Amicus Curiae Brief in Case No. 424/G/TF/2022

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 Jakarta Administrative Court in Case No. 424/G/TF/2022.

3. The ICJ (**intervener**) provides submissions to the Jakarta Administrative Court in the present case brought by the Claimants, comprising private individuals and non-government organizations against the Minister of Communication and Information Technology. The claim concerns the action taken by the Minister on 30 July 2022 to block access to eight websites: PayPal, Yahoo, Epic Games, Steam, Dota, Counter Strike, Xandr.com, and Origin (EA). According to the Ministry of Communication and Information Technology (**MCIT**), the platforms were blocked because they failed to register as a Private Electronic Systems Operators (**Private ESO**) in accordance with Regulation of the Minister of Communication and Information Technology Number 5 of 2020 on Private Electronic System Operators (**Ministerial Regulation No. 5**).

4. The objective of the intervener in this brief is 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 rights of freedom of expression and information and the right to privacy. The intervener respectfully requests that the Jakarta Administrative Court review the access blocking conducted by the MCIT in line with Indonesia's obligations under international human rights law.

II. Indonesia's International Human Rights Obligations

5. One of the first resolutions of the UN General Assembly, adopted in 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".[1] In 2022, the UN Human Rights Council adopted a resolution reaffirming that the right to freedom of expression and information:[2]

> […] 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 […]

[1] 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).
[2] 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.

6. Indonesia's compliance with its international human rights obligations is a cornerstone for ensuring respect for and the promotion of 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:[3]

> 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].[4]

7. Under the principle 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.[5] Furthermore, Indonesia may not rely on provisions of its internal law to justify a failure to meet a treaty obligation.[6]

8. Indonesia acceded to the International Covenant on Civil and Political Rights (**ICCPR**) on 23 February 2006. States that are parties to the ICCPR have an obligation to respect and ensure a range of human rights, including. These include, among others, the freedom of expression and information (article 19) and the right to privacy (article 17). 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.[7]

9. 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 provided:

> 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

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[3] 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.
[4] 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.
[5] 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').
[6] VCLT, articles 26 and 27; CCPR/C/21/Rev.1/Add.13, para. 4.
[7] 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.

Party.[8]

> [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.[9]

The nature of legal obligations was 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.[10]

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

10. 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, 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.

11. Indonesia has the 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.
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> 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.

12. The UN Human Rights Committee has clarified in General Comment No. 34 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.[11]

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[8] CCPR/C/21/Rev.1/Add.13, para. 4.
[9] CCPR/C/21/Rev.1/Add.13, para. 8.
[10] Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, 12 September 2011, para. 7, available at: http://www.refworld.org/docid/4ed34b562.html ('CCPR/C/GC/34').
[11] CCPR/C/GC/34, paras. 2 - 3.

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

13. 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:
>
> 1) For respect of the rights or reputations of others;
>
> 2) For the protection of national security or of public order (*ordre public*), or of public health or morals.

14. 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)), 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:[12]

    a. The restriction imposed must be **provided by law**, which is clear and accessible to everyone;[13] in particular, the law must be "formulated with sufficient precision to enable an individual to regulate his or her conduct" (emphasis added);[14]

    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);[15]

    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).[16]

15. The Human Rights Committee has made clear that when the State invokes a legitimate purpose to restrict expression and information, it must "demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat".[17]

16. States should only seek to restrict content pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy,[18] as affirmed by the UN Special Rapporteur on the promotion and

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[12] 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, paras 64 and 81, available at: http://www.refworld.org/docid/5008134b2.html ('A/HRC/20/17').
[13] A/HRC/20/17.
[14] CCPR/C/GC/34, para. 25.
[15] A/HRC/20/17.
[16] A/HRC/20/17.
[17] CCPR/C/GC/34, para. 35; The UN Special Rapporteur on Freedom of Expression has also made clear that States "must establish a direct and immediate connection between the expression and the threat said to exist", and that "the limitation must target a specific objective and not unduly intrude upon other rights"; see, UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, *David Kaye*, 22 May 2015, A/HRC/29/32 ('A/HRC/29/32'), para. 35, available at: https://undocs.org/A/HRC/29/32.
[18] A/HRC/38/35, para. 66.

protection of the right to freedom of opinion and expression (**UN Special Rapporteur on Freedom of Expression**).[19]

17. The right to an effective remedy guaranteed by article 2(3) of the ICCPR and the rule of law requires States to ensure the availability of appeal procedures provided "by a competent judicial authority".[20] Restrictive laws that do not expressly provide for the right to appeal by an independent and impartial judicial authority renders the executive branch as the "arbiters of lawful expression",[21] which is inconsistent with State obligations under article 19 of the ICCPR and the requirement of separation of powers under the rule of law.[22]

IV. The Right to Privacy in International Law

18. The right to privacy is recognized by the UN General Assembly as "one of the foundations of a democratic society", and a pre-requisite to the free and independent exercise of the rights to expression and to hold opinions without interference.[23] Article 17 of the ICCPR provides that:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

19. While not set out expressly in article 17, the Human Rights Committee and the Human Rights Council have both affirmed that the principles of legality, necessity, and proportionality, apply to the right to privacy in the same manner as they do to freedom of expression and other fundamental freedoms.[24]

V. Analysis of Blocking of Internet Platforms under International Law

20. The intervener respectfully submits that to ensure good-faith adherence to Indonesia's international human rights obligations, Indonesian law must be interpreted and construed so as to ensure conformity and compliance with international human rights law, including the rights to freedom of expression and information, and privacy guaranteed in the ICCPR, as summarized above. As noted above, it is incumbent of all branches of government, including the judiciary, to ensure respect for these obligations and the ICCPR engages the responsibility of all branches of Government. The court should thus interpret Indonesia's laws so as ensure conformity with international human rights law.

21. The intervener submits that the blocking of the eight digital platforms on 30 July 2022 is in breach of Indonesia's obligations under article 19 of the ICCPR since it failed to meet the elements of (**A**) legality and legitimate purpose; and (**B**) necessity and proportionality. Furthermore, the blocking (**C**) has not been carried out with sufficient independent judicial oversight.

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[19] UN Special Rapporteurs are independent human rights experts mandated by the UN Human Rights Council to report and advise on human rights from a thematic or country-specific perspective. See UN Human Rights Council Resolution 5/2, *Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council*, 18 June 2007, A/HRC/RES/5/2, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/5/2.

[20] UN Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression: Addendum, Communications to and from Governments*, 16 May 2011, A/HRC/17/27 ('A/HRC/17/27'), para 47, available at: https://www.refworld.org/docid/50f3db632.html.

[21] A/HRC/38/35, para. 68.

[22] A/HRC/RES/19/36, para 16(a).

[23] UN General Assembly, 'The right to privacy in the digital age', A/RES/68/167 ('A/RES/68/167'), 18 December 2013, available at: https://undocs.org/A/RES/68/167

[24] UN Human Rights Council, 'The right to privacy in the digital age', A/HRC/RES/42/15, 26 September 2019, para. 2, available at: https://undocs.org/A/HRC/RES/42/15; Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992, 31 March 1994, para. 8.3.

A. Legality and Legitimate Purpose

22. Under Ministerial Regulation No. 5, the MCIT is authorized to block access to digital platforms if they fail to register with the MCIT.[25] Before the platforms were blocked on 30 July 2022, the MCIT issued a Press Release warning digital platforms that they would be blocked in Indonesia if they failed to comply with registration requirements under Ministerial Regulation No. 5.[26] The MCIT further stated that the registration requirement was a way for it to fulfil its commitment towards protecting the rights of users, such as the right to privacy, and maintaining an accountable digital ecosystem.[27]

23. The intervener submits that the authority for the MCIT to impose restrictions of the right to freedom of expression in the digital space, such as access blocking or content takedown, should be granted by primary legislation (*Undang-Undang*) rather than a Ministerial Regulation. Interpreting article 19 of the ICCPR in light of its object and purpose,[28] the term "provided by law" under article 19(3) requires that restrictions on freedom of expression be set down in formal legislation.[29] In the present case, the access blocking by the MCIT was based on a Ministerial Regulation that did not undergo the formal legislation-making process of the People's Representative Council of Indonesia, which is inconsistent with the principle of legality.

24. While protecting the right to privacy of others may constitute a legitimate purpose in purporting to restrict the rights of freedom of expression and information under article 19(3) of the ICCPR, that alone is not sufficient to make the restriction lawful. The rationale for these restrictions must meet the requirement of legality, in other words, be provided by law "with sufficient precision",[30] so as to establish a concrete connection between the requirement to register and the protection of the rights of others.[31] The intervener notes that Ministerial Regulation No. 5 does not provide an explicit justification for the requirement to register, or any subsequent blocking. The only connection to the right to privacy is found in article 3(3) of Ministerial Regulation No. 5, which requires Private ESOs to provide the MCIT with accurate information on how they have complied with information security and personal data protection obligations. The vagueness of Ministerial Regulation No. 5 may lead to arbitrary decision-making by the MCIT, which does not comply with the principle of legality and rule of law.[32]

25. The intervener submits that more clarity and transparency is needed from the MCIT to constitute a lawful restriction comprising blocking of the platforms. The MCIT claimed that the blocking of access to digital platforms was conducted for failing to fulfil registration requirements. However, when the blocked websites were accessed, the message that appears suggests that the website had been blocked for containing prohibited content under article 9(3) of Ministerial Regulation No. 5:[33]

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[25] Regulation of the Minister of Communication and Information Technology Number 5 of 2020 on Private Electronic System Operators ('Ministerial Regulation No. 5'), article 7(2).
[26] Ministry of Communication and Information Technology ('MCIT'), *Siaran Pers No. 308/HM/KOMINFO/07/2022 tentang Pendaftaran Penyelenggara Sistem Elektronik (PSE) Lingkup Privat*, 29 July 2022 ('MCIT Press Release 29 July 2022'), available at: https://www.kominfo.go.id/content/detail/43385/siaran-pers-no-308hmkominfo072022-tentang-pendaftaran-penyelenggara-sistem-elektronik-pse-lingkup-privat/0/siaran_pers.
[27] MCIT Press Release 29 July 2022.
[28] VCLT, article 31(1).
[29] Manfred Nowak, *UN Covenant on Civil and Political Rights CCPR Commentary*, N.P. Engel – Germany, 2nd revised edition, 2005, pp. 270 and 460.
[30] Article 19(3), ICCPR; CCPR/C/GC/34, para. 25.
[31] UN Human Rights Council, *Disinformation and freedom of opinion and expression - Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan*, UN Doc. A/HRC/47/25, 13 April 2021 ('A/HRC/47/25'), para. 40, available at: https://undocs.org/A/HRC/47/25.
[32] CCPR/C/GC/34, para. 25; A/HRC/RES/19/36, para. 16(c).
[33] Novina Putri Bestari, 'Mangkir Daftar, Dota Hingga Yahoo Diblokir!', CNBC Indonesia, 30 July 2022, available at: https://www.cnbcindonesia.com/tech/20220730084002-37-359782/mangkir-daftar-dota-hingga-yahoo-diblokir.

> Sorry, access to this website has been denied by the Government of Indonesia due to **negative content** as it violates Indonesian law. [emphasis added]

This inconsistency runs counter to the rule of law, which requires that Indonesia ensure a sufficient degree of legal certainty and predictability in the application of Ministerial Regulation No. 5, in order to avoid any arbitrariness.[34]

B. Necessity and Proportionality

26. The wholesale blocking of entire platforms under Ministerial Regulation No. 5 violates the principles of necessity and proportionality under international human rights law, even if a legitimate purpose has been invoked by the MCIT. The Human Rights Committee has stated that "generic bans on the operation of certain sites and systems" are not compatible with article 19(3) of the ICCPR.[35] During the period that the platforms were blocked, users were unable to receive and impart information on the platforms that were blocked, such as Yahoo which hosts an email service.

27. Blocking of entire platforms is an extreme measure, which should not be pursued where there are less restrictive measures to purportedly protect the right to privacy of users.[36] For instance, the MCIT could have employed other measures to ensure compliance, such as issuing a written notice and/or imposing a fine.[37] If the claim was that particular private ESOs contained unlawful content that would interfere with the rights of others, the MCIT could have addressed it through the takedown of the specific content through a judicial decision, instead of blocking the entire website.[38]

28. The unnecessary and disproportionate nature of the outright blocking is exacerbated by the adverse impact on the right to work as guaranteed by article 6 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), to which Indonesia is a party.[39] The Committee on Economic, Social and Cultural Rights (**CESCR**) in its General Comment No. 18 stated that the right to work includes "the right not to be deprived of work unfairly."[40]

29. Specifically, the blocking of PayPal deprived workers from accessing their funds on the application and receiving payment for their work.[41] The MCIT appeared to acknowledge this unfair deprivation of work of users of the blocked platforms when it restored access to PayPal temporarily to urge users to transfer their funds to other platforms while the platform fulfils the registration process.[42]

30. The MCIT or any other engaged authorities must also explicitly demonstrate in "specific and individualized fashion" the threat posed by the failure of the platforms to register, and why the blocking of the eight platforms was necessary and proportionate to purportedly protect the right to privacy of users online.[43] The intervener notes that the MCIT did not individually

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[34] A/HRC/RES/19/36, para. 16(c).
[35] CCPR/C/GC/34, para. 43.
[36] 2011 Joint Declaration.
[37] For example, the European Union General Data Protection Regulation imposes administrative fines for infringements, the amount determined based on factors such as the nature, gravity and duration of the infringement. See *GDPR Enforcement Tracker,* available at: https://www.enforcementtracker.com/. (accessed 20 February 2023)
[38] CCPR/C/GC/34, para 43. See also A/HRC/38/35, para 7.
[39] *International Covenant on Economic, Social and Cultural Rights* ('ICSER'), available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4. (accessed 20 February 2023)
[40] UN Committee on Economic, Social and Cultural Rights ('CESCR'), *The Right to Work, General Comment No. 18, Article 6 of the International Covenant on Economic, Social and Cultural Rights,* 24 November 2005, E/C.12/GC/18, para 4, available at: https://www.refworld.org/docid/4415453b4.html.
[41] *PAYPAL SEMPAT DIBLOKIR KOMINFO, INI DAMPAKNYA BAGI FREELANCER*, Binus University, 28 August 2022, available at: https://student-activity.binus.ac.id/himti/2022/08/28/paypal-sempat-diblokir-kominfo-ini-dampaknya-bagi-freelancer/.
[42] Directorate-General of Application Informatics, *Kominfo Buka Sementara Blokir Paypal*, 31 July 2022, available at: https://aptika.kominfo.go.id/2022/07/kominfo-buka-sementara-blokir-paypal/.
[43] MCIT Press Release 29 July 2022.

demonstrate how blocking each of the eight platforms for non-registration would actually serve to protect the rights to privacy of users. In addition, Ministerial Regulation No. 5 does not explain clearly why registration or blocking would serve to protect the right to privacy of users. The press release issued by the MCIT, which does not in any event carry the force of law, also did not provide any explanation as to how the digital platforms and the content on the platforms posed a threat to the rights of users.

C. Independent and Impartial Judicial Oversight

31. It is submitted that the Court should ensure that there is sufficient independent judicial oversight before and after any restrictions on the right to freedom of expression and information, including the blocking of entire platforms, in line with international human rights law and rule of law standards.

32. The extrajudicial blocking of eight digital platforms was conducted solely by the MCIT without prior authorization by an independent and impartial judicial authority, which runs contrary to international law.[44] The blocking was undertaken pursuant to powers granted by article 7(2) of Ministerial Regulation No. 5, which directly empowers the MCIT to impose administrative sanctions in the form of access blocking on Private ESOs who fail to register.

33. An express judicial appeal mechanism to challenge blocking decisions by the MCIT should also be embedded into Ministerial Regulation No. 5,[45] which the Regulation is currently silent on. Article 7 of Ministerial Regulation No. 5, which grants the MCIT authority to block platforms for non-registration, provides no explicit appeal mechanism for a digital platform to challenge the blocking order. Instead, digital platforms will only have their access restored once they have fulfilled the registration requirements under Ministerial Regulation No. 5.[46]

34. Indonesian law allows for Private ESOs to challenge the access blocking by filing an administrative claim against the MCIT directly,[47] and if a Private ESO is not satisfied with the reply provided by the MCIT, the Private ESO may file a judicial claim against the blocking.[48] This creates procedural hurdles for aggrieved parties to meaningfully access their right to appeal and is inconsistent with Indonesia's obligations under article 2(3) of the ICCPR to guarantee the right to effective remedy. Pursuant to the procedures established by Indonesian law, the first stage of recourse is an administrative appeal to the MCIT who issued the blocking order in the first place. This results in a self-checking process still embedded in executive control. Furthermore, the subsequent submission of a judicial claim against the blocking is likely to be a costly process that not all aggrieved parties can engage in within a limited time frame.

VI. Analysis of Mandatory Registration Requirements under International Law

35. The eight platforms had their access blocked by the MCIT for failing to comply with the mandatory requirement to register with and obtain a registration certification from the MCIT, under article 2 of Ministerial Regulation No. 5.

36. The intervener submits that this mandatory registration requirement is non-compliant with Indonesia's international obligations, which renders blocking decisions for failing to register arbitrary, and thus impermissible as a matter of international law. The intervener respectfully requests the Court to interpret Chapter II of Ministerial Regulation No. 5 regarding the registration of Private ESOs in a manner consistent with Indonesia's obligations under international human rights law.

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[44] CCPR/C/GC/34, para 25. See also A/HRC/38/35, para 66.
[45] CCPR/C/GC/34, para 25. See also A/HRC/17/27, para 47. The intervener also notes that in any case, this right to appeal, as well as the provisions of Ministerial Regulation No. 5, should be contained in primary legislation in line with the principle of legality.
[46] Ministerial Regulation No. 5, articles 7(4) – 7(6).
[47] Law No. 30 of 2014 on Governmental Administration, article 75(1).
[48] Law No. 5 of 1986 on Administrative Courts, article 53(1).

37. In its current form, the registration requirement is overbroad and poses a significant risk to the right to be free from arbitrary interferences of privacy and the right to freedom of expression and information. International human rights law provides that any regulation of internet intermediaries must not be "overbroad,[49] and focus "on enforcing transparency, due process rights for users and due diligence on human rights by companies, and on ensuring that the independence and remit of the regulators are clearly defined, guaranteed and limited by law".[50]

38. Article 2 of Ministerial Regulation No. 5 requires all Private ESOs to complete registration. However, "Private ESOs" are defined broadly in article 1 to encompass virtually every online service or application.[51] Such an overbroad registration requirement risks providing the government with the capacity to monitor individuals beyond any legitimate purpose, which runs contrary to international human rights law.[52] The Special Rapporteur on Freedom of Expression has stated that overly expansive registration requirements of internet platforms cannot be justified as the internet can accommodate an unlimited number of points of entry and an essentially unlimited number of users.[53]

39. To obtain a registration certificate from the MCIT, Private ESOs must provide the MCIT with information on the location of data management, processing, and storage and to guarantee and implement the requirement to provide access to their electronic systems and data in support of law enforcement and oversight efforts. Overbroad provisions which authorize governments to access data poses a risk to the right to privacy and freedom of expression, which are closely interlinked.[54] Such provisions must comply with the elements of legality, legitimate purpose, necessity and proportionality under international human rights law.[55] Currently, there is no definition of what constitutes "oversight" and no judicial oversight for requests by the MCIT,[56] both of which are inconsistent with international human rights law and the rule of law.[57]

40. Although the intervener underscores that requests for user data should only be undertaken pursuant to an order issued by an independent and impartial authority, the intervener also notes the inconsistency from the MCIT in terms of which executive body actually possesses the authority to issue such demands. In a statement issued on 31 July 2022, the Director-General of Application Informatics stated that the MCIT does not have authorization to request Private ESOs to hand over data, and that the authorization solely lies with law enforcement officials and other authorized governmental bodies.[58] This statement directly contradicts article 21(1) of Ministerial Regulation No. 5, which states that:

> Private ESOs are obligated to provide access to Electronic Systems and/or Electronic Data towards the Ministry or Institution and Law Enforcement Officials.

The MCIT's inconsistent interpretation regarding provisions under Ministerial Regulation No. 5 which interfere with the right to privacy is inconsistent with rule of law since it does not ensure legal certainty and predictability in the application of Ministerial Regulation No. 5.[59]

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[49] A/HRC/38/35, para. 66.
[50] A/HRC/47/25, para. 91.
[51] Article 1 defines Private ESOs as including "any individual, business entity, or community" that operates an "Electronic System" involved in the "preparing, collecting, processing, analysing, saving, displaying, announcing, sharing and/or distributing" of electronic information. This includes Individuals and companies connected to websites, social media platforms, email services, search engines, financial services, and nearly any other online service or application, per article 2(2).
[52] A/HRC/29/32, para. 51.
[53] A/HRC/17/27, para. 27.
[54] A/HRC/29/32, para 16. See also UN Human Rights Council, *The right to privacy in the digital age – Report of the United Nations High Commissioner for Human Rights*, 3 August 2018, A/HRC/39/29 ('A/HRC/39/29'), para 20, available at: https://undocs.org/A/HRC/39/29.
[55] CCPR/C/GC/34, paras. 21 – 36. See also A/HRC/29/32, para. 45.
[56] Ministerial Regulation No. 5, article 22 – 31.
[57] CCPR/C/GC/34, para 25; A/HRC/RES/19/36, paras. 16(a) and 16(c).
[58] Directorate-General of Application Informatics, *Kominfo Buka Sementara Blokir Paypal*, 31 July 2022, available at: https://aptika.kominfo.go.id/2022/07/kominfo-buka-sementara-blokir-paypal/.
[59] A/HRC/RES/19/36, para. 16(c).

VII. Conclusion

41. It is respectfully submitted that to ensure good-faith adherence to Indonesia's international human rights obligations, the access blocking by the MCIT and the provisions of Ministerial Regulation No. 5 must be interpreted 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. Restrictions to the right to freedom of expression and information that do not comply with the elements of legality, legitimate purpose, and necessity and proportionality shall be deemed unlawful. Particularly, blocking access to entire platforms should only be conducted with sufficient oversight from an independent and impartial judicial authority, pursue a legitimate purpose, and comply with the principles of necessity and proportionality. Furthermore, the registration requirement under Ministerial Regulation No. 5, which authorized the access blocking, should be interpreted to ensure conformity with Indonesia's international human rights obligations to ensure the rights to privacy and freedom of expression and information.