

***Amicus Curiae* for the Judges of East Jakarta District Court, with court case number no.
203/Pid.Sus/2023/PN Jkt.Tim and no.202/Pid.Sus/2023/PN Jkt.Tim for defendant
Ms. Fatiah Maulidiyanty and Mr. Haris Azhar**

**Submitted by:
Asian Forum for Human Rights and Development (FORUM-ASIA)**



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I. Introduction

1. The Asian Forum for Human Rights and Development (FORUM-ASIA), founded in 1991, is a regional human rights organisation with 85 member organisations across 23 countries, including in Indonesia, with the main objective to strengthen movements for human rights and sustainable development. FORUM-ASIA has consultative status with the United Nations Economic and Social Council and consultative relationship with the ASEAN Intergovernmental Commission on Human Rights.
2. FORUM-ASIA submits this Amicus Brief to provide submissions in the context of defamation case (Article 310 and 311 of the Criminal Code, Article 27 paragraph (3) and Article 45 paragraph (3) of the Electronic Information and Transaction (ITE) Law against Ms. Fatiah Maulidiyanti and Mr. Haris Azhar, court case no. 203/Pid.Sus/2023/PN Jkt.Tim and no.202/Pid.Sus/2023/PN Jkt.Tim respectively; brought by Mr. Luhut Binsar Panjaitan (the Plaintiff). The case stemmed from a YouTube video titled **“ADA LORD LUHUT DIBALIK RELASI EKONOMI-OPS MILITER INTAN JAYA!!JENDERAL BIN JUGA ADA!! NgeHAMtam”** posted on 20 August 2021, wherein Ms. Fatiah Maulidiyanti and Mr. Haris Azhar (the Defendants) discussed the potential involvement of several retired Indonesian National Armed Forces Generals, including the Plaintiff who is Indonesia’s Coordinating Minister for Maritime Affairs and Investment, in mining operations in Intan Jaya Regency, Papua.
3. Ms. Fatiah Maulidiyanti is a woman human rights defender and served as the Coordinator of the Commission for the Disappeared and Victims of Violence (Kontras). She has a clear record of working in the civil society movement and work on various human rights issues. Mr. Haris Azhar is a human rights defender and the Executive Director of Lokataru, as well as former Coordinator of KontraS. He has been known to promote and protect human rights in Indonesia and internationally.
4. The Amicus Brief asserts that the criminal defamation case (the Defamation Case) against the Defendants is inconsistent with Indonesia's obligations under international human rights law. As a State Party to core international human rights instruments, Indonesia has an obligation to promote, respect, and protect the right to freedom of expression and other fundamental freedoms. Failure to protect the right to freedom of expression has severe implications to the exercise of other rights, such as the right to participate in public affairs and the right for human rights defenders to operate safely and without fear of reprisals.
5. Indonesia as a State Party to International Covenant on Civil and Political Rights (ICCPR), which ratified through Law No. 12 of 2005, shall guarantee the enjoyment of human rights set out in the ICCPR for all individuals. All state actors, including the

judiciary, are obliged to ensure the enjoyment of rights under the ICCPR. This also entails the application of human rights principles when adjudicating criminal cases.¹

II. Legal Considerations under International Law

A. The defamation case against the Defendants represents an unjustified restriction on the right to freedom of expression

6. The Universal Declaration of Human Rights (UDHR) recognised the right to freedom of expression under Article 19 which stipulates:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

7. The right to freedom of expression is also guaranteed in the ICCPR as it is stipulated under Article 19:

“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.”

As a Member State of the United Nations (UN) and a State Party to the ICCPR, Indonesia has the obligation, under international law, to promote, respect and protect human rights and fundamental freedoms, including the right to freedom of expression.

8. Pursuant to Article 27 of the Vienna Convention on the Law of Treaties, national laws cannot be utilised to justify a state’s failure to comply with its obligations under the international treaty it has ratified on.²
9. The right to freedom of expression is essential as a foundation of every free and democratic society. It is essential for the realisation of the principles of transparency and accountability which are key components for the promotion and protection of

¹ UN Human Rights Committee, General Comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004) para. 4; and UN Human Rights Committee, CCPR General Comment No. 34: Article 19 (Freedoms of opinion and expression), UN Doc. CCPR/C/GC/34 (12 September 2011) para. 7.

² Vienna Convention on the Law of Treaties, Article 27; and UN Human Rights Committee, General Comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004) para. 4.

human rights.³ The right to freedom of expression is interrelated and indivisible from enjoyment of other human rights.⁴

10. The UN Human Rights Committee affirmed that the right to freedom of expression includes all forms of communication including political discussion and commentary on public affairs. The General Comment no. 34 paragraph 11 explains:

“... This right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, subject to the provisions in article 19, paragraph 3, and article 20. It includes political discourse, commentary on one’s own and on public affairs, canvassing, discussion of human rights, journalism, ...”⁵

11. While the right to freedom of expression is paramount, it is not absolute. Restrictions are permissible, with clear requirements, under Article 19 paragraph 3 of the ICCPR, which stipulates:

“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.”

12. The UN Human Rights Committee stated that the limitation on the right to freedom of expression must be prescribed by law and be imposed to pursue a legitimate purpose stipulated under Article 19 subparagraph (a) and (b) of the ICCPR. Moreover, the limitation must be deemed necessary and proportionate to pursue such a purpose.⁶

13. Considering the restrictive nature of defamation law towards the right to freedom of expression, the East Jakarta District Court (the Court) must ensure that the law is imposed in a manner that conforms to the strict requirement set forth in Article 19 of ICCPR and that it is not used to unduly curtail the right to freedom of expression.⁷

³ UN Human Rights Committee, CCPR General Comment No. 34: Article 19 (Freedoms of opinion and expression), UN Doc. CCPR/C/GC/34 (12 September 2011) paras. 2-3.

⁴ Ibid, para. 4.

⁵ Ibid, para. 11.

⁶ Ibid, para. 22; and UN Human Rights Committee, General Comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004) para. 6.

⁷ UN Human Rights Committee, CCPR General Comment No. 34: Article 19 (Freedoms of opinion and expression), UN Doc. CCPR/C/GC/34 (12 September 2011) para 47.

14. The UN Special Rapporteur on Freedom of Opinion and Expression emphasises that the Court must examine whether a defamation case satisfy the requirements specified under the Article 19 of the ICCPR, which are:
- (i) Legality: the restriction must be “provided by law” which “is clear and accessible to everyone”
 - (ii) Legitimate aim: the restriction must be legitimate under Article 19 (3) which are to protect the rights or reputations of others; national security, public order or health, or morals
 - (iii) Necessity and proportionality: the restriction must be imposed as necessary, the least restrictive and proportionate means to achieve the stated aim.⁸
15. In addition, the Court must also ensure that defamation laws are not used to stifle ‘open public debate of matters of general or specific interest’.⁹ In the present context, the case against the Defendants stemmed from a YouTube video where the Defendants discussed the findings of a multi-stakeholder report. Referring to the findings, the Defendants made commentaries on the alleged involvement of the Plaintiff in gold mining operations in Intan Jaya Regency, Papua, which is a purported factor in the escalation of environmental damages and human rights violations in the area.¹⁰
16. Taking into account the Defendants’ action of exercising their freedom of expression, the Court shall note the assertion of the UN Special Rapporteur on Freedom of Opinion and Expression that reporting on human rights, government activities and corruption fall under the types of expression that should never be subjected to restriction and criminalisation.¹¹ The Defendants’ conduct in the form of reports on human rights and government activity should not be criminalised by the use of defamation law aimed at protecting the reputation of the Plaintiff.¹²
- B. The use of defamation law by the Plaintiff is a disproportionate response considering his position as a public official. Public shall be allowed to comment and criticise on public interest issues without fear of reprisals.
17. By making commentaries on human rights violations and offering criticism against the government and/or public officials, the Defendants are exercising their right to participate in public affairs. This right is interrelated with the right to freedom of

⁸ UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/20/17 (4 June 2012) para. 81.

⁹ UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63 (18 January 2000) para. 52.

¹⁰ Koalisi Bersihkan Indonesia, “Ekonomi-Politik Penempatan Militer di Papua: Kasus Intan Jaya” (August 2021) <<https://www.jatam.org/ekonomi-politik-penempatan-militer-di-papua-kasus-intan-jaya/>>.

¹¹ UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/66/290 (10 August 2011) para. 42.

¹² Ibid, para. 40.

expression and other human rights, and is recognised under Article 25 paragraph (a) of the ICCPR.

18. Consequently, the Court must consider Indonesia's obligation to guarantee that its citizens can engage in public discourse and influence policymaking through public debate. Such participation is a core of the democratic government based on the consent of the people and in conformity with principles of the ICCPR.¹³
19. Implementation of defamation law in Indonesia should consider the importance of open discussion on matters of public interest. The Court must keep in mind that the Plaintiff as a public official must be able to endure a higher degree of criticism compared to ordinary individuals.¹⁴
20. The UN Human Rights Committee stated that in the context of defamation, criminal law should only be considered in the most severe and exceptional cases.¹⁵ In relation to criticism against the Plaintiff as a public official, with his prominent and public role, the Court shall assert that the conduct of the Defendants genuinely harmed the the Plaintiff's rights and reputation to such an extreme level that it warrants the categorisation of the 'most severe and exceptional'.¹⁶

C. The Court must recognize the defence of public interest and publication without malice or with reasonable effort.

21. The UN Human Rights Committee has asserted that when assessing the exercise of freedom of expression, public interest should be recognised as a valid defence irrespective of the circumstances. Given the Plaintiff's status as a public official, this should further justify as a ground to avoid criminal penalties.¹⁷
22. In the context of the Defendants' conduct, defences such as publication without malice or with reasonable effort/ verification should be recognised, especially for the matters related to public interest. A strict standard of truth shall be applied in the court. The UN Human Rights Committee further emphasised that 'rendering unlawful

¹³ UN Human Rights Committee, CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), UN Doc. CCPR/C/21/Rev.1/Add.7 (12 July 1996) para. 8.

¹⁴ UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63 (18 January 2000) para. 52; and UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. A/HRC/20/17 (4 June 2012) para. 88.

¹⁵ UN Human Rights Committee, CCPR General Comment No. 34: Article 19 (Freedoms of opinion and expression), UN Doc. CCPR/C/GC/34 (12 September 2011) para. 47.

¹⁶ Ibid.

¹⁷ Ibid.

untrue statements that have been published in error but without malice' should not be subject to criminalisation.¹⁸

23. The UN Special Rapporteur on Freedom of Opinion and Expression emphasises that, in situations where strict adherence to truth is demanded, defences such as "non-malicious or reasonable publication" should be recognised. Furthermore, requiring absolute truth in publications pertaining to matters of public interest is excessive. Instead, it should be sufficient if reasonable efforts have been made to ascertain the truth, particularly when the expression concerns matters of public interest.¹⁹

D. Pursuing a defamation case against the Defendants undermines the protection of human rights defenders.

24. 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 (The Declaration of Human Rights Defenders) underscores the rights of human rights defenders. The declaration was adopted unanimously by the General Assembly in 1999, to ensure the promotion and protection of all human rights and fundamental freedoms for all individuals, especially human rights defenders and their important role.²⁰

25. The protection of the rights of human rights defenders are important to the defence of human rights at large. It is crucial to enable a conducive environment for the defenders to effectively carry out their activities.²¹ The Declaration of Human Rights Defenders reiterated that the state has an obligation to ensure the protection of human rights defenders in exercising their rights set out in the binding international human right instruments, including ICCPR:

"Article 1: Everyone has the right, individually and in association with others, to promote and to strive for the protection and realisation of human rights and fundamental freedoms at the national and international levels.

Article 2: 1. Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, inter alia, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all

¹⁸ Ibid.

¹⁹ UN Commission on Human Rights, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63 (18 January 2000) para. 52.

²⁰ UNGA, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN Doc. A/RES/53/144 (8 March 1999).

²¹ UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/63/288 (14 August 2008) Annex, para. 2.

persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.”

26. The Declaration also recognised the right to freedom of expression and its importance in enabling human rights defenders to effectively conduct their work. Article 6 of the Declaration set out as below:

“Everyone has the right, individually and in association with others:

(a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;

(b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;

(c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters.”

27. The Court should also take into account the Defendants’ status as human rights defenders, as validated by the Indonesian National Commission on Human Rights (Komnas HAM), through letter No. 587/K-PMT/VII/2022 dated 12 July 2022 where the Komnas HAM declared that the Defendants met the qualifications of human rights defenders whose activities are legally protected. This validation underscores the Court’s obligation to respect and protect the rights of human rights defenders.

28. Article 66 of Indonesian Law No. 32 of 2009 on Environmental Protection and Management guarantees that all individuals who advocate for a healthy and safe environment shall not be criminalised. This provision is in line with the spirit and values instilled in the Declaration of Human Rights Defenders.

29. Regrettably, defamation law has often been imposed to hinder the human rights defenders in carrying out their activity and to prohibit their work through criminalisation. The UN Special Rapporteur on the situation of human rights defenders reiterated that criminalisation is increasingly utilised by authorities and non-state actors against defenders reporting human rights violations.²²

30. The UN Special Rapporteur on the situation of human rights defenders further emphasised that civil defamation lawsuits also have a harmful impact as much as criminal defamation offences. Civil defamation can disastrously affect freedom of opinion and expression.²³ The sanctions of fines and imprisonment imposed on human rights defenders will severely impair their ability to carry out their work, and the

²² UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights defenders, UN Doc. A/HRC/13/22 (30 December 2009) para. 33.

²³ Ibid.

possibility of civil and criminal lawsuits may also result in their self-censorship and discourage further human rights work.²⁴

III. Analysis

31. It is imperative that the defamation laws, which serve as the legal basis in the criminal case against the Defendants, including Article 310 and 311 of the Indonesian Criminal Code, Article 27 paragraph (3) in conjunction with Article 45 paragraph (3) of the ITE Law - are applied by the Court in a manner consistent with international human rights standards as mentioned above.
32. The discussion done by the Defendants and broadcasted on YouTube represents a legitimate form of exercising their right to freedom of expression. This YouTube video also contains commentary on potential human rights violations and critiques of government officials, that must be protected under the international human rights law and should remain exempt from criminal prosecution.
33. The Court must prioritise public interest as a legitimate defence in reaching its verdict. The content of the YouTube video shall be understood as an action to inform the public, providing expert commentary on human rights issues and potential human rights violations.
34. The Plaintiff, in his capacity as Indonesia's Coordinating Minister for Maritime Affairs and Investment, occupies a high level public official role. Consequently, he is expected to be receptive to public criticisms, especially from human rights defenders who have an inherent role to highlight human rights concerns. Critiques to public officials are part of the application of good governance principles, especially transparency and accountability.
35. The discussion in the YouTube video should be perceived as a reasonable and non-malicious publication. The Defendants' work history shows their continued good faith in advocating for human rights issues. The Court should recognise that conveying criticism in the public interests and drawing attention to alleged human rights violations are inherent duties of human rights defenders, and it is a legitimate and protected action under the ICCPR. Thus, the Defendants' exercise of their right to freedom of expression and participation in public affairs should not be misconstrued as bearing malicious intent.
36. Taking into account the Defendants' status as human rights defenders and the matter discussed in the YouTube video pertaining to public interest, the Court must strictly adhere to the principles of legality, legitimate aim, proportionality, and necessity in the application of defamation law, ensuring that the rights of the public to seek, obtain and receive information related to public affairs are upheld.

²⁴ Ibid.

37. The adjudication of the defamation case by the court should be consistent with the recommendations made by the UN Human Rights Committee in its concluding observation on the initial report of Indonesia on ICCPR implementation. The Committee expressed concern that the defamation provisions stipulated in both the Criminal Code and the ITE Law may be exploited to silence legitimate criticism directed towards government officials, and hence constitute a violation of article 19 of the ICCPR.²⁵
38. It is also affirmed by Indonesia's fourth cycle Universal Periodic Review process under the UN Human Rights Council where there are recommendations for Indonesia to decriminalise defamation and ensure safe space for freedom of expression.²⁶ The Indonesian government has acknowledged the importance of safeguarding the right to freedom of expression and supported the recommendation to amend ITE Law and Criminal Code provisions related to this matter.²⁷ In light of this, the Court should uphold human rights principles and reflect the commitment made by Indonesia at the international level.

IV. Conclusion and Recommendation

39. The international law and human rights principles, including conventions ratified by the Indonesian government, set a high standard concerning limitations on the right to freedom of expression. As a State Party to the ICCPR, ratified through the Law No. 12 of 2005, every organ of the Indonesian government must ensure compliance to their international obligation to respect and protect fundamental human rights. Limitations on freedom of expression must be applied in a strict manner, particularly when the case involving the Defendants is related to public interest.
40. Given the Plaintiff's status as a high-level public official, for a defamation case to be valid, it should fall within the 'most severe and exceptional' category.²⁸ Exercising the right to freedom of expression on issues related to public matters and potential human rights violations involving state actors does not meet these criteria. The use of defamation law as evident in the case against the Defendant, should not be deemed as a proportionate and acceptable response to criticism against public officials.
41. The Defendants' discussion on YouTube is a legitimate exercise of freedom of expression and the right to participate in public affairs. The matters discussed are of public concern and reasonable efforts have been made to ascertain the truth, as

²⁵ UN Human Rights Committee, Concluding observations on the initial report of Indonesia, UN Doc. CCPR/C/IDN/CO/1 (21 August 2013) para. 27.

²⁶ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Indonesia, UN Doc. A/HRC/52/8 (21 December 2022) paras. 140.105, 109-113.

²⁷ Ibid, para. 140.110.

²⁸ UN Human Rights Committee, CCPR General Comment No. 34: Article 19 (Freedom of opinion and expression), UN Doc. CCPR/C/GC/34 (12 September 2011), para. 47.

demonstrated by the report utilised in the video as the basis of the Defendants' argument. Furthermore, the status of the Defendants as human rights defender, as evident from their work history and the Komnas HAM letter No. 587/K-PMT/VII/2022 dated 12 July 2022, further affirm that providing critiques on public affairs and discussing alleged human rights violations is part of their work. As such, the action of the Defendants shall not be misconstrued as stemming from malicious intent.

42. Based on all aforementioned reasons, we respectfully request the Court to interpret defamation laws in alignment with international human rights law and standards, in order to ensure the maximum enjoyment of the right to freedom of expression. No individuals should be subjected to criminal liability for defamation while exercising their freedom of expression, especially on matters of public interests involving public officials. It is essential for the Court to recognise the significant role of human rights defenders' work in highlighting potential human rights violations. Their work shall not be misconstrued as an act borne out of malicious intention. Any prosecution of defamation actions, or any constraints on the right to freedom of expression must strictly follow the principles of legality, necessity, and proportionality, and this should be proven beyond a reasonable doubt.
