indonesia that it revise its defamation laws, in particular the ITE Law, to ensure that they are in compliance with article 19 of the ICCPR.<sup>34</sup>
25. Article 27(3) of the ITE Law provides for criminal liability for anyone who “intentionally and without authority distributes and/or transmits and/or causes to be accessible Electronic Information and/or Electronic Records with contents of affronts and/or defamation”.<sup>35</sup> Under article 45(3), a person who commits an offense shall be punished with maximum

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<sup>28</sup> CCPR/C/GC/34, para. 47. For an example of a violation of article 19 through criminal conviction for defamation, see *Adonis v. Philippines*, CCPR/C/103/D/1815/2008/Rev.1, 26 October 2011.

<sup>29</sup> CCPR/C/GC/34, para. 47.

<sup>30</sup> CCPR/C/GC/34, paras. 34 and 47.

<sup>31</sup> CCPR/C/GC/34, para. 47.

<sup>32</sup> E/CN.4/1999/64, para. 28(d).

<sup>33</sup> UN Human Rights Committee, *Concluding Observations on the initial report of Indonesia*, UN Doc.

CCPR/C/IDN/CO/1, 21 August 2013 (“CCPR/C/IDN/CO/1”), para. 27, available at:

<https://www.ohchr.org/en/documents/concluding-observations/ccprcidnco1-concluding-observations-initial-report-indonesia>.

<sup>34</sup> CCPR/C/IDN/CO/1, para. 27. Furthermore, the UN Special Rapporteur on the situation of human rights defenders (**UN Special Rapporteur on human rights defenders**), UN Special Rapporteur on freedom of expression and UN Special Rapporteur on the rights to freedom of peaceful assembly and of association expressed concern at the pattern that the ITE Law is being used to threaten activists or human rights defenders for speaking out about the human rights situation in Indonesia. See: *Mandates of the Special Rapporteur on the situation of human rights defenders; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, UN Doc. AL IDN 8/2021, 20 October 2021, pp. 3-4, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26731>.

<sup>35</sup> Available at: <https://peraturan.bpk.go.id/Home/Details/37582/uu-no-19-tahun-2016>.

four years imprisonment and/or a fine of maximum Rp 750,000,000 (approximately USD 50,000).

26. Article 310 of the KUHP provides that:<sup>36</sup>

(1) The person who intentionally harms someone's honour or reputation by accusing him of something, with the clear intent to make the accusation known to the public, shall, being guilty of slander, be punished by maximum nine months imprisonment or a maximum fine of four thousand and five hundred rupiahs (approximately USD 0.31).<sup>37</sup>

(2) If this takes place by means of writings or portraits which are disseminated, shown or put up in public, then he/she shall, being guilty of libel, be punished by maximum one year and four months imprisonment or a maximum fine of four thousand and five hundred rupiahs (approximately USD 0.31).

(3) An act is not slander nor libel if the act was clearly carried out in the public interest or as an act of self-defence.

27. It is submitted that criminal defamation provisions do not accord with Indonesia's international human rights law obligations under articles 14(2) and 19 of the ICCPR on the following grounds:

- a. The provisions, in substantial part, are vague and overbroad, so that a reasonable person cannot know in advance how to regulate their conduct to avoid criminal liability for breaching the law.<sup>38</sup> Such vague and overbroad sections contravene the general principle of legality. The use of the terms "affront" in article 27(3) of the ITE Law, and "honour" in article 310 of the KUHP, which are not clearly defined in the law, allows for an extremely wide range of interpretation as to their scope and meaning.
- b. Relatedly, parts of these provisions go beyond the legitimate purposes for which the freedom of expression may be limited. While it may be limited to protect the rights and reputation of others, the protection from the nebulous harms of being "affronted" or "dishonoured" is not a permissible basis for restriction under the ICCPR. Just as those terms do not meet the test of legality, they also do not comply with the requirement of legitimate purpose.
- c. The provisions impose disproportionately harsh sanctions by applying criminal sanctions, as opposed to civil remedies. Both article 27(3) of the ITE Law and article 310 of the KUHP allow for punishment by way of imprisonment as well as a fine. The threat of criminal sanctions has a chilling effect on freedom of expression, making it inconsistent with the principle of proportionality.<sup>39</sup> In particular, the imposition of imprisonment is disproportionate and never an appropriate penalty.<sup>40</sup>
- d. The provisions inappropriately repress and criminalize the legitimate work of journalists and human rights defenders in informing the public and advocating for the protection of human rights. The broad drafting of these criminal defamation provisions allows for the broad targeting of individuals or organizations working under a genuine mandate to raise awareness of public interest issues. In addition, such prosecutions are likely to cause serious physical, psychological, emotional, financial, and/or reputational harm to those who share information about matters of public interest. They also impose legal proceedings that are long, complex and expensive, amounting to legal harassment, and in effect imposing a chilling effect on the exercise of free expression. In this connection,

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<sup>36</sup> Available at: <https://jdih.mahkamahagung.go.id/legal-product/kitab-undang-undang-hukum-pidana/detail>.

<sup>37</sup> The maximum amount has been adjusted to IDR4.500.000 (approximately USD300). See: Peraturan Mahkamah Agung Nomor 2 Tahun 2012 Penyesuaian Batasan Tindak Pidana Ringan dan Jumlah Denda dalam KUHP, article 3, available at: <https://peraturan.bpk.go.id/Home/Details/209445/perma-no-2-tahun-2012>.

<sup>38</sup> CCPR/C/GC/34, para 25.

<sup>39</sup> E/CN.4/1999/64, para. 28.

<sup>40</sup> CCPR/C/GC/34, para 47.

it should be noted that the Special Rapporteur on freedom of expression has previously stated that “it is critical to raise the public conscience to ensure that criminal laws are not used (or abused) to stifle public awareness and suppress discussion of matters of general or specific interest”.<sup>41</sup>

- e. The provisions risk violating the presumption of innocence (protected under article 14(2) of the ICCPR),<sup>42</sup> if the prosecution is not required to prove all elements of the offence, forcing the defendant to prove innocence. The Special Rapporteur on freedom of expression stated that “the onus of proof of all elements [of criminal defamation] should be on those claiming to have been defamed rather than on the defendant; **where truth is an issue, the burden of proof should lie with the plaintiff**”<sup>43</sup> (emphasis added). In at least one prior decision applying article 27(3) of the ITE Law, the Palopo District Court determined that the burden of proof to prove the truthfulness of the statement lay with the defendant, rather than requiring the prosecution to prove that the statements at issue were untrue.<sup>44</sup> Article 27(3) of the ITE Law and article 310 of the KUHP should not be interpreted in a manner that places the burden on the defendant to prove the truthfulness of allegedly defamatory statements.

28. The ICJ requests the Court to ensure that the defences of truth and public interest are available for both article 27(3) of the ITE Law and article 310 of the KUHP, in accordance with international law and standards:

- a. Article 27(3) of the ITE Law does not establish an explicit defence of truth. In this regard, the Court should interpret article 27(3) of the ITE Law in line with the Joint Decree of the Minister of Communication and Information Technology, the Attorney General, and the Chief of the Indonesian National Police on the Guidelines for the Implementation of the Electronic Information and Transaction Law (**Joint Decree**), which was signed on 23 June 2021.<sup>45</sup> While the Joint Decree is not legally binding, it serves as a set of guidelines on the implementation of the ITE Law. The Joint Decree establishes that an action is not a defamation offense if the content “is in the form of an assessment, opinion, evaluation result or if is a fact”. This guidance is in line with international human rights law.<sup>46</sup>
- b. Article 310 of the KUHP also does not provide for the defence of truth, and the courts have interpreted that the provision does not include such a defence.<sup>47</sup> The exclusion of the defence of truth within article 310 of the KUHP is inconsistent with international human rights law and standards.<sup>48</sup>
- c. While article 310(3) of the KUHP establishes public interest as a defence, article 27(3) of the ITE Law does not expressly recognize this defence. However, the Constitutional Court provided that the interpretation of article 27(3) of the ITE Law “cannot be

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<sup>41</sup> E/CN.4/1999/64, para. 28.

<sup>42</sup> Article 14(2) of the ICCPR. According to the UN Human Rights Committee’s General Comment 13: “By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.” UN Human Rights Committee, *General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984, para. 7, available at: <http://www.refworld.org/docid/453883f90.html>

<sup>43</sup> E/CN.4/1999/64, para. 28(f).

<sup>44</sup> Pengadilan Negeri Palopo, *Putusan Nomor 46/Pid.Sus/2021/PN P/p*, p. 57, available at:

<https://putusan3.mahkamahagung.go.id/direktori/putusan/zaec4cc2adbe236e90cf303830353536.html>.

<sup>45</sup> Available at: <https://icjr.or.id/wp-content/uploads/2021/06/SKB-UU-ITE.pdf>. This Joint Decree was enacted with the aim of protecting individuals from unjust criminalization arising from overbroad interpretations of the provisions of the ITE Law. See: Kementerian Komunikasi dan Informatika Republik Indonesia, ‘SKB Pedoman Implementasi UU ITE Ditandatangani, Menko Polhukam Berharap Beri Perlindungan pada Masyarakat’, 23 June 2021, available at: <https://www.kominfo.go.id/content/detail/35229/skb-pedoman-implementasi-uu-ite-ditandatangani-menko-polhukam-berharap-beri-perlindungan-pada-masyarakat/0/berita>.

<sup>46</sup> CCPR/C/GC/34, para. 47.

<sup>47</sup> Hukumononline, “Pidana Penghinaan”, 15 May 2009, available at: <https://www.hukumononline.com/klinik/a/penghinaan-cl6865>.

<sup>48</sup> CCPR/C/GC/34, para. 47.

separated” from the legal norms within article 310 of the KUHP.<sup>49</sup> Based on this and international law and standards, article 27(3) of the ITE Law should be interpreted so that an act cannot be considered a defamation offense if it was carried out in the public interest. This public interest defence should be interpreted to ensure that legitimate acts of public criticism are not criminalized merely because they are considered to be insulting to a public figure.<sup>50</sup> The UN Human Rights Committee has provided that “[a]t least with regard to comments about public figures, consideration should be given to **avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice**” (emphasis added).<sup>51</sup>

## V. Analysis of Articles 14(2) and 15 of Law 1/1946 under International Human Rights Law

29. The ICJ respectfully submits that the Court should ensure its interpretation of articles 14(2) and 15 of Law 1/1946 is consistent with Indonesia’s obligations under international human rights law.
30. Under article 14(2) of Law 1/1946, anyone who broadcasts news or issues statements which may “cause chaos within society” where he/she reasonably suspected that the news or statement was false, may be sentenced to a maximum of three years imprisonment. The elucidation of article 14 defines “chaos” as something greater than inducing anxiety or shaking the hearts of the people.<sup>52</sup>
31. Article 15 of Law 1/1946 criminalizes anyone who broadcasts news which is “uncertain, excessive or incomplete”, where he/she reasonably suspected that the news may “cause chaos within society”, with maximum two years imprisonment. The elucidation of article 15 clarifies that this provision applies to news that have been broadcasted with additions or removals.
32. It is submitted that articles 14(2) and 15 of Law 1/1946 do not accord with Indonesia’s international human rights obligations on the following grounds:
  - a. The articles do not comply with the principle of legality under international human rights law by failing to specify what constitutes “false news or statements” and news that is “uncertain, excessive or incomplete”.<sup>53</sup> Prohibitions on the dissemination of information based on such vague and ambiguous terms are incompatible with international standards on freedom of expression,<sup>54</sup> as they may allow authorities to impermissibly apply them against journalists, political opponents and human rights defenders arbitrarily.<sup>55</sup> Moreover, the threshold of “reasonably suspected”, instead of requiring concrete intent to be proven, is far too low. This low threshold has the potential to criminalize someone for merely disseminating false information even without malicious intent regarding the truthfulness of the information for article 14(2), and criminalizing untrue statements made without intent to cause harm (article 15).
  - b. Article 14(2) establishes a low threshold for prosecution, merely requiring the prosecutor to prove that “he/she reasonably suspected that the news or statement was false” instead of proving beyond a reasonable doubt that the statement or news was *actually* false. This low threshold risks breaching the accused’s presumption of innocence as guaranteed by article 14(2) of the ICCPR.

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<sup>49</sup> Putusan Mahkamah Konstitusi Nomor 50/PUU-VI/2008, para. 3.17, available at: [https://www.mkri.id/public/content/persidangan/putusan/putusan\\_sidang\\_FINAL%20PUTUSAN%2050%20UU%20ITE%202008.pdf](https://www.mkri.id/public/content/persidangan/putusan/putusan_sidang_FINAL%20PUTUSAN%2050%20UU%20ITE%202008.pdf). The elucidation to article 27(3) of the ITE Law reaffirms this, providing that article 27(3) “refers to the provisions regulating defamation and/or slander within the KUHP”.

<sup>50</sup> CCPR/C/GC/34, para. 38.

<sup>51</sup> CCPR/C/GC/34, para. 47.

<sup>52</sup> Available at: <https://jdih.mahkamahagung.go.id/legal-product/uu-nomor-01-tahun-1946/detail>.

<sup>53</sup> A/HRC/47/25, para. 54.

<sup>54</sup> *Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda*, 3 March 2017, para. 2(a), available at: <https://www.osce.org/files/f/documents/6/8/302796.pdf>.

<sup>55</sup> A/HRC/47/25, para. 55.

- c. The provisions are also inconsistent with the principle of legitimate purpose, as the objective of preventing “caus[ing] chaos within society” is not one of those listed in article 19(3) of the ICCPR i.e. respect of the rights and reputations of others, or the protection of national security, public order (*ordre public*), public health or morals. The ICJ highlights that the prohibition of false information is not in itself a legitimate aim under international human rights law.<sup>56</sup>
  - d. The notion of preventing “chaos within society” cannot be equated with the legitimate purpose of “public order”. The UN Human Rights Committee has made clear that “[p]ublic order” refers to the sum of the rules that ensure the proper functioning of society, or the set of fundamental principles on which society is founded, which also entails respect for human rights”.<sup>57</sup>
  - e. Thus, in the context of another right protected in the ICCPR, the right to peaceful assembly, the Committee made clear that “States parties should not rely on a vague definition of “public order” to justify overbroad restrictions on the right of peaceful assembly. Peaceful assemblies can in some cases be inherently or deliberately disruptive and require a significant degree of toleration. “Public order” and “law and order” are not synonyms”.<sup>58</sup> This same principle and logic applies to freedom of expression. The provisions at issues fail to specifically define what constitutes “chaos within society” and the elucidation adopts a vague elaboration of “something greater than inducing anxiety or shaking the hearts of the people”. These vaguely defined terms risk criminalizing broad categories of expression, going well beyond a legitimate conception of public order and is thus inconsistent with the principle of legality.<sup>59</sup>
  - f. The imposition of criminal sanctions by articles 14(2) and 15 of Law 1/1945 is in contravention of the principles of necessity and proportionality, as they are serious interferences with freedom of expression that constitute disproportionate responses.<sup>60</sup>
33. Even if the Court were to apply articles 14(2) and 15 of Law 1/1946, the prosecution would need to establish that there was a “concrete and strong nexus” between the Defendant’s statement or news and the harm caused.<sup>61</sup> It is not enough to prove that the broadcasted statement or news was false, or that the statement or news may have caused harm. The prosecution must demonstrate that there was a reasonable probability that the content **caused** the resulting harm.
34. Furthermore, if the disseminated statement or news relates to matters of public interest, the terms “false, uncertain, excessive or incomplete news or statements” should not require the defendant to prove the absolute truth of the statement or news. Criminal sanctions should not be imposed if reasonable efforts have been made to ascertain the truth.<sup>62</sup>

## **VI. Indonesia’s International Human Rights Obligations to Protect Human Rights Defenders**

35. The ICJ submits that human rights defenders must be protected from abusive litigation aimed at curtailing the rights to freedom of expression and access to information, and other legitimate activities of human rights defenders. This includes strategic lawsuits against public participation (**SLAPP lawsuits**), which are undertaken with the principal objective or curtailing or deterring public criticism or opposition to certain activities of the entity of those initiating the legal action, including in the human rights area.<sup>63</sup>

<sup>56</sup> A/HRC/47/25, para. 40.

<sup>57</sup> UN Human Rights Committee, *General comment No. 37 (2020) on the right of peaceful assembly (article 21)*, UN Doc. CCPR/C/GC/37, 17 September 2020 (“CCPR/C/GC/37”), para. 44, available at: <https://www.undocs.org/CCPR/C/GC/37>.

<sup>58</sup> CCPR/C/GC/37, para. 44. See also CCPR/C/KAZ/CO/1, para. 26; and CCPR/C/DZA/CO/4, paras. 45–46.

<sup>59</sup> CCPR/C/GC/34, para. 25.

<sup>60</sup> A/HRC/47/25, para. 41.

<sup>61</sup> A/HRC/47/25, para. 54.

<sup>62</sup> E/CN.4/1999/64, para. 28(d).

<sup>63</sup> International Commission of Jurists, “Dictating the Internet: Curtailing Free Expression and Information

36. Human rights defenders are individuals or groups who act to promote, protect or strive for the protection and realization of human rights and fundamental freedoms through peaceful means.<sup>64</sup> The work of human rights defenders covers a broad range of fields, including actions to protect environmental and land rights as well as actions to fight against and expose corruption.<sup>65</sup>
37. States have adopted a number of international human rights instruments recognizing the special role of human rights defenders in the promotion, protection and implementation of international human rights. In particular, the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (**Declaration on Human Rights Defenders**)<sup>66</sup> affirms the right to engage in human rights education and advocacy and the corollary State duties to ensure the protection of human rights defenders. The Declaration on Human Rights Defenders reaffirms standards already enshrined in binding international law, including the ICCPR, the Charter of the United Nations and the UDHR. The Declaration on Human Rights Defenders was adopted in 1999 by consensus of the General Assembly and thus represents a unanimous commitment by all UN member States to its implementation. The Declaration affirms, among other things, that:
- a. “everyone has the right, individually and in association with others, **to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels**” (article 1, emphasis added);
  - b. “the State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration” (article 12.2).
38. On 16 December 2021, the UN General Assembly adopted by consensus Resolution 76/174, which reaffirms the importance of the Declaration on Human Rights and that the respect, support and protection for the activities of human rights defenders “is essential to the overall enjoyment of human rights”.<sup>67</sup> The Resolution underlines that:

[...] domestic law and administrative provisions and their application should not hinder but **enable the work, both online and offline, of human rights defenders, including by avoiding any criminalization**, stigmatization,

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Online in Thailand”, April 2021, p. 45, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2021/06/Thailand-Dictating-the-Internet-FoE-Publication-2021-ENG.pdf>. See also: UN Human Rights Council, *The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders*, UN Doc. A/HRC/47/39/Add.2, 22 June 2021, para. 83, available at: <https://undocs.org/A/HRC/47/39/Add.2>.

<sup>64</sup> UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders*, UN Doc. A/73/215, 23 July 2018 (“A/73/215”), available at: <https://undocs.org/A/73/215>.

<sup>65</sup> UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders*, UN Doc. A/71/281, 3 August 2016 (“A/71/281”), available at: <https://undocs.org/A/71/281>; UN Human Rights Council, *At the heart of the struggle: human rights defenders working against corruption Report of the Special Rapporteur on the situation of human rights defenders, Mary Lawlor*, UN Doc. A/HRC/49/49, 28 December 2021, available at: <https://undocs.org/A/HRC/49/49>.

<sup>66</sup> UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: resolution / adopted by the General Assembly*, UN Doc. A/RES/53/144, 8 March 1999, available at: <http://www.refworld.org/docid/3b00f54c14.html>.

<sup>67</sup> UN General Assembly, *Implementing the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms through providing a safe and enabling environment for human rights defenders and ensuring their protection, including in the context of and recovery from the coronavirus disease (COVID-19) pandemic*, UN Doc. A/RES/76/174, 16 December 2021, available at: <https://undocs.org/A/RES/76/174>.



impediments, obstructions or restrictions thereof, contrary to the obligations and commitments of States under international human rights law. (emphasis added)

39. The ICJ considers that the lawsuit filed against the Defendant constitutes a SLAPP lawsuit, as it appears to have been filed to interfere with the Defendant's rights to freedom of expression.<sup>68</sup> The ICJ submits that the Court should interpret the abovementioned charges in light of the resolution by the Human Rights Council, adopted by consensus, for States to protect individuals from SLAPP lawsuits, including by adopting laws and policies that prevent and/or alleviate such cases and provide support to victims.<sup>69</sup>
40. The ICJ notes that in Indonesia, article 66 of Law No. 32 of 2009 on Environmental Protection and Management (**Law 32/2009**) stipulates that:<sup>70</sup>

Any person who defends the right to a good and healthy environment shall not be prosecuted based on criminal and civil lawsuits.

Since the statement concerned in the present case relates to the right to a healthy environment, and in view of Indonesia's obligation to protect human rights defenders from SLAPP lawsuits, the Court should consider applying article 66 of Law 32/2009.

## VII. Conclusion

41. It is respectfully submitted that, to ensure the good-faith discharge of Indonesia's international human rights obligations, criminal defamation and "false information" laws should be treated and construed in ways that ensure conformity with international human rights law, including the ICCPR, and standards as summarized above. It is incumbent on all branches of government, including the judiciary, to ensure respect for these obligations.
42. With regards to criminal defamation, the ICJ requests the East Jakarta District Court to consider:
- a. Avoiding the imposition of criminal sanctions for defamation as they would contravene the right to freedom of expression guaranteed by article 19 of the ICCPR. No form of imprisonment or detention is permissible under the ICCPR in cases of defamation.
  - b. If criminal prosecution based on defamation does nonetheless take place, ensuring that the defences of truth and public interest are available, and avoiding penalizing untrue statements that have been published in error but without malice; and
  - c. Scrupulously guarding the presumption of innocence, including by ensuring that no criminal conviction occurs without the prosecution proving beyond a reasonable doubt each element of the offence, including proving beyond a reasonable doubt that the defendant failed to make reasonable efforts to ascertain the truth of the statements.
43. With regards to articles 14(2) and 15 of Law 1/1946, the ICJ requests the Court to consider avoiding the imposition of criminal sanctions as the articles are vague and overbroad, based on an illegitimate purpose, and disproportionately and unnecessarily sanction expression, which will contribute to a chilling effect on freedom of expression.
44. Thus, the ICJ submits that the Court should ensure that laws restricting freedom of expression, including defamation and "false information" laws, are not interpreted or applied in ways that prevent or punish the exercise of the right of human rights defenders and journalists to protect the public interest by informing the public about possible human rights violations and advocating for improved protection of internationally protected rights. Any legal actions that impede the right to freedom of expression must be deemed unlawful

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<sup>68</sup> A/71/281, para. 64.

<sup>69</sup> UN Human Rights Council, *Resolution adopted by the Human Rights Council 51/9: The safety of journalists*, UN Doc. A/HRC/RES/51/9, 6 October 2022, para. 11(i), available at: <https://undocs.org/A/HRC/RES/51/9>.

<sup>70</sup> Available at: <https://peraturan.bpk.go.id/Home/Details/38771/uu-no-32-tahun-2009>.

where they do not comply with the strict requirements of legality, legitimate purpose, necessity, proportionality and non-discrimination.