

Indonesia: Law No. 12 of 2022 on Sexual Violence Crimes and Online Gender-Based Violence Against Women

Legal Briefing
September 2023

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, 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.

Indonesia: Law No. 12 of 2022 on Sexual Violence Crimes and Online Gender-Based Violence Against Women
Legal Briefing

© Copyright International Commission of Jurists

Published in September 2023

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to its headquarters at the following address:

International Commission of Jurists

P.O. Box 1740

Rue des Buis 3

CH 1211 Geneva 1

Switzerland

t: +41 22 979 38 00

f: +41 22 979 38 01

www.icj.org

Indonesia: Law No. 12 of 2022 on Sexual Violence Crimes and Online Gender-Based Violence Against Women

Legal Briefing
September 2023

Table of Contents

I.	Introduction and Summary of Recommendations	1
II.	International Human Rights Law and Standards	3
A.	<u>Adverse impact of OGBV on the enjoyment of human rights</u>	3
i.	<i>The right to non-discrimination and right to be free from OGBV</i>	3
ii.	<i>Rights to life, security of person, freedom from torture and other cruel, inhuman or degrading treatment or punishment, and health</i>	4
iii.	<i>Right to privacy</i>	5
iv.	<i>Right to freedom of expression and access to information</i>	6
B.	<u>State obligation to prevent and punish OGBV</u>	7
III.	Assessment of Law 12/2022 on Sexual Violence Crimes under International Human Rights Law	8
A.	<u>Restrictive definition of OGBV</u>	9
i.	<i>Forms of OGBV criminalized under Law 12/2022</i>	10
ii.	<i>Forms of OGBV not criminalized by Law 12/2022</i>	10
iii.	<i>Criminalization of OGBV consistent with general principles of criminal law and international human rights law principles</i>	12
B.	<u>Gender-sensitive implementation of Law 12/2022</u>	13
C.	<u>Legal protection for victims of OGBV</u>	14
i.	<i>Prevention and removal of harmful online content</i>	15
ii.	<i>Protection orders</i>	17
iii.	<i>Criminalization of victims/survivors</i>	18
D.	<u>Intersectional discrimination</u>	20
E.	<u>Procedural limitations of Law 12/2022</u>	21
i.	<i>Gathering and securing digital evidence</i>	21
ii.	<i>Anonymity of perpetrators</i>	23
F.	<u>Other appropriate measures to prevent OGBV under Law 12/2022</u>	24
IV.	Role of Online Platforms and Tech Companies	25
A.	<u>Online platforms</u>	25
B.	<u>Right to be forgotten</u>	26
V.	Conclusion	27
VI.	Annex – Table of Recommendations	27

I. Introduction and Summary of Recommendations

On 12 April 2022, the Indonesian House of Representatives adopted Law No. 12 of 2022 on Sexual Violence Crimes (Law 12/2022).¹ The adoption of Law 12/2022 was welcomed by women's rights activists as a significant advancement toward protecting women's human rights.² The International Commission of Jurists (ICJ) has noted that the adoption of Law 12/2022 marked an important step towards Indonesia fulfilling its legal obligations under international human rights law to protect women's human rights by tackling sexual violence more effectively and seeking to ensure access to legal remedies for victims/survivors.³

In particular, article 4(1) of Law 12/2022 explicitly criminalizes "electronic-based sexual violence". The inclusion of this term explicitly recognizes that gender and sexual-based violence occurs online and is facilitated by digital technologies, hence enhancing efforts to guarantee effective legal protection for victims/survivors of online gender-based violence (OGBV). Article 4(1) provides an additional legal basis for the Indonesian criminal justice system to investigate, prosecute and punish perpetrators of certain forms of OGBV.

Women,⁴ who access and use the internet, are disproportionately impacted by OGBV, albeit men and boys may also be the target of OGBV. Furthermore, online violence targeted at lesbian, gay, bisexual and transgender (LGBT) people may also constitute OGBV, particularly when such violence is motivated by harmful gender stereotypes, gender norms and social constructs.⁵ This briefing paper, however, focuses exclusively on OGBV against women and girls in Indonesia.

The United Nations (UN) Special Rapporteur on violence against women, its causes and consequences (Special Rapporteur on VAW) defines "online violence against women" as:⁶

any act of gender-based violence against women that is committed, assisted or aggravated in part or fully by the use of [information and communications technology], such as mobile phones and smartphones, the Internet, social media platforms or email, against a woman because she is a woman, or affects women disproportionately.

Acts of OGBV constitute acts that inflict or threaten substantial harm to the rights and freedoms of others, and amount to a violation of their physical, sexual or psychological integrity, thus necessitating a criminal law response from States, including, first and foremost, the criminal proscription of certain forms of OGBV.⁷

¹ Law No. 12 of 2022 on Sexual Violence Crime (Law 12/2022), available at: <https://peraturan.bpk.go.id/Home/Details/207944/uu-no-12-tahun-2022>.

² Tunggal Prawestri and Tim Mann, "Indonesia finally has a law to protect victims of sexual violence. But the struggle is not over yet.", *Indonesia at Melbourne*, 20 April 2022, available at: <https://indonesiaatmelbourne.unimelb.edu.au/indonesia-finally-has-a-law-to-protect-victims-of-sexual-violence-but-the-struggle-is-not-over-yet/>.

³ International Commission of Jurists (ICJ), "Indonesia: the ICJ welcomes the Indonesian Parliament's landmark adoption of legislation on sexual violence", 21 April 2022 ("ICJ Press Release"), available at: <https://www.icj.org/indonesia-the-icj-welcomes-the-indonesian-parliaments-landmark-adoption-of-legislation-on-sexual-violence/>.

⁴ This briefing paper uses the term "women" to refer to women and girls, unless stated otherwise.

⁵ See, for instance: ICJ, "Silenced But Not Silent: Lesbian, Gay, Bisexual and Transgender Persons' Freedom of Expression and Information Online in Southeast Asia – A Baseline Study of Five Countries in Southeast Asia: Indonesia, Malaysia, Philippines, Singapore and Thailand", 27 July 2023 ("LGBT Persons' Freedom of Expression and Information Online Baseline Study"), pp. 10 – 11, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2023/07/ICJ-Silenced-But-Not-Silent-Report.pdf>.

⁶ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, UN Doc. A/HRC/38/47, 18 June 2018, ("A/HRC/38/47"), para. 23.

⁷ UN Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, UN Doc. CEDAW/C/GC/35, 26 July 2017, ("CEDAW/C/GC/35"), para. 29(a). Other harmful acts, such as sexist hate speech that does not inflict or directly threaten violence, while not warranting a criminal law response, should still be addressed by States through legal and other appropriate measures. For instance, States may adopt positive measures to address the dissemination of sexist hate speech, including education policies calling attention to the harms produced by sexist hate speech and/or formal condemnation of sexist hate speech by high-level public officials. For specific guidance on addressing hate speech, see: Human Rights Council, *Annual report of the United Nations High Commissioner for Human Rights: Addendum*, UN Doc. A/HRC/22/17/Add.4 ("Rabat Plan of Action"), 11 January 2013, paras. 35 – 39, available at: https://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

OGBV may take many different forms. It can arise from online content, such as non-consensual sharing of intimate images and videos and doxing,⁸ and online behaviours, such as digital threats of violence, sextortion,⁹ online stalking and online sexual harassment.¹⁰ In severe cases, online threats of physical harm can become a reality.¹¹ For example, when private information, such as a victim's home address and whereabouts, are disclosed online as part of a concerted campaign of targeted harassment, the victim is put at severe risk of offline harassment.

According to Indonesia's National Commission on Violence Against Women (Komnas Perempuan),¹² OGBV against women in the country has become increasingly prevalent over the past few years. There has been a sharp increase in OGBV complaints received by Komnas Perempuan since the COVID-19 pandemic, with 281 complaints of OGBV in 2019, which significantly rose to 940 complaints in 2020, and up to 1721 complaints of OGBV in 2021.¹³ Further data from the Indonesian Statistics Institute's 2021 National Survey of Women's Experiences indicates that OGBV is most prevalent against girls aged 15-19.¹⁴ The most commonly reported forms of OGBV are sextortion, online harassment and non-consensual sharing of intimate images and videos.¹⁵

Despite advancements made with the adoption of Law 12/2022, much still needs to be done to effectively prevent OGBV and ensure access to justice and effective remedies for victims/survivors of OGBV. The ICJ has previously published a legal guidance, grounded in international human rights law and standards, to assist States to draft new laws or amend existing legal provisions to enhance effective prevention of and redress against OGBV against women.¹⁶

The following section describes the relevant international human rights law standards to address, prevent and punish acts of OGBV. Section III then benchmarks Law 12/2022 against these relevant standards and ICJ's legal guidance on OGBV to highlight how Indonesia can better meet its international human rights obligations to protect women against OGBV. Lastly, Section IV describes the role of private companies in efforts to address OGBV.

Based on the analysis provided in this briefing paper, the ICJ recommends that:

- The definition of "electronic-based sexual violence" under article 14 of Law 12/2022 should be broadened to encompass additional forms of OGBV not addressed by Law 12/2022;
- The Indonesian authorities should expedite the adoption of Governmental Regulations implementing Law 12/2022 on: the prevention and removal of harmful content; legal protection of victims/survivors; and other measures to prevent OGBV;
- Take steps to ensure that each chain of justice sector actors in Indonesia, including law enforcement officers, prosecutors and judges, applies Law 12/2022 in a gender-sensitive manner, recognizing the harms faced by victims/survivors of OGBV and avoiding revictimization; and

⁸ "Doxing" refers to the publication of private information, such as contact details, on the Internet with malicious intent, usually with the insinuation that the victim is soliciting sex (researching and broadcasting personally identifiable information about an individual without consent, sometimes with the intention of exposing the woman to the "real" world for harassment and/or other purposes). It includes situations where personal information and data retrieved by a perpetrator is made public with malicious intent, clearly violating the right to privacy. See A/HRC/38/47, para. 36.

⁹ "Sextortion" refers to the use of information communications technology and intimate pictures to blackmail a victim. In such cases, the perpetrator threatens to release intimate pictures of the victim for extortion purposes, including: additional sexual content or money from the victim. See A/HRC/38/47, para. 35.

¹⁰ A/HRC/38/47, para. 27.

¹¹ *Ibid*, para. 27.

¹² National Commission on Violence Against Women (Komnas Perempuan), "Catatan Tahunan tentang Kekerasan terhadap Perempuan Tahun 2021", 7 March 2022 ("Komnas Perempuan Annual Report"), p. 67, available at: <https://komnasperempuan.go.id/catatan-tahunan-detail/catahu-2022-bayang-bayang-stagnansi-daya-pencegahan-dan-penanganan-berbanding-peningkatan-jumlah-ragam-dan-kompleksitas-kekerasan-berbasis-gender-terhadap-perempuan>.

¹³ *Ibid*, p. 67. The number of actual instances of OGBV in Indonesia is likely to be significantly higher, as this figure only represents the complaints that were actually filed with Komnas Perempuan.

¹⁴ Ministry of Women Empowerment and Child Protection (KemenPPPA), "KEMENPPPA DORONG UPTD RESPON KEKERASAN BERBASIS GENDER ONLINE", 23 June 2022, available at: <https://www.kemenpppa.go.id/index.php/page/read/29/3961/kemenpppa-dorong-uptd-respon-kekerasan-berbasis-gender-online>.

¹⁵ Komnas Perempuan Annual Report, p. 71.

¹⁶ ICJ, "ICJ publishes guidance for laws to prevent and address online gender-based violence against women", 19 May 2023, available at: <https://www.icj.org/icj-publishes-guidance-for-laws-to-prevent-and-address-online-gender-based-violence-against-women/>.

- Online platforms and tech companies should step up their efforts to protect women from OGBV by, among other things, improving reporting mechanisms and cooperating with relevant authorities to help bring perpetrators of OGBV to justice.

II. International Human Rights Law and Standards

Among other international human rights treaties, Indonesia is a State party to the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). As a State party, it is obligated under international law to ensure the exercise and enjoyment of the human rights guaranteed by such treaties, such as the right to be free from prohibited discrimination, the right to privacy and the right to freedom of expression and information.

While the aforementioned human rights treaties were adopted before the invention of the internet, the UN Human Rights Council (HRC) has affirmed “that the same rights that people have offline must also be protected online”.¹⁷ Subsequent resolutions adopted by the HRC and the UN General Assembly reinforce the recognition of OGBV as a human rights abuse and part of the continuum of violence against women, thus underscoring States’ legal obligations under international human rights law to prevent and punish OGBV.¹⁸ The CEDAW Committee in its General Recommendation No. 35 has also reaffirmed that gender-based violence against women occurs online and in other digital environments.¹⁹

A. Adverse impact of OGBV on the enjoyment of human rights

As mentioned earlier, OGBV adversely impacts victims/survivors’ enjoyment of human rights, including human rights guaranteed under international human rights treaties, such as the ICCPR, ICESCR and CEDAW by which Indonesia is bound. The following sub-sections describe the ways in which the harms caused by OGBV amount to violations of certain human rights.²⁰

i. The right to non-discrimination and right to be free from OGBV

Women and girls are disproportionately targeted by OGBV. OGBV constitutes discrimination against women, as defined in article 1 of CEDAW, since the consequences of and harm caused by OGBV are specifically gendered, given that women and girls suffer from particular stigma in the context of structural inequality, discrimination and patriarchy.²¹ The CEDAW Committee has emphasized that gender-based violence against women is one of the fundamental social, political and economic means that perpetuate the subordinate position of women with respect to men and their stereotyped roles.²²

The harms caused by OGBV also disproportionately affect women, where manifestations of OGBV result in physical, psychological, sexual and economic harm, as well as limiting women’s access to the internet.²³ For example, OGBV can be used to further intensify the impacts of domestic violence by enabling perpetrators to target their current or former partner through coercive and controlling behaviour, manipulation and surveillance. As a result, victims/survivors are likely to experience increasing fear, anxiety and gradual isolation from friends and family.²⁴

¹⁷ UN Human Rights Council, *Resolution adopted by the Human Rights Council 20/8: The promotion, protection and enjoyment of human rights on the Internet*, UN Doc. A/HRC/RES/20/8, 5 July 2012, para. 1.

¹⁸ A/HRC/38/47, paras. 43 – 49.

¹⁹ CEDAW/C/GC/35, para. 20.

²⁰ This briefing paper does not purport to encompass the full range of human rights that may be adversely impacted by OGBV. Further, the rapidly evolving nature of digital technology means that novel manifestations of OGBV may arise, such as those in relation to artificial intelligence, topics which the ICJ hopes to conduct further research and analysis on in the near future.

²¹ A/HRC/38/47, para. 25.

²² CEDAW/C/GC/35, para. 10.

²³ A/HRC/38/47, para. 27.

²⁴ Council of Europe Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *GREVIO General Recommendation No. 1 on the digital dimension of violence against women*, 20 October 2021 (“GREVIO General Recommendation No. 1”), para. 25.

Discrimination against women can have a compounding and aggravating negative impact based on several other factors, such as a woman's race, sexual orientation and political opinion.²⁵ Women who have multiple marginalized identities are often targeted online on the basis of a combination of these factors.²⁶

For example, lesbian, bisexual and transgender (LBT) women and gender diverse persons are subjected to distinct forms of OGBV, such as online harassment based on their sexual orientation and gender identity,²⁷ and "outing", that is, the public and non-consensual disclosure of an LBT woman's sexual orientation or gender identity.²⁸

ii. Rights to life, security of person, freedom from torture and other cruel, inhuman or degrading treatment or punishment, and health

The Special Rapporteur on VAW has highlighted how acts of OGBV against women result, or are likely to result, in psychological and physical harm.²⁹ Manifestations of OGBV, such as death threats, other threats of violence, online harassment and sextortion violate the victim's/survivor's rights to life, security of person and health.

Right to life: In its General Comment No. 36, the UN Human Rights Committee has emphasized that the effective protection of the right to life is "the prerequisite for the enjoyment of all other human rights".³⁰ The right to life should not be interpreted narrowly and shall include the right to enjoy a life with dignity.³¹ The second sentence of article 6 (1) provides that the right to life "shall be protected by law", implying that States parties must establish a legal framework to ensure the full enjoyment of the right to life.³² This positive duty to protect the right to life requires States parties to:³³

take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence. Such persons include human rights defenders, officials fighting corruption and organized crime, humanitarian workers, journalists, prominent public figures, witnesses to crime and **victims of domestic and gender-based violence** and human trafficking. [emphasis added]

Severe instances of OGBV against women may constitute a violation of the right to life, acknowledging that OGBV is a part of the continuum of the multiple, recurring and interrelated forms of gender-based violence against women.³⁴ Repeated online death threats, and instances of online incitement to violence against women, may have a direct link to cases of femicide or offline physical violence resulting in death.

Right to security of person and right to be free from torture or other cruel, inhuman or degrading treatment or punishment: The right to life with dignity may overlap with the right to security of person as guaranteed by article 9(1) of the ICCPR, protecting individuals against intentional infliction of bodily or mental injury, regardless of whether the person concerned is detained or not.³⁵ Under article 9(1) of the ICCPR, States parties are obligated to take appropriate measures in response to death threats against persons and more generally to protect individuals from foreseeable threats to life or bodily injury proceeding from any governmental or private actor.³⁶ States parties must respond appropriately to patterns of violence against

²⁵ CEDAW/C/GC/35, para. 12.

²⁶ A/HRC/38/47, para. 28.

²⁷ NORC at the University of Chicago and the International Center for Research on Women, *Case Study: Technology-facilitated Gender Based Violence in Indonesia, 2022* ("NORC Report"), p. 3, available at: https://pdf.usaid.gov/pdf_docs/PA00Z77G.pdf.

²⁸ UN Human Rights Council, *Right to privacy – Report of the Special Rapporteur on the right to privacy*, UN Doc. A/HRC/40/63, 16 October 2019 ("A/HRC/40/63"), para. 60.

²⁹ A/HRC/38/47, para. 27.

³⁰ UN Human Rights Committee, *General comment no. 36, Article 6 (Right to Life)*, UN Doc. CCPR/C/GC/36, 3 September 2019 ("CCPR/C/GC/36"), para. 2.

³¹ *Ibid*, para. 3.

³² *Ibid*, para. 18.

³³ *Ibid*, para. 23.

³⁴ A/HRC/38/47, para. 14; GREVIO General Recommendation No. 1, para. 22.

³⁵ UN Human Rights Committee, *General comment no. 35, Article 9 (Liberty and security of person)*, UN Doc. CCPR/C/GC/35, 16 December 2014 ("CCPR/C/GC/35"), para. 9.

³⁶ *Ibid*, para. 9.

well-known categories of victims/survivors, such as intimidation of human rights defenders and journalists, retaliation against witnesses, and violence against women.³⁷ This positive obligation to protect the right to security of person is applicable in the digital sphere too, obligating States to respond to manifestations of OGBV, such as online death threats and other threats of violence.

In certain circumstances, OGBV may amount to torture or other cruel, inhuman or degrading treatment or punishment prohibited by, among others, article 7 of the ICCPR.³⁸ For example, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has provided that domestic violence may fulfil the substantive component of torture or other ill-treatment as it degrades, brutalizes and otherwise violates the physical, mental and emotional integrity of persons who are often subjected to controlling and disempowering situations.³⁹ Forms of OGBV, such as online stalking or threats to disseminate intimate content, should be seen as part of the continuum of domestic violence, and may, in turn, reach the threshold of torture or other cruel, inhuman or degrading treatment or punishment. States must take effective measures to protect individuals from acts of OGBV that may amount to torture and ill-treatment.⁴⁰

Right to health: Certain forms of OGBV may also violate the right to the “highest attainable standard of physical and mental health”, guaranteed by article 12(1) of the ICESCR.⁴¹ With respect to this, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that gender-based violence (GBV) inhibits the ability of women to enjoy economic, social and cultural rights on an equal basis with men, acting as a barrier to achieving the highest attainable standard of physical and mental health.⁴² OGBV victims/survivors may experience depression, anxiety and fear, and in some cases may also develop suicidal tendencies, threatening their right to the highest attainable standard of mental health.⁴³ States parties are thus obligated under the ICESCR to adopt legislation or to take other measures to protect women from OGBV and prosecute perpetrators of OGBV.⁴⁴ States parties are also obligated to ensure the availability, accessibility, acceptability and quality of health facilities and services, including appropriate mental health treatment and care, that enable OGBV victims/survivors to recover from the harms caused by OGBV.⁴⁵

iii. Right to privacy

Article 17 of the ICCPR protects anyone from being “subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”.⁴⁶ The concept of “privacy” is closely linked with meaningful personal autonomy, where an infringement of privacy restricts the freedom of an individual to act as they please and puts them at risk of other human rights violations.⁴⁷ Privacy refers to the sphere of a person’s life in which they can freely express their identity, be it by entering into relationships with others or alone.⁴⁸ It encompasses a range of aspects, including gender identity,⁴⁹ private information and personal data protection.⁵⁰

³⁷ *Ibid*, para. 9.

³⁸ CEDAW/C/GC/35, paras. 16 – 18.

³⁹ UN Human Rights Council, *Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence*, UN Doc. A/74/148, 12 July 2019 (“A/74/148”), paras. 8 – 10.

⁴⁰ *Ibid*, para. 23.

⁴¹ ICESCR, art. 12(1).

⁴² UN Committee on Economic, Social and Cultural Rights (CESCR), *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, UN Doc. E/C.12/2000/4, 11 August 2000 (“E/C.12/2000/4”), paras. 9 – 11, and 21. See also CESCR, *General comment No. 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/2005/4, 11 August 2005, para. 27 (referring to the right to the widest possible protection and assistance to the family under article 10(1) of the ICESCR).

⁴³ A/HRC/38/47, para. 27. See also SAFEnet, “Memahami dan Menyikapi Kekerasan Berbasis Gender Online: Sebuah Panduan”, p. 10, available at: <https://safenet.or.id/wp-content/uploads/2019/11/Panduan-KBGO-v2.pdf>.

⁴⁴ E/C.12/2000/4, paras. 35 and 51.

⁴⁵ E/C.12/2000/4, paras. 12 and 17.

⁴⁶ ICCPR, art. 17(1).

⁴⁷ A/HRC/40/63, para. 10.

⁴⁸ UN Human Rights Committee, *Coeriel et al. v. Netherlands*, UN Doc. CCPR/C/52/D/453/1991, 31 October 1994, para. 10.2.

⁴⁹ UN Human Rights Committee, *G v. Australia*, UN Doc. CCPR/C/119/D/2172/2012, 17 March 2012, para. 7.2.

⁵⁰ UN Human Rights Committee, *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 8 April 1988 (“Human Rights Committee General Comment No. 16”), para. 10.

In 2016, the General Assembly, in its resolution 71/199, recognized that women were particularly affected by violations of the right to privacy in the digital age, and called upon all States to further develop preventive measures and remedies.⁵¹ This recognition was reaffirmed by the Human Rights Council in resolution 42/15 adopted in 2019, which noted that violations and abuses of the right to privacy in the digital age have particular effects on women, as well as children, persons with disabilities and those who are vulnerable and marginalized.⁵²

Many forms of OGBV breach women's and girls' right to privacy by depriving victims/survivors of their personal autonomy and control over what content concerning them is disseminated online. Forms of OGBV that breach the right to privacy include the non-consensual publication or posting online of intimate photographs, digitally altering images to sexualize or otherwise humiliate, shame or stigmatize a woman, and doxing.⁵³

iv. Right to freedom of expression and access to information

In 2017, the Special Rapporteur on VAW and the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur on freedom of expression) issued a joint statement that stressed that OGBV is inconsistent with the principle of equality under international human rights law and adversely impacts women's enjoyment of the right to freedom of expression.⁵⁴ The statement underlined that ensuring an Internet free from gender-based violence enhanced women's empowerment.⁵⁵

In a report on gender justice and freedom of opinion and expression, the Special Rapporteur on freedom of expression used the term "gendered censorship" to describe instances where the voices for many women or gender nonconforming people are:⁵⁶

[...] suppressed, controlled or punished explicitly by laws, policies and discriminatory practices and implicitly by social attitudes, cultural norms and patriarchal values. In its most extreme form, **sexual and gender-based violence online and offline is used to chill or kill expression** that is nonconformist or transgresses patriarchal and heteronormative societal or moral codes or norms. [emphasis added]

Women suffer a disproportionate cost for exercising their right to freedom of expression online. Women journalists, human rights defenders, politicians, activists and ordinary women users are often targeted for speaking out or simply for being women in leadership roles and attacked through OGBV, including through threats of death and rape.⁵⁷ The highly gendered consequences of OGBV include: being less willing to engage in public discourse and to voice one's opinions; withdrawing from specific conversations; self-censoring one's responses; or withdrawing from the internet or social media altogether.⁵⁸ Perpetrators employ a range of forms of OGBV, such as online threats of physical violence and doxing, with the intent to intimidate and silence women and drive them out of digital spaces.⁵⁹

⁵¹ UN Human Rights Council, *Resolution adopted by the Human Rights Council 71/199 The right to privacy in the digital age*, UN Doc. A/RES/71/199, 19 December 2016.

⁵² UN Human Rights Council, *Resolution adopted by the Human Rights Council 42/15 The right to privacy in the digital age*, UN Doc. A/RES/42/15, 26 September 2019, para. 6(h).

⁵³ A/HRC/38/47, paras. 36 and 57.

⁵⁴ UN OHCHR, "UN experts urge States and companies to address online gender-based abuse but warn against censorship", 8 March 2017, available at: <https://www.ohchr.org/en/press-releases/2017/03/un-experts-urge-states-and-companies-address-online-gender-based-abuse-warn>.

⁵⁵ UN OHCHR, "UN experts urge States and companies to address online gender-based abuse but warn against censorship", 8 March 2017, available at: <https://www.ohchr.org/en/press-releases/2017/03/un-experts-urge-states-and-companies-address-online-gender-based-abuse-warn>.

⁵⁶ UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan*, UN Doc. A/76/258, 30 July 2021 ("A/76/258"), para. 12.

⁵⁷ *Ibid*, para. 17.

⁵⁸ Amnesty International, "#TOXICTWITTER: VIOLENCE AND ABUSE AGAINST WOMEN ONLINE", 2018 ("Amnesty International Report"), p. 47, available at: <https://www.amnestyusa.org/wp-content/uploads/2018/03/Toxic-Twitter.pdf>; Alexandra Tyers-Chowdhury and Gerda Binder, 'What we know about the gender digital divide for girls: A literature review', UNICEF, June 2021, pp. 16 – 17, <https://www.unicef.org/eap/reports/innovation-and-technology-gender-equality-0>.

⁵⁹ A/76/258, para. 23.

By increasing the safety risk for women in online spaces, OGBV is one of the factors that prevent or inhibit women's access and use of online spaces, restricting their exercise of their right to access to information under article 19(2) of the ICCPR.⁶⁰ The right of access to information encompasses the general right of the public to receive media output and have access to information of public interest from a variety of sources, including information published online.⁶¹ This right to information is necessary for the fulfilment of other basic human rights, such as the right to participate in political decision-making, guaranteed by article 25 of the ICCPR.⁶²

B. State obligation to prevent and punish OGBV

OGBV is a form of GBV, and States' legal obligations under international human rights law to prevent human rights violations, and to investigate, prosecute and punish them when they occur, also apply to OGBV. Under international human rights law, States are obligated to respect, protect and fulfil the rights guaranteed by international human rights treaties. These obligations must be upheld by all branches of the State – executive, legislative and judicial – and by all public or governmental bodies.⁶³

The obligation to respect human rights requires that States, and their organs and agents, refrain from engaging in any act of OGBV.⁶⁴ It also requires States to ensure that laws, policies, programmes and procedures do not discriminate against women, and to hold State agents accountable when they commit acts of OGBV.⁶⁵

The obligation to protect human rights imposes a due diligence obligation upon States to adopt any appropriate laws or other measures in order to protect women from OGBV by non-State actors.⁶⁶ Due diligence encompasses the obligation to prevent, as well as to investigate, prosecute, punish and ensure access to effective remedies for acts or omissions by non-State actors that constitute or result in OGBV.⁶⁷ General Recommendation No. 35 of the CEDAW Committee provides that States shall adopt "laws, institutions and a system in place to address [gender-based] violence and [ensure] that they function effectively in practice and are supported by all State agents and bodies who diligently enforce the laws".⁶⁸

States are obligated to adopt other appropriate measures to address the underlying causes of gender-based violence against women, including patriarchal attitudes and harmful gender stereotypes.⁶⁹ Raising awareness of OGBV, as well as establishing and providing information on services and legal protection available to stop violations and to prevent their reoccurrence are also key.⁷⁰ Moreover, States should design and implement comprehensive and co-ordinated policies to address OGBV, allocating appropriate human and financial resources to national and local governance bodies enabling them to tackle OGBV, as well as to legal aid, healthcare and social protection institutions.⁷¹

⁶⁰ UN Human Rights Council, *Promotion, protection and enjoyment of human rights on the Internet: ways to bridge the gender digital divide from a human rights perspective – Report of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/35/9, 5 May 2017, para. 11(c).

⁶¹ 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. 13. 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*, UN Doc. A/68/362, 4 September 2013, para. 19.

⁶² A/76/258, para. 34. See also US Department of State, "Inclusive Technology: The Gender Digital Divide, Human Rights & Violence Against Women" (15 December 2017) <https://www.state.gov/inclusive-technology-the-gender-digital-divide-human-rights-violence-against-women/>.

⁶³ 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 ("CCPR/C/21/Rev.1/Add. 13"), para. 4.

⁶⁴ CEDAW/C/GC/35, para. 22. See also ICJ, "Women's Access to Justice for Gender-Based Violence: Practitioners' Guide No. 12", February 2016 ("ICJ Practitioner's Guide"), p. 50, available at: <https://www.icj.org/womens-access-to-justice-for-gender-based-violence-icj-practitioners-guide-n-12-launched/>.

⁶⁵ CEDAW/C/GC/35, para. 22.

⁶⁶ A/HRC/38/47, para. 62. See also CCPR/C/GC/36, para. 18.

⁶⁷ CEDAW/C/GC/35, para. 24(b). See also Human Rights Committee, General Comment No 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para. 8.

⁶⁸ CEDAW/C/GC/35, para. 24(b).

⁶⁹ *Ibid*, para. 30(a).

⁷⁰ A/HRC/38/47, para. 66.

⁷¹ GREVIO General Recommendation No. 1, p. 27.

In addition, international human rights law obligates States to investigate instances of OGBV and, where warranted by the evidence, prosecute and sanction perpetrators in a manner commensurate with the gravity of their offences.⁷² With respect to this, States must ensure effective access to justice for victims/survivors of OGBV, and the authorities must respond adequately to all cases of OGBV against women, and bring alleged perpetrators to justice in fair proceedings in a timely manner.⁷³ The Human Rights Committee has also noted that, in certain circumstances, States may be required to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.⁷⁴ For example, States should provide a way for victims/survivors of OGBV to apply to an independent and impartial judicial authority to request the removal of harmful online content constituting OGBV or even to prevent its publication.

The CEDAW Committee has recommended that States should provide mandatory, recurrent and effective capacity-building, education and training for members of the judiciary, lawyers and law enforcement officers to equip them to adequately prevent and address gender-based violence against women.⁷⁵ Among other things, such education and training should promote: understanding of, and adherence to, domestic legal provisions on GBV against women; the application of international human rights law and standards that are particularly relevant to GBV; and adequate ways of eliminating factors that lead to the revictimization of victims/survivors.⁷⁶

III. Assessment of Law 12/2022 on Sexual Violence Crimes under International Human Rights Law

In the following section, the ICJ provides an analysis of Law 12/2022 on Sexual Violence Crimes (Law 12/2022) to assist the Indonesian authorities in better complying with the country's international human rights obligations. The ICJ aims to assist the Indonesian authorities to better prevent and punish OGBV with laws that function effectively in practice, in compliance with international human rights law and standards.

The ICJ reiterates that the enactment of Law 12/2022 marks a significant development towards the protection of women from OGBV. Article 14 of Law 12/2022 explicitly criminalizes "electronic-based sexual violence", thus providing an additional legal basis to prosecute and punish perpetrators of OGBV. Furthermore, chapter IV of Law 12/2022 establishes the procedural rules for investigating, prosecuting and trying OGBV cases, and chapter V sets out the legal rights of OGBV victims/survivors to protection and remedies.

One of the most significant advancements that Law 12/2022 makes is to provide a full range of remedies for victims/survivors of OGBV. These remedies include the immediate removal of the harmful content, restitution, rehabilitation, satisfaction and guarantees of non-repetition.⁷⁷ Article 70(3) of Law 12/2022 lists forms of rehabilitation that victims/survivors of OGBV are entitled to, including regular and ongoing physical and psychological health services, assistance in the use of restitution/compensation, and economic empowerment.⁷⁸

Article 31(1) of Law 12/2022 explicitly obligates law enforcement officers, public prosecutors and judges to inform victims of their right to restitution. This is a positive step towards ensuring access to effective remedies for victims/survivors of OGBV. In accordance with the Concluding Observations of the CEDAW Committee,⁷⁹ pursuant to article 31(1) of Law 12/2022 victims/survivors should be informed of their right

⁷² ICCPR, article 2(3). See also CCPR/C/21/Rev.1/Add. 13, para. 18.

⁷³ CEDAW/C/GC/35, para. 32.

⁷⁴ CCPR/C/21/Rev.1/Add. 13, para. 19.

⁷⁵ CEDAW/C/GC/35, para. 30(e).

⁷⁶ *Ibid*, para. 30(e). For specific guidance for judges, see: ICJ, "Bangkok General Guidance for Judges on Applying a Gender Perspective in Southeast Asia", 2018 (Bangkok General Guidance), available at: <https://www.icj.org/wp-content/uploads/2018/06/Southeast-Asia-Bangkok-Guidance-Advocacy-2016-ENG.pdf>.

⁷⁷ Law 12/2022, arts. 30, 68 and 70.

⁷⁸ Law 12/2022, art. 70.

⁷⁹ CEDAW Committee, *Concluding observations on the eighth periodic report of Indonesia*, UN Doc. CEDAW/C/IDN/CO/8, 24 November 2021 ("CEDAW/C/IDN/CO/8"), para. 16(b); see also, ICJ, Bangkok General Guidance, para. 14.

to the full range of remedies available under Law 12/2022, including compensation and rehabilitation.⁸⁰

The implementation of certain provisions of Law 12/2022 shall be further regulated by Governmental Regulations (GRs). Under article 5(2) of Indonesia's Constitution, the President is authorized to enact GRs to "implement laws as they should be".⁸¹ Law 12/2022 provides that five aspects will be further regulated by GRs: (i) the establishment of a Victim Assistance Fund (article 35(4)); (ii) the prevention and removal of harmful content containing an act of sexual violence (article 46(2)); (iii) protection and recovery procedures (article 66(3)); (iv) implementation of prevention measures (article 80); and (v) coordination and monitoring procedures (article 83(5)).

A. Restrictive definition of OGBV

Indonesia's obligation under international human rights law to ensure effective access to justice for victims/survivors of OGBV requires it to criminalize all forms of OGBV that amount to a violation of their physical, sexual or psychological integrity.⁸²

Law 12/2022 uses the term "electronic-based sexual violence" to criminalize certain forms of OGBV. Currently, Law 12/2022 criminalizes acts of:

- non-consensual capturing of sexual images and videos;⁸³
- sending unsolicited sexual content;⁸⁴
- digitally facilitated stalking;⁸⁵
- online sexual harassment;⁸⁶ and
- sextortion.⁸⁷

However, Law 12/2022 does not criminalize other forms of OGBV that may inflict substantial harm to victims/survivors, such as:

- non-consensual sharing (as opposed to capturing) of sexual images and videos;
- threats of non-consensual sharing of sexual images and videos;
- online threats of physical violence and incitement to violence; and
- doxing.

Potentially, these other forms of OGBV may fall within the ambit of conduct criminalized under the criminal provisions of Law No. 11 of 2008 on Electronic Information Transactions (ITE Law), Law No. 44 of 2008 on Pornography ('Pornography Law') and Law No. 27 of 2022 on Personal Data Protection (PDP Law).⁸⁸ However, such laws were not designed to address acts of OGBV, and they are not necessarily applicable in a gender-sensitive manner. As a result, none of these laws captures precisely the gender-based causes and impacts of OGBV, and they are not designed to provide the appropriate remedies required for victims/survivors of OGBV,⁸⁹ ultimately failing to address acts of online *gender-based* violence as criminal offences.⁹⁰

⁸⁰ Law 12/2022, art. 70.

⁸¹ The Constitution of the Republic of Indonesia 1945, article 5(2).

⁸² A/HRC/38/47, para. 82; CEDAW/C/GC/35, para. 29(a). See also: ICJ, "The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty", March 2023 ("8 March Principles"), principle 2 – Harm Principle, available at: https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/8-March-Principles-Report_final_print-version.pdf.

⁸³ Law 12/2022, art. 14(1)(a).

⁸⁴ Law 12/2022, art. 14(1)(b).

⁸⁵ Law 12/2022, art. 14(1)(c).

⁸⁶ Law 12/2022, art. 4(1)(a).

⁸⁷ Law 12/2022, art. 14(2).

⁸⁸ Law No. 11 of 2008 on Electronic Information and Transactions (ITE Law), available at: <https://peraturan.bpk.go.id/Home/Details/37589/uu-no-11-tahun-2008>; Law No. 44 of 2008 on Pornography ('Pornography Law'), available at: https://www.dpr.go.id/dokidih/document/uu/UU_2008_44.pdf; Law 27 of 2022 on Personal Data Protection (PDP Law), available at: <https://peraturan.bpk.go.id/Home/Details/229798/uu-no-27-tahun-2022>.

⁸⁹ CEDAW/C/GC/35, para. 9.

⁹⁰ A/HRC/38/47, para. 102.

i. *Forms of OGBV criminalized under Law 12/2022*

As mentioned above, article 14(1) of Law 12/2022 makes key progress by explicitly criminalizing non-consensual capturing of sexual images and videos, sending unsolicited sexual content, and digitally facilitated stalking.⁹¹ A person who commits an offence under article 14(1) will face criminal charges of maximum four years' imprisonment and/or a maximum fine of two hundred million rupiahs (approx. USD 13,000).

Article 14(2) imposes aggravated criminal sanctions of maximum six years' imprisonment and/or a maximum fine of three hundred million rupiahs (approx. USD 19,500) if the offence is committed with the intention to extort, threaten, coerce, mislead and/or deceive the victim/survivor.⁹² This provision could be used as the legal basis to punish acts of *sextortion*, which concerns instances where the perpetrator threatens to release intimate pictures of the victim/survivor in order to extort additional explicit photos, videos, or sexual acts from the victim.⁹³

Potentially, Law 12/2022 may also address other manifestations of OGBV outside the ones explicitly criminalized by article 14. Article 15(1)(l) of Law 12/2022 imposes aggravated punishments for acts of non-physical sexual harassment (article 5), sexual abuse (article 11), sexual exploitation (article 12) and sexual slavery (article 13), if such offence were carried out using electronic means. Under article 5, "non-physical sexual harassment" is defined as a "non-physical sexual act towards the body, sexual desire and/or reproductive organ conducted with the intention of degrading a person's dignity based on their sexuality and/or decency". Therefore, read together with article 15(1)(l), article 5, proscribing "non-physical sexual harassment", may also, potentially, criminalize online sexual harassment.⁹⁴ Articles 12 and 13 of Law 12/2022, which criminalize sexual abuse and sexual exploitation, respectively, may potentially be used as the legal basis to address instances where information and communication technology (ICT) systems are used for the purposes of trafficking in women and girls, or to threaten or compel them into trafficking situations.⁹⁵

However, the potential use of Law 12/2022 to address the abovementioned manifestations of OGBV that Law 12/2022 does not *explicitly* criminalize may be inconsistent with the principle of legality under international law. The principle of legality requires that the law be capable of being clearly understood in its application and consequences.⁹⁶ Thus, crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offence with a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from conduct that is not criminally proscribed.⁹⁷ Having to resort to what Law 12/2022 may proscribe by implication to criminally sanction certain forms of OGBV may result in the imprecise and arbitrary application of the law, inconsistent with the principle of legality. This underscores the need to broaden the scope of article 14(1) of Law 12/2022 to explicitly criminalize additional forms of OGBV.

ii. *Forms of OGBV not criminalized by Law 12/2022*

In any event, key manifestations of OGBV – such as online threats of physical and/or sexual violence, doxing, non-consensual distribution of intimate contents ("revenge porn"), and threats to share intimate content – do not fall within the scope of conduct proscribed by Law 12/2022. The Legal Aid Foundation of

⁹¹ Law 12/2022, art. 14(1).

⁹² Law 12/2022, art. 14(2).

⁹³ A/HRC/38/47, para. 35.

⁹⁴ *Ibid*, para. 40.

⁹⁵ *Ibid*, para. 32.

⁹⁶ Principle 1 of [The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty](#), issued by the ICJ in March 2023, enunciates the principle of legality in the criminal law context as follows: 1 "No one may be held criminally liable for any act or omission that did not constitute a criminal offence, under national or international law, at the time when such conduct occurred. The principle of legality also requires that the law be publicly and sufficiently accessible and the criminal liability foreseeable and capable of being clearly understood in its application and consequences. Thus, crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offence with a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from conduct that is not criminally proscribed. Criminal law must not proscribe any act or omission in terms that are vague, imprecise, arbitrary or overly broad. Criminal law must not be construed broadly to an accused person's disadvantage. In the case of ambiguity, the definition of a particular offence should be interpreted in favour of the accused."

⁹⁷ The 8 March Principles, Principle 1 – Principle of Legality.

the Association of Women for Justice (LBH APIK)⁹⁸ and Komnas Perempuan have reported that, throughout 2022, they received reports of OGBV against women in the form of threats to spread sexual content, non-consensual accessing of someone's account to obtain control over sexual content and doxing.⁹⁹ Under Law 12/2022, victims/survivors would face significant difficulty in reporting these types of cases and seeking protection since such conduct is not criminalized under Law 12/2022.¹⁰⁰ Victims/survivors and justice sector actors would have to resort to other applicable laws, such as the ITE Law, Pornography Law and PDP Law, with a view to holding perpetrators to account.

Acts of non-consensual sharing of sexual images and videos: The ICJ is concerned, in particular, that acts of non-consensual sharing of sexual images and videos – that is, conduct that is characteristic of “revenge porn” – are currently excluded from the scope of what Law 12/2022 proscribes.¹⁰¹ This is the case because article 14(1)(b) of Law 12/2022 focuses on the consent of the *recipient* and not the consent of the person depicted in the photo or video. The harm committed against those who have had their intimate images and videos distributed non-consensually may fall under article 27(1) of the ITE Law and article 4 of Law No. 44 of 2008 on Pornography (Pornography Law), which criminalize the dissemination of content that goes against “propriety” and dissemination of “pornography”, respectively.¹⁰² Notably, both provisions do not turn on the consent of the person depicted in the sexual images and videos, an element that forms the crux of the OGBV acts of non-consensual sharing of sexual images and videos. However, the ITE Law and the Pornography Law are broadly worded and not specifically intended to proscribe the non-consensual sharing of intimate images and videos, and may, in fact, be used to criminalize, instead, victims/survivors for having sent the images and videos to the perpetrators of OGBV in the first place as conduct that goes against “propriety” and/or the dissemination of “pornography”.

Threats of non-consensual sharing of sexual images and videos: Threats to spread sexual content are another manifestation of OGBV that is excluded from the scope of what Law 12/2022 proscribes. The Special Rapporteur on VAW specifically recommended that legislative measures should be applicable to threats of releasing harmful information or content online, so that advocates and prosecutors may intervene and prevent the abuse before it is perpetrated.¹⁰³

There is a risk that such conduct may not be considered as “taking pictures and/or videos without consent”, under article 14(1)(a) of Law 12/2022, since the picture/video may have been taken with the victim/survivor's consent at that time. Threatening to share sexual images/videos may also fail to meet the definition of “sharing sexual content without the consent of the recipient”, under article 14(1)(b), which focuses on the consent of the *recipient*. The conduct to be proscribed, that is, “threats of non-consensual sharing of sexual images/videos”, is not premised on the consent or otherwise of the prospective recipient as an element of the crime since the photos/videos have not actually been shared with anyone yet, such sharing being simply “threatened”. Hence, threats of non-consensual sharing of sexual images and videos are not captured by conduct proscribed by Law 12/2022.

Criminalizing threats to release sexual content may be possible through article 27(1) of the ITE Law (dissemination of content against propriety) and article 4(1) of the Pornography Law (dissemination of pornography) by characterizing such threats as attempts to “disseminate content against propriety” and/or attempts to “disseminate pornography”. To convict someone of “attempts” – that is, of committing an inchoate offence – it must be proven that the intention of the offender has revealed itself by a commencement of the crime and the crime was not completed only because of circumstances independent of the offender's

⁹⁸ The Legal Aid Foundation of the Association of Women for Justice (LBH APIK) is a non-governmental organization based in Indonesia that works to provide legal aid for women and other groups.

⁹⁹ LBH APIK, “Angka Kekerasan Semakin Meningkat: Potret Buram Keadilan Bagi Perempuan dan Anak Korban Kekerasan – Laporan Tahunan LBH APIK Jakarta 2022”, November 2022 (“LBH APIK Annual Report”), p. 23, available at: <https://www.lbhapik.org/2022/12/laporan-akhir-tahun-2022-lbh-apik.html>; Komnas Perempuan Annual Report, p. 71.

¹⁰⁰ LBH APIK Annual Report, p. 41.

¹⁰¹ “Revenge porn” consists in the non-consensual online dissemination of intimate images, obtained with or without consent, with the purpose of shaming, stigmatizing or harming the victim. See A/HRC/38/47, para. 41.

¹⁰² ITE Law, art. 27(1) and Pornography Law, art. 4.

¹⁰³ A/HRC/38/47, paras. 100 – 101.

will.¹⁰⁴ Threats to disseminate sexual content may be considered as an inchoate offence as the element of commencing the performance of the crime is fulfilled by the act of storing the intimate photos or videos. Nonetheless, the ICJ reiterates that article 27(1) of the ITE Law and article 4 of the Pornography Law are ill-suited for preventing and punishing threats of non-consensual sharing of sexual images and videos since the provisions do not include the depicted person's lack of consent as a critical element of the offence.

Online gender-based harassment and doxing: Digital threats of physical violence and severe online gender-based harassment may give rise to criminal liability under article 29 of the ITE Law, which criminalizes the act of sending "Electronic Information and/or Electronic Records that contain threats of violence or are aimed at personally intimidating someone".¹⁰⁵ If convicted, the perpetrator faces a sentence of up to four years' imprisonment and/or a maximum fine of seven hundred and fifty million rupiah (approximately USD 48,000).¹⁰⁶

Lastly, acts of doxing may be criminalized under article 65(2), in conjunction with article 67(2), of the PDP Law.¹⁰⁷ Article 67(2) of the PDP Law provides that anyone who "intentionally and unlawfully discloses Personal Data that does not belong to them [...] shall be sentenced to [a] maximum [term of] imprisonment of 4 (four) years and/or a maximum fine of Rp4,000,000,000.00 (four billion rupiah)" (approx. USD260,000).¹⁰⁸

iii. Criminalization of OGBV consistent with general principles of criminal law and international human rights law principles

Criminalizing forms of OGBV by using laws that were not designed to address OGBV, such as the ITE Law and PDP Law, fails to meet Indonesia's due diligence obligation under international human rights law to protect women from OGBV. While criminal provisions under the ITE Law, Pornography Law and PDP Law may be potentially used as the legal bases to criminalize the above-mentioned forms of OGBV, and impose criminal sanctions on perpetrators, such provisions fall short of adequately addressing OGBV as they do not apply a gender perspective to assess the gender-based causes and harms associated with acts of OGBV.¹⁰⁹ As elaborated further below, using these provisions to tackle forms of OGBV they were not designed to address in the first place potentially risks criminalizing victim/survivors of OGBV. Further, the provisions of the ITE Law, Pornography Law and PDP Law do not provide victims/survivors of OGBV with access to effective remedies, such as rehabilitation.¹¹⁰ This underscores the need for acts of OGBV to be addressed through the enactment of specific, additional standalone criminal offences.

The criminalization of OGBV by reliance on criminal provisions outside Law 12/2022 is also inconsistent with principles of legality, harm and proportionality. The legality principle requires that proscribed criminal acts are precisely defined, establishing its elements and the factors that distinguish it from conduct that is not criminally proscribed.¹¹¹ Under the harm and proportionality principles, criminal law may only be applied in response to conduct that inflicts or threatens substantial harm to the fundamental rights and freedoms of others or to certain fundamental public interests, and it ought to be a measure of last resort, where other less restrictive means of achieving legitimate interests are insufficient.¹¹² Utilizing the criminal provisions under the ITE Law, Pornography Law and PDP Law to criminalize OGBV would fail to precisely identify key elements characterizing certain conduct as acts of OGBV, such as the victim's/survivor's lack of consent, the perpetrator's criminal intent, and the power imbalance between the perpetrator and the victim/survivor.

¹⁰⁴ KUHAP, article 53. See also Letezia Tobing, "Tentang Percobaan Tindak Pidana (Poging)", *HukumOnline*, 17 April 2015, available at: <https://www.hukumonline.com/klinik/a/tentang-percobaan-tindak-pidana-poging-lt552b7aa9d04bf#>.

¹⁰⁵ ITE Law, art. 29.

¹⁰⁶ Law No. 19 of 2016 on Changes to Law No. 11 of 2008 on Information and Electronic Transactions (Revised ITE Law), art. 45B.

¹⁰⁷ PDP Law, arts. 65(2) and 67(2).

¹⁰⁸ PDP Law, art. 67(2).

¹⁰⁹ A/HRC/38/47, para. 102; CEDAW/C/GC/35, para. 9.

¹¹⁰ Komnas Perempuan, "Siaran Pers Terkait Tindak Lanjut UU Perlindungan Data Pribadi Untuk Memastikan Jaminan Rasa Aman Bagi Perempuan", 28 September 2022, available at: <https://komnasperempuan.go.id/siaran-pers-detail/siaran-pers-terkait-tindak-lanjut-uu-perlindungan-data-pribadi-untuk-memastikan-jaminan-rasa-aman-bagi-perempuan>.

¹¹¹ The 8 March Principles, Principle 1 – Principle of Legality.

¹¹² The 8 March Principles, Principle 2 – Harm Principle, and Principle 7 – Human Rights Restrictions on Criminal Law, respectively.

Recommendations

In light of the above concerns, the ICJ recommends that the Indonesian authorities should:

- Broaden the definition of “electronic-based sexual violence” under article 14(1) of Law 12/2022 or enact additional laws to explicitly criminalize additional forms of OGBV – such as: (i) online threats of physical and/or sexual violence; (ii) severe harassment online, including sexual harassment; (iii) doxing; (iv) non-consensual distribution of intimate contents (“revenge porn”); and (v) threats to share intimate content – inflicting or threatening substantial harm to victims/survivors, and amounting to violations of their human rights, including their right to physical, sexual or psychological integrity;
- Ensure that provisions criminalizing additional forms of OGBV and their enforcement be consistent with international human rights law and general principles of criminal law, including the principles of legality, harm and proportionality; and
- Ensure that laws and regulations on OGBV be constantly reviewed to ensure that they are responsive to contemporary and relevant forms of OGBV.

B. Gender-sensitive implementation of Law 12/2022

Indonesia’s due diligence obligation to protect women from OGBV requires it to ensure that laws addressing OGBV are diligently enforced by the relevant State agents and bodies.¹¹³ The Special Rapporteur on VAW has cautioned that merely having a specialized legal framework to address OGBV in place is not enough, and that significant barriers to access to justice for victims/survivors of OGBV remain where justice sector actors, including law enforcement officials, are insufficiently trained or equipped to effectively implement the law owing to the lack of adequate gender-sensitive training and the general perception that online abuse is not a serious crime.¹¹⁴

Law 12/2022 comprehensively sets out procedural rules applicable to crimes of sexual violence, encompassing the entirety of the criminal justice process, from initial reporting of the crime to what judges should take into account when making their decisions.¹¹⁵ Articles 21(1) and 26(3) of Law 12/2022 require investigators, prosecutors, judges, lawyers, health professionals and governmental units mandated to protect women’s rights who handle cases of sexual violence to have a human rights and victim-oriented perspective.¹¹⁶ During criminal trials, investigators, prosecutors and judges must strive to protect the human rights of victims/survivors of sexual violence, and avoid intimidating, victim-blaming and revictimizing victims/survivors of sexual violence.¹¹⁷

Article 81(1) explicitly mandates the central and local government to enact education and training programs for law enforcement officers, government service personnel, and service personnel at Community-Based Service Provider Institutions.¹¹⁸ Since the enactment of Law 12/2022, there have been encouraging developments from civil society groups and the Ministry of Women Empowerment and Child Protection to train justice sector actors to effectively handle cases of sexual violence against women.¹¹⁹

Despite these comprehensive provisions, victims/survivors of OGBV in Indonesia continue to face significant barriers to access to justice owing to the prevalence of harmful gender stereotypes and the downplaying of harms caused by OGBV among justice sector actors. Harmful gender stereotypes include generalized perceptions regarding characteristics attributed to men and women, which often provide the basis for related

¹¹³ CEDAW/C/GC/35, para. 24(b).

¹¹⁴ A/HRC/38/47, para. 85.

¹¹⁵ Law 12/2022, chapter IV.

¹¹⁶ Law 12/2022, arts. 21(1) and 26(3)

¹¹⁷ Law 12/2022, art. 22.

¹¹⁸ Law 12/2022, art. 81(1).

¹¹⁹ For examples: ICJ, “Indonesia: Judiciary called on to play its role in eliminating gender discriminatory practices and facilitating women’s access to justice”, 12 November 2022, available at: <https://www.icj.org/indonesia-judiciary-called-on-to-play-its-role-in-eliminating-gender-discriminatory-practices-and-facilitating-womens-access-to-justice/>; Ministry of Women Empowerment and Child Protection, “KEMENPPPA DAN POLRI WUJUDKAN SINERGITAS DAN KOLABORASI KUNCI PERLINDUNGAN PEREMPUAN DAN ANAK”, 5 July 2022, available at: <https://kemenpppa.go.id/index.php/page/read/29/3989/kemenpppa-dan-polri-wujudkan-sinergitas-dan-kolaborasi-kunci-perlindungan-perempuan-dan-anak>.

generalized assumptions as to how men or women should or will behave in a range of circumstances.¹²⁰ Gender stereotypes can influence justice sector actors to behave in ways that inhibit access to justice for victims/survivors of OGBV, such as downplaying the harm they have experienced.¹²¹ For example, in a notorious case, Indonesian law enforcement officers reportedly refused to investigate an instance of revenge-porn, claiming that, since the recording containing sexual content did not show the victim's face, there was no victim and thus no reason to further investigate the incident.¹²² The prevalence of harmful gender stereotyping among justice sector actors results in a culture of silence and underreporting where women victims/survivors are reluctant to speak out and report their cases to the authorities for fear of being re-victimized.¹²³

The ICJ is also concerned that article 22 of Law 12/2022 on the obligation of investigators, prosecutors and judges to adopt a gender-sensitive approach during trial does not encompass lawyers. Lawyers, particularly lawyers for defendants, may ask questions to victims/survivors during trial that espouse gender stereotypes or otherwise re-victimize victims/survivors. We note that these instances are addressed in article 7 of the Regulation of the Supreme Court No. 3 of 2017 on Guidelines for Adjudicating Cases of Women before the Law, which gives power to judges, during trial, to "prevent and/or verbally scold [...] lawyers who behave or ask questions that demean, victim-blame, intimidate and/or use the sexual experience or behaviour of Women before the Law".¹²⁴

Recommendations

The ICJ recommends that the Indonesian authorities should:

- Adopt the GRs implementing Law 12/2022 to facilitate the effective prevention of OGBV and protection of OGBV victims;
- Provide adequate and continuous capacity-building training to justice sector actors, including law enforcement officials, public prosecutors, judges, lawyers and government service officials, on the application of international human rights law and standards that are particularly relevant to the investigation, prosecution, adjudication and sentencing of OGBV-related criminal offences; and
- Increase the justice sector actors' understanding of: (i) the harms associated with OGBV, (ii) how to identify and respond appropriately to the specific needs of women victims/survivors of OGBV, (iii) how to avoid revictimization and the use of stereotyping language, and (iv) the gender-based causes and impacts of OGBV. The trainings should also increase their understanding of intersectional discrimination, the compounding negative impacts suffered by someone with multiple identities, and how to avoid using stereotyping language.

C. Legal protection for victims of OGBV

Indonesia's due diligence obligations requires it to adopt and implement effective measures to protect victims/survivors from the harms caused by OGBV.¹²⁵ For example, for some forms of OGBV, such as "revenge-porn", the speed by which content is disseminated and shared on the internet risks rendering lengthy judicial processes ineffective at preventing the harms caused by OGBV. Victims/survivors may also be at risk of being exposed to physical violence when they report their cases to the authorities. An additional barrier to access to justice for victims/survivors are overbroad criminal provisions that have the potential to criminalize victims/survivors themselves. These factors necessitate the establishment and effective enforcement of protection measures under Law 12/2022 to address the immediate harms faced by OGBV victims/survivors.

¹²⁰ Bangkok General Guidance, para. 6(g).

¹²¹ CEDAW/C/GC/35, para. 26(c); CEDAW Committee, *General recommendation No. 33 on women's access to justice*, UN Doc. CEDAW/C/GC/33, 3 August 2015 ("CEDAW/C/GC/33"), paras. 26 – 28.

¹²² Sugeng Bahagijo, "Analisis Tantangan Implementasi dan Kebutuhan Operasionalisasi Undang-Undang Tindak Pidana Kekerasan Seksual (UU TPKS)", October 2022 ("Analisis Tantangan Implementasi UU TPKS"), p. 89, available at: <https://icjr.or.id/analisis-tantangan-implementasi-dan-kebutuhan-operasionalisasi-undang-undang-tindak-pidana-kekerasan-seksual-uu-tpks/>.

¹²³ A/HRC/38/47, para. 68.

¹²⁴ Regulation of the Supreme Court No. 3 of 2017 on Guidelines for Adjudicating Cases of Women before the Law, art. 7, available at: <https://peraturan.bpk.go.id/Home/Details/209695/perma-no-3-tahun-2017>.

¹²⁵ CEDAW/C/GC/35, paras. 24(b) and 21(a).

i. *Prevention and removal of harmful online content*

Instances of OGBV “create a permanent digital record that can be distributed worldwide and cannot be easily deleted, which may result in further victimization of the [victim/survivor]”.¹²⁶ For example, intimate photos or videos disseminated without the victim’s/survivor’s consent and digital threats (to disseminate such content) can spread like wildfire through social media private messaging applications, compounding the harm that victims/survivors of OGBV suffer, giving rise to additional forms of harm, such as economic harm, which the dissemination of such intimate photos or videos can cause by harming the reputation of the person concerned.¹²⁷ This is an additional reason why the obligation to protect victims/survivors of OGBV encompasses the establishment of procedures to prevent the publication of and immediately remove harmful content amounting to OGBV through the elimination of the original material or halting its distribution.¹²⁸

Removal of harmful online content: Under Law 12/2022, victims of electronic-based sexual violence have the right to the removal of harmful content amounting to OGBV.¹²⁹ Law 12/2022 establishes two separate procedures to enable content removal. First, article 46(1) authorizes the Central Government to directly “delete and/or restrict access to electronic information and/or electronic documents containing the Sexual Violence Crime”.¹³⁰ Second, article 47 provides that prosecutors may submit a request to the District Court to instruct the relevant Ministry to remove harmful content for “public interest” purposes.¹³¹

The first procedure established by article 46(1) of Law 12/2022, empowering the Central Government authority to remove harmful content, is inconsistent with the principle of the separation of powers under international law. This principle provides that a law may not confer unfettered discretion to restrict human rights on those who are charged with its execution without independent judicial oversight.¹³² The ICJ has previously highlighted how legal provisions in Indonesia that authorize the government to remove content it deems harmful without prior judicial approval have been applied to target legitimate speech online, particularly LGBT-related expression.¹³³ As a result, there is a need for judicial oversight over the removal of harmful content that may amount to OGBV to ensure consistency with Indonesia’s international obligation to guarantee the right to freedom of expression.¹³⁴

As noted above, article 47 of Law 12/2022 provides that prosecutors can submit a request to the District Court to delete content if it is in the “public interest”. The term “public interest” under article 47 should be amended to reflect the narrower purpose of “preventing the harms caused by offences provided under this law”. This more precise formulation would ensure that the removal of harmful content amounting to OGBV narrowly responds to conduct that inflicts or threatens substantial harms and violates the human rights of victims/survivors.¹³⁵ This would also ensure that content removal requests be granted only for the legitimate purpose of protecting the rights of OGBV victims, consistent with article 19(3) of the ICCPR on permissible restrictions to freedom of expression.¹³⁶

Prevention of publication of harmful online content: To avoid the harms caused by OGBV, particularly with respect to instances of OGBV involving the non-consensual dissemination of intimate content, Law 12/2022 should provide victims/survivors with the right to file an application for an immediate injunction to prevent the publication of harmful content.¹³⁷

¹²⁶ A/HRC/38/47, para. 42.

¹²⁷ A/HRC/38/47, para. 27.

¹²⁸ *Ibid*, para. 100.

¹²⁹ Law 12/2022, art. 68(g).

¹³⁰ Law 12/2022, art. 46(1).

¹³¹ Law 12/2022, art. 47.

¹³² CCPR/C/GC/34, para. 25. 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*, UN Doc. A/HRC/38/35, 6 April 2018 (“A/HRC/38/35”), para. 7.

¹³³ ICJ, “LGBT Persons’ Freedom of Expression and Information Online Baseline Study”, pp. 31 – 33. See also: OONI, “iMAP State of Internet Censorship Report 2022 – Indonesia”, 23 December 2022, available at: <https://ooni.org/post/2022-state-of-internet-censorship-indonesia/#trustpositif-by-kominfo>.

¹³⁴ ICCPR, art. 19.

¹³⁵ The 8 March Principles, Principle 2 – Harm Principle.

¹³⁶ See also CCPR/C/GC/34, para. 28; 8 March Principles, principle 7 - Human rights restrictions on criminal law.

¹³⁷ A/HRC/38/47, para. 70.

Article 46(1) of Law 12/2022 may potentially be used to prevent the publication of harmful content amounting to OGBV. The article provides that the Central Government may restrict a perpetrator's "access to electronic information and/or electronic documents containing the Sexual Violence Crime".¹³⁸ However, there is a lack of clarity regarding the type of measures to restrict access to information and documents the Central Government may take. In these circumstances, the persons concerned who would be the target of such measures are not able to foresee the consequences to which their actions may give rise, something which is inconsistent with the principle of legality as applied in the context of the criminal law.¹³⁹

Procedural aspects of prevention and removal of harmful content amounting to OGBV: Indonesia is obligated to introduce measures to effectively enable victims'/survivors' access to justice.¹⁴⁰ Law 12/2022 currently excludes key aspects regarding the prevention and removal of harmful content that would effectively enable victims/survivors to obtain redress for the harms caused by OGBV.

Article 46(1) of Law 12/2022 does not specify which parties may request the removal of harmful content, and article 47 only grants public prosecutors the right to submit removal requests. This has the risk of excluding the victim's family and lawyers from being able to file requests,¹⁴¹ which may be detrimental to girls who are victims/survivors of OGBV, as they often lack the social or legal capacity to file requests themselves.¹⁴² It is entirely possible to incorporate an inclusive list of parties that can file prevention or removal requests, as demonstrated by article 45(1) of Law 12/2022 providing that the victim's family, lawyer or the Integrated Services for the Protection of Women and Children (UPTD PPA) may file a protection order request.¹⁴³

Law 12/2022 also does not establish an expedited legal process that would allow the authorities to respond to *urgent* requests to prevent distribution of harmful content amounting to OGBV or to remove it immediately. First, Law 12/2022 does not explicitly make urgent prevention or removal requests available to victims/survivors on an *ex parte* basis. Second, Law 12/2022 does not make explicit that the standard of proof that applicants must discharge to have their urgent requests granted should be much lower than the standard of proof in criminal cases. Third, Law 12/2022 does not explicitly make urgent requests available irrespective of the initiation of a criminal case against the perpetrator. The fact that Law 12/2022 does not cater for those important aspects risks delaying the process to address urgent prevention or removal requests. For example, requiring the approval of urgent requests to be based on the standard of proof in criminal cases, i.e., beyond reasonable doubt, may lead to delays owing to the need to seek further evidence,¹⁴⁴ putting victims/survivors at greater risk of harm from OGBV, particularly for acts of "revenge porn" or digital threats of violence.

Recommendations

In light of the above concerns, the ICJ recommends that the Indonesian authorities should:

- Explicitly guarantee judicial oversight for the prevention and removal of harmful content amounting to OGBV, requiring authorities to obtain approval from an independent and impartial judicial authority before restricting online content, in accordance with the principle of the separation of powers, due process and international human rights law of legality, necessity, proportionality and non-discrimination;
- Amend the term "public interest" under article 47 of Law 12/2022 to ensure that it is enforced in a manner conforming to the narrower purpose of "preventing the harms caused by offences provided under this law";

¹³⁸ Law 12/2022, art. 46(1).

¹³⁹ The 8 March Principles, Principle 1 – Principle of Legality.

¹⁴⁰ CEDAW/C/GC/33, para. 25(a).

¹⁴¹ Law 12/2022, art. 47.

¹⁴² CEDAW/C/GC/33, paras. 24 and 25(b).

¹⁴³ Law 12/2022, art. 45(1).

¹⁴⁴ UN Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences*, UN Doc. A/HRC/35/30, 13 June 2017 ("A/HRC/35/30"), para. 112(b).

- Explicitly establish which parties may request the prevention or removal of harmful content, including the victim’s family, the victim’s lawyer and the Integrated Services for the Protection of Women and Children (UPTD PPA); and
- Establish an expedited judicial process to address urgent requests to prevent and remove harmful content. The legal mechanism should explicitly guarantee that requests may be filed, where necessary, on an *ex parte* basis; not be dependent on the initiation of a criminal case against the perpetrator; and the standard of proof that an applicant must discharge in order to be granted an order should not be the standard of proof in criminal cases. Instead, judges should be empowered to grant prevention or removal requests based on reasonable evidence of risk of OGBV. The removal order based on urgent requests should only be a temporary order, pending the outcome of proceedings in which the alleged perpetrator can put their case and seek the discharge of the temporary removal order.

ii. *Protection orders*

Indonesia’s due diligence obligations under international human rights law to protect women’s human rights requires it to adopt legislative and regulatory measures that enable the relevant authorities to hand down protection orders for victims/survivors of OGBV in situations of immediate danger.¹⁴⁵ Protection orders aim to ensure the safety of victims/survivors of OGBV against further harm to themselves or their family by requiring the perpetrator to refrain from getting near and/or contacting the victim/survivor. Protection orders can effectively protect victims/survivors if protection orders are accessible to victims/survivors and effectively enforced.¹⁴⁶

Law 12/2022 establishes a legal procedure to enable the relevant authorities to issue protection orders. Under article 42 of Law 12/2022, the police may provide temporary protection for victims/survivors immediately after receiving a report of sexual violence by “limiting the movement of the perpetrator, with the aim of keeping the perpetrator away from the victim within a certain distance and time or limiting certain rights of the perpetrator” for a maximum of fourteen days.¹⁴⁷ Article 45(1) of Law 12/2022 authorizes judges to issue protection orders at the request of the victim, the victim’s family, a public prosecutor, or a victim’s companion. Perpetrators who breach a protection order shall be detained in accordance with provisions of laws and regulations.¹⁴⁸

Pursuant to article 45(2) of Law 12/2022, the maximum length of a protection order issued by a judge is six months, with the possibility of extension for another period of maximum six months.¹⁴⁹ This extension is only available once. According to article 45(3), victims/survivors may request this one-time extension at the latest seven days before the end of the first six-month protection order.

The strict time limit for protection orders imposed by article 45(2) of Law 12/2022 places victims/survivors who remain exposed to violence over a long-term period, such as domestic violence, at risk.¹⁵⁰ Currently, protection orders will not be available for a period over twelve months as article 45(2) of Law 12/2022 only allows for a one-time extension. Further, victims/survivors who fail to request an extension before the end of the first six-month protection period will not be granted an extension under article 45(3). Imposing this strict time limit to file an extension fails to take into account circumstances that would hinder a victim/survivor from effectively accessing the courts, such as women who do not have adequate logistical and financial means to travel to court immediately.

Law 12/2022 also excludes key aspects of an effective protection order.¹⁵¹ First, Law 12/2022 does not make protection orders available, when necessary, on an *ex parte* basis. Second, the Special Rapporteur on VAW has recommended that protection orders should be available, in cases of immediate danger of violence, on

¹⁴⁵ CEDAW/C/GC/35, para. 31(a)(ii). See also A/HRC/35/30, para. 48.

¹⁴⁶ ICJ Practitioner’s Guide, pp. 174 – 175; A/HRC/35/30, para. 85.

¹⁴⁷ Law 12/2022, art. 42.

¹⁴⁸ Law 12/2022, art. 45(5).

¹⁴⁹ Law 12/2022, art. 45(2).

¹⁵⁰ A/HRC/35/30, para. 112(c).

¹⁵¹ *Ibid*, paras. 112(b) and 112(c).

the statement of the victim.¹⁵² These aspects are not explicitly provided under Law 12/2022, risking delays that put the victim at greater risk of violence.

Recommendations

In light of the above concerns, the ICJ recommends that the Indonesian authorities should:

- Adopt the GRs to implement Law 12/2022 on victim protection. The GRs should stipulate that protection orders are available, when necessary, on an *ex parte* basis; irrespective of, or in addition to, other legal proceedings against the perpetrator; and not be contingent on the initiation of a criminal case;
- Abolish the time limit to access the one-time extension of protection orders and provide victims access to protection orders beyond the maximum length of a protection order of twelve months as stipulated in article 45(2) of Law 12/2022; and
- Ensure the effective implementation and monitoring of protection orders, imposing appropriate criminal punishments on perpetrators who breach protection orders.

iii. Criminalization of victims/survivors

Criminal provisions that contain vague and overbroad definitions of “offences” risk criminalizing victims/survivors and act as a barrier against effective access to justice. Victims/survivors may be deterred from reporting their cases to the authorities owing to fear that doing so would expose them to criminal charges and legal reprisals¹⁵³ from the perpetrator, thus rendering the pursuit of justice illusory and potentially harmful to them. This has been the case in Indonesia. In its Concluding Observations on Indonesia, the CEDAW Committee expressed concern that victims/survivors of OGBV can be prosecuted under article 27(1) of the ITE Law and article 4 of the Pornography Law “despite the fact that they did not consent to the dissemination of intimate content”.¹⁵⁴ The ICJ is also concerned that criminally proscribed acts under the new Criminal Code may risk criminalizing victims/survivors.

Criminalization of “pornographic” content: the Indonesian authorities have used the Pornography Law to criminally investigate, charge and convict victims/survivors, further victimizing them and contravening Indonesia’s obligation to respect women’s rights. Article 4(1), in conjunction with article 29 of the Pornography Law, criminalizes the production or distribution of “pornography”, imposing criminal sanctions of maximum twelve years’ imprisonment and/or a maximum fine of Rp6,000,000,000 (approx. USD390,000).¹⁵⁵ Article 4(1) excludes “pornographic” content that was made for private use from its scope.¹⁵⁶ Despite this, Indonesian law enforcement officers have launched criminal investigations against victims/survivors of OGBV based on article 4(1) of the Pornography Law, even though the impugned “pornographic” content was disseminated without the victim’s/survivor’s consent. For example, a survivor/victim of OGBV was subject to a criminal investigation based on article 4(1) of the Pornography Law after a video of them engaged in “pornographic” conduct went viral online without their consent.¹⁵⁷ This case demonstrates how article 4(1) has been used in ways that not only fail to address acts of OGBV, such as the non-consensual dissemination of sexual photos/images, but that also expose victims/survivors to criminal sanctions as the provision does not explicitly take into account the lack of consent of victims/survivors.

¹⁵² *Ibid*, para. 112(b).

¹⁵³ In the context of this briefing paper, legal reprisals refer to criminal complaints filed by perpetrators aimed at silencing victims/survivors.

¹⁵⁴ CEDAW/C/IDN/CO/8, para. 25(c).

¹⁵⁵ Pornography Law, art. 29.

¹⁵⁶ Pornography Law, elucidation of art. 4(1).

¹⁵⁷ BBC News Indonesia, “Penetapan tersangka artis GA dalam kasus pornografi: ‘Preseden buruk’ bagi korban penyebaran konten intim dan ‘bias patriarki’”, 30 December 2020, available at: <https://www.bbc.com/indonesia/indonesia-55486196>.

Legal reprisals against victims/survivors: Ensuring access to justice for victims/survivors of OGBV requires Indonesia to take measures to prevent legal reprisals against victims/survivors.¹⁵⁸

In Indonesia, articles 27(1) and 27(3) of the ITE Law criminalizing the distribution of “content that violates propriety” and “content containing affronts and/or defamation”, respectively, provide “legal bases” for perpetrators to file criminal complaints against victims/survivors of OGBV who speak out about their experience of abuse online.

A person convicted of committing an offence under article 27(1) of the ITE Law faces criminal sanctions of maximum six months’ imprisonment and/or a maximum fine of Rp1,000,000,000 (approx. USD65,000).¹⁵⁹ Article 27(1) of the ITE Law provides no definition of what constitutes “content that violates propriety”, thus potentially encompassing a wide range of acts, in contravention of the principle of legality.¹⁶⁰ Article 27(1) of the ITE Law also fails to apply a gender perspective to the criminalization of “propriety”, providing no protection for victims/survivors of OGBV who did not consent to having their photos/videos uploaded online. In 2018, the Indonesian Supreme Court convicted Baiq Nuril of violating article 27(1) of the ITE Law and sentenced her to six months’ imprisonment after a phone call that she recorded, containing unsolicited sexual content she received, was disseminated without her consent.¹⁶¹ In July 2019, Baiq Nuril received an amnesty from the Indonesian President.¹⁶²

Second, under article 27(3) of the ITE Law in conjunction with article 45(3) of the Revised ITE Law, any person who distributes content containing “affronts and/or defamation” shall face criminal punishments of maximum four years’ imprisonment and/or a maximum fine of Rp750,000,000 (approx. USD49,000). The ICJ has previously highlighted how article 27(3) of the ITE Law is inconsistent with the principle of legality owing to the vague and overbroad definition of “affront and/or defamation”, as well as the lack of an explicit defence of truth.¹⁶³ Owing to its vagueness, article 27(3) of the ITE Law has been used as a legal basis to enable legal reprisals against victims/survivors. For example, Anindya Shabrina Joediono was subject to police investigation following a complaint filed against her under article 27(3) of the ITE Law by a member of the Surabaya municipal police after she had made a Facebook post and posted a comment on a YouTube video alleging sexual assault by police officers.¹⁶⁴

The risk of legal reprisals that victims/survivors of OGBV face underscores the need for effective legal protections to be enshrined in Law 12/2022. Establishing effective legal protection against legal reprisals aims to eradicate this barrier that victims/survivors face when accessing justice. While article 69(g) of Law 12/2022 provides that victims/survivors of sexual violence shall be protected from criminal charges or civil lawsuits,¹⁶⁵ it does not clarify *when* victims/survivors would be entitled to this protection. Owing to this lack of clarity, article 69(g) of Law 12/2022 may be interpreted narrowly, only affording protection for victims/survivors once they have reported their case to the authorities, crucially leaving out protection from legal reprisals for victims/survivors who choose not to report their cases to the authorities but who nonetheless choose to share their experience of abuse online.

¹⁵⁸ CEDAW/C/GC/33, para. 51(d).

¹⁵⁹ Revised ITE Law, art. 45(1).

¹⁶⁰ CCPR/C/GC/34, para. 25, see also, the ICJ’s 8 March Principles, Principle 1 – Principle of Legality.

¹⁶¹ Supreme Court of Indonesia, *Decision No. 574 K/PIID.SUS/2018*, 26 September 2018. See also: Institute for Criminal Justice Reform, “Baiq Nuril adalah Korban Kekerasan Seksual, ICJR Pertanyakan Putusan Kasasi Yang Menghukum Baiq Nuril”, 11 November 2018, available at: <https://icjr.or.id/baiq-nuril-adalah-korban-kekerasan-seksual-icjr-pertanyakan-putusan-kasasi-yang-menghukum-baiq-nuril/>.

¹⁶² BBC News Indonesia, “Baiq Nuril, amnesti pertama untuk korban pelecehan seksual: ‘Belum selesaikan masalah secara struktural’”, 25 July 2019, available at: <https://www.bbc.com/indonesia/indonesia-49107027>.

¹⁶³ See: ICJ, “Indonesia: ICJ asks court to ensure that defamation and “false information” laws not be used to silence and criminalize human rights defenders”, 14 June 2023, available at: <https://www.icj.org/indonesia-icj-asks-court-to-ensure-that-defamation-and-false-information-laws-not-be-used-to-silence-and-criminalize-human-rights-defenders/>.

¹⁶⁴ ICJ, “Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia”, December 2019, p. 57, available at: <https://www.icj.org/wp-content/uploads/2019/12/Southeast-Asia-Dictating-the-Internet-Publications-Reports-Thematic-reports-2019-ENG.pdf>.

¹⁶⁵ Law 12/2022, art. 69(g).

New Penal Code: On 6 December 2022, the Indonesian House of Representatives adopted Law No. 1 of 2023 on the Penal Code (“New Penal Code”),¹⁶⁶ revising the previous Penal Code.¹⁶⁷ The ICJ has previously expressed concern that the criminalization of “adultery” (article 411) and “cohabitation” (article 412) within the New Penal Code discriminate against women.¹⁶⁸ For example, the crime of “cohabitation” under article 412 of the New Penal Code may be used to criminalize victim/survivors of “revenge-porn”, if it is found that the photos/videos were taken while the victim/survivor was “living together as husband and wife outside of marriage”.¹⁶⁹

Recommendations

In light of the above concerns, the ICJ recommends that the Indonesian authorities should:

- Explicitly provide that the legal protection from criminal charges and civil lawsuits guaranteed by article 69(g) of Law 12/2022 applies to victims/survivors of OGBV and all other forms of GBV, irrespective of whether the victim has reported his/her case to the authorities or not; and
- Repeal or substantially amend laws that have the potential to be used as the basis for legal reprisals to silence victims/survivors of OGBV, including article 4(1) of the Pornography Law, articles 27(1) and 27(3) of the ITE Law and article 412 of the New Penal Code.

D. Intersectional discrimination

The effective prevention and punishment of OGBV requires Indonesia to specifically recognize intersectional discrimination and the compounded negative impacts that OGBV may have on women depending on their multiple identities.¹⁷⁰

Intersectional discrimination

Discrimination of women based on sex and gender is inextricably linked with other factors that define who women are, such as race, ethnicity, religion or belief, health, age, class, caste, sexual orientation and gender identity, disability, immigration status, and socio-economic status.¹⁷¹ Due to the varying and intersecting forms of discrimination, OGBV may affect women to different degrees or in different ways, requiring States to adopt appropriate legal and policy responses.¹⁷²

Law 12/2022 contains provisions to specifically address the heightened impacts of sexual violence resulting from intersectional forms of discrimination. The explanatory notes of Law 12/2022 recognize that “the impacts of sexual violence are heightened when the victim belongs to a socially, economically and politically marginalized community or those with special needs, such as children and persons with disabilities”.¹⁷³ Article 15(1) of Law 12/2022 provides aggravated punishments for OGBV committed against children, pregnant women, a person with disabilities, a person who is unconscious or helpless, and a person in a situation of emergency, state of danger, conflict, disaster or war.¹⁷⁴ There are numerous other provisions that address the specific consequences and needs of child OGBV victims and OGBV victims/survivors with disabilities. For example, under article 14(3), child victims/survivors and victims/survivors with disabilities are not required to individually file a report to the authorities to have their cases processed.

¹⁶⁶ Law No. 1 of 2023 on the Penal Code, available at: <https://peraturan.bpk.go.id/Home/Details/234935/uu-no-1-tahun-2023>.

¹⁶⁷ The New Penal Code will enter into force in January 2026, three years after it has been codified into law (article 624), during which time the provisions may be amended.

¹⁶⁸ ICJ, “Indonesia: New Penal Code is a major human rights setback and must be repealed or substantially amended”, 9 December 2022, available at: <https://www.icj.org/indonesia-new-penal-code-is-a-major-human-rights-setback-and-must-be-repealed-or-substantially-amended/>.

¹⁶⁹ Under article 412(2), the criminal offence of cohabitation may only be prosecuted if it was based on a criminal complaint by the offender’s husband or wife if the offender was married, or the parents or children of the offender.

¹⁷⁰ CEDAW/C/GC/35, paras. 12 and 28. See also A/HRC/38/47, para. 28.

¹⁷¹ CEDAW Committee, *General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc. CEDAW/C/GC/28, 16 December 2010, para. 18.

¹⁷² CEDAW/C/GC/35, para. 28.

¹⁷³ Law 12/2022, explanatory notes.

¹⁷⁴ Law 12/2022, art. 15(1).

However, current provisions do not cover other factors that may have an aggravating negative impact for victims/survivors of OGBV, including ethnicity, sexual orientation and gender identity and the stigmatization of women who fight for their rights, including human rights defenders.¹⁷⁵ The exclusion of these factors fails to address the aggravating negative impacts and raises additional barriers to access to justice for some victims/survivors of OGBV.¹⁷⁶ For example, lesbian, gay, bisexual and transgender (LGBT) people, including LBT women, in Indonesia have been subject to discriminatory laws and practices,¹⁷⁷ including the explicit criminalization of consensual same-sex sexual activity,¹⁷⁸ the prevalence of anti-LGBT statements by government officials,¹⁷⁹ and the restriction of LGBT-related expression, online and offline.¹⁸⁰ Due to fear of discrimination and violence, LGBT persons, including LBT women, in the country are unlikely to report instances of OGBV and have limited access to support services.¹⁸¹

Recommendations

In light of the above concerns, the ICJ recommends that the Indonesian authorities should:

- Review Law 12/2022 with a view to addressing intersectional discrimination and the compounded negative impacts that OGBV has on women who may be subjected to one or multiple, intersecting grounds of discrimination prohibited by international human rights law, including, age; sex; sex characteristics; gender; sexual orientation; gender identity; gender expression; race; colour; national or social origin; nationality/citizenship; ethnicity; disability; immigration status; property; birth or descent, including on the basis of caste and analogous systems of inherited status; language; religion or belief; political or other opinion; membership of a particular social group; marital or family status; pregnancy; childbirth; parenthood; health status, including HIV status or drug dependence; economic and social status; occupational status; place of residence; indigenous identity or status; and minority or other status.

E. Procedural limitations of Law 12/2022

The online dimension of OGBV poses specific procedural and evidentiary challenges in efforts to prosecute and punish perpetrators. Chapter IV of Law 12/2022 on the investigation, prosecution and examination of sexual violence currently fails to address the distinct aspects of investigating and prosecuting OGBV, such as the gathering and storage of digital evidence, and the anonymity of perpetrators.

i. Gathering and securing digital evidence

Ensuring effective access to justice requires Indonesia to ensure that criminal procedures establish effective measures to protect victims'/survivors' right to privacy,¹⁸² guaranteed under article 17 of the ICCPR.¹⁸³ This entails the obligation to respect the right to privacy, requiring State institutions and agents to refrain from engaging in any act or practice that would breach victim's right to privacy,¹⁸⁴ such as publishing sexual photos/videos intended to be used as digital evidence. Indonesia also has the due diligence obligation to

¹⁷⁵ CEDAW/C/GC/35, para. 12; UN Human Rights Committee, *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, UN Doc. CCPR/C/21/Rev.1/Add.10, 29 March 2000 ("CCPR/C/21/Rev.1/Add.10"), para. 30.

¹⁷⁶ CEDAW/C/GC/33, para. 8.

¹⁷⁷ For further detail on discrimination against LGBT persons in Indonesia, see: ICJ, "LGBT Persons' Freedom of Expression and Information Online Baseline Study", pp. 13 – 18, 31 – 33, 35 – 37.

¹⁷⁸ For example: Aceh Qanun No. 6 of 2014 on Jinayat Law, arts. 63 and 64, available at: <https://dsi.acehprov.go.id/wp-content/uploads/2017/02/Qanun-Aceh-Nomor-6-Tahun-2014-Tentang-Hukum-Jinayat.pdf> and Local Regulation of Bogor City No. 10 of 2021 on Prevention and Control of Sexual Deviant Acts, art. 6, available at: <https://peraturan.bpk.go.id/Home/Details/207080/perda-kota-bogor-no-10-tahun-2021>.

¹⁷⁹ For example: in 2018, it was reported that the Depok administration formed an anti-LGBTI special force, to "limit the presence of the LGBT community in the city": Lowy Institute, "Indonesia's LGBT crackdown", 8 June 2018, available at: <https://www.lowyinstitute.org/the-interpreter/indonesia-s-lgbt-crackdown>.

¹⁸⁰ OutRight Action International and others, "NO ACCESS: LGBTIQ Website Censorship in Six Countries", 10 August 2021, p. 23, available at: <https://ooni.org/documents/2021-lgbtiq-website-censorship-report/2021-lgbtiq-website-censorship-report-v2.pdf>.

¹⁸¹ NORC Report, p. 3.

¹⁸² A/HRC/38/47, para. 102. See also: CEDAW/C/GC/35, para. 31(a)(i).

¹⁸³ ICCPR, art. 17.

¹⁸⁴ CEDAW, article 2(d) and ICCPR, article 17. See also CEDAW/C/GC/35, para. 22.

protect the right to privacy from violations by private actors,¹⁸⁵ requiring the establishment of effective measures to prevent unauthorized access to digital evidence. Applying this in the present context, the absence of comprehensive legal safeguards to protect against the mishandling of digital evidence risks having digital evidence be accessed by unauthorized private actors.¹⁸⁶ The mishandling of digital evidence, such as intimate photos/videos, in cases of OGBV re-victimizes OGBV victims/survivors and violates their right to privacy.¹⁸⁷ Good practices on the handling of digital evidence include establishing measures to authenticate digital evidence, requiring investigators to conduct a risk assessment prior to the seizure of digital devices or online data, and establishing guidelines on digital evidence preservation to prevent unauthorized access.¹⁸⁸

Law 12/2022 establishes rules on handling digital evidence. Under article 24 of Law 12/2022, evidence admissible to prosecute sexual violence includes electronic evidence in the form of “electronic information and/or electronic documents” and “evidence used to commit a criminal act or as a result of a criminal act of sexual violence and/or objects or goods related to the crime”. Article 25(1) of Law 12/2022 provides that:

witness and/or victims’ statements are sufficient to prove that the defendant is guilty if it is accompanied by 1 (one) other valid evidence and the judge is convinced that it is true that a criminal act has occurred and the defendant is guilty of committing it.

Law 12/2022 excludes key aspects on the gathering and securing of digital evidence, which risks breaching the privacy of OGBV victims/survivors.

Currently, only article 57(4) of Law 12/2022 provides an explicit legal safeguard against the misuse of electronic evidence, requiring the public prosecutor to exclude any photos/videos containing sexual content related to the act of OGBV in the letter of indictment.¹⁸⁹ The scope of article 57(4) is limited and does not capture the full extent of risks associated with gathering and storing digital evidence. First, article 57(4) excludes key justice sector actors, such as investigators and judges, who are involved in criminal proceedings and may have access to sensitive data disclosing evidence of OGBV. Second, article 57(4) only covers the process of drafting an indictment letter, excluding key stages in the handling of digital evidence, such as how to obtain and preserve digital evidence. Article 57(4) of Law 12/2022 does not ensure that justice sector actors will gather, store, and utilize digital evidence solely for the purpose of investigating OGBV, nor does it impose sanctions on those responsible for intentionally or negligently mishandling digital evidence. The lack of legal safeguards on the gathering and storing of digital evidence risks threatening the right to privacy of victims/survivors.

Additionally, there is concern that the rights of personal data subjects under the PDP Law may be waived for law enforcement purposes,¹⁹⁰ posing the risk that the intentional or negligent misuse of sensitive data gathered during investigations of acts of OGBV by State authorities will not be sanctioned. This underscores the need to have explicit legal safeguards on gathering and securing digital evidence embedded within Law 12/2022.

¹⁸⁵ Human Rights Committee General Comment No. 16, para. 10.

¹⁸⁶ CEDAW/C/GC/33, para. 51(g).

¹⁸⁷ *Ibid*, para. 51(g).

¹⁸⁸ See Association of Chief Police Officers, “ACPO Good Practice Guide for Digital Evidence”, March 2012, para. 2.2.8, available at: https://www.digital-detective.net/digital-forensics-documents/ACPO_Good_Practice_Guide_for_Digital_Evidence_v5.pdf.

¹⁸⁹ Law 12/2022, art. 57(4).

¹⁹⁰ PDP Law, art. 15.

Recommendations

In light of the above concerns, the ICJ recommends that the Indonesian authorities should:

- Adopt guidelines for law enforcement officers and public prosecutors on gathering and securing digital evidence for OGBV cases, guided by international human rights law and standards, including with respect to the right to privacy of the victim/survivor and/or of witness/es. Ensure that such guidelines use a confidential and gender-sensitive approach to avoid re-victimization of OGBV victims/survivors. Any digital evidence that is gathered should be kept and utilized solely for the purpose of investigating and prosecuting OGBV;
- Establish measures to authenticate digital evidence, such as ensuring that a qualified forensic expert recovers and/or examines the evidence;
- Establish measures to prevent mishandling digital evidence, such as requiring investigators to conduct a risk assessment prior to the seizure of digital devices or online data and establishing guidelines on digital evidence preservation to prevent unauthorized access;
- Sanction justice sector actors who, intentionally or as a result of negligence, mishandle digital evidence leading to the revictimization of OGBV victims/survivors; and
- Implement training programmes to develop the forensic capabilities of law enforcement officers on the gathering and securing of electronic evidence. Such training programmes should increase justice sector actors' understanding of the harms associated with OGBV and how to safely store and process digital evidence of OGBV.

ii. Anonymity of perpetrators

Online anonymity can make it difficult for authorities to identify perpetrators of OGBV and bring them to justice.¹⁹¹ This can amplify the harms suffered by victims/survivors of OGBV, where perpetrators feel emboldened to repeatedly attack victims/survivors because they feel safe from accountability.¹⁹² In Indonesia, Komnas Perempuan reports that the second most frequent perpetrators of OGBV have remained anonymous.¹⁹³ The absence of a legal process to identify anonymous OGBV perpetrators under Law 12/2022 leaves a gap in preventing and punishing acts of OGBV, thus serving as a barrier to access to justice for victims/survivors of OGBV.¹⁹⁴

At the same time, anonymity and encryption is crucial to the enjoyment of the rights to privacy and freedom of expression.¹⁹⁵ The ICJ has previously highlighted how Regulation of the Minister of Communication and Information Technology Number 5 of 2020 on Private Electronic System Operators (Ministerial Regulation No. 5), obligating tech companies to provide authorities access to data for the purpose of "supporting law enforcement and oversight efforts", threaten the rights to privacy and freedom of expression of internet users in Indonesia.¹⁹⁶ Ministerial Regulation No. 5 provides no oversight for governmental requests to access data, inconsistent with the international human rights law of legality, necessity and proportionality.¹⁹⁷ Thus, the ICJ is concerned that the establishment of a legal process under future GRs implementing Law 12/2022 to identify anonymous perpetrators could threaten the rights to privacy and freedom of expression, particularly if the legal process gives overbroad powers to law enforcement officials to access user data without sufficient judicial oversight.

¹⁹¹ A/HRC/38/47, para. 75; Komnas Perempuan Annual Report, p. 70.

¹⁹² Komnas Perempuan Annual Report, p. 70. See also SAFENet, 'kami jadi TARGET: Pengalaman Perempuan Pembela HAM Menghadapi Kekerasan Berbasis Gender Online (KBGO)', 28 March 2022, p. 74 ("SAFENet HRD Report"), available at: <https://awaskbgo.id/ppham/>.

¹⁹³ Komnas Perempuan Annual Report, p. 68.

¹⁹⁴ A/HRC/38/47, para. 77.

¹⁹⁵ ICCPR, arts. 17 and 19; 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*, UN Doc. A/HRC/29/32, 22 May 2015 ("A/HRC/29/32"), para. 16.

¹⁹⁶ ICJ, "Amicus Curiae Brief in Case No. 424/G/TF/2022", 27 March 2023 ("MR5 Amicus Brief"), para. 39, available at: <https://icj2.wpenginepowered.com/wp-content/uploads/2023/03/English-Final-MR5-Amicus-Curiae-Brief.pdf>.

¹⁹⁷ *Ibid*, para. 39.

Recommendations

In light of the above concerns, the ICJ recommends that the Indonesian authorities should:

- Establish a legal process to enable law enforcement officials to identify anonymous perpetrators of OGBV, for example, by linking digital identifiers, such as an IP address, to physical devices and perpetrators;
- Implement training programmes to develop the technical capabilities of law enforcement officers on the identification of anonymous OGBV perpetrators; and
- Ensure that identification processes be consistent with the principles of legality, necessity, proportionality and non-discrimination. This requires that identification processes be implemented with prior approval from an independent and impartial judicial authority, based on prior risk assessment, strictly necessary for the purpose of identifying perpetrators of OGBV, clearly limited in scope, focused on a specific target, and be adopted only when less intrusive means of investigation are not available.

F. Other appropriate measures to prevent OGBV under Law 12/2022

The rapidly evolving nature of digital technology underscores the importance of States' efforts to take effective policy measures to prevent acts of OGBV and address its underlying causes, such as promoting digital literacy and providing gender-sensitive education in schools.¹⁹⁸ Article 79 of Law 12/2022 mandates the Government to adopt prevention measures, including through education programmes and information campaigns. Such prevention measures should take into account specific situations, such as conflict, disaster, geographical location.¹⁹⁹ However, Law 12/2022 does not explicitly mention what materials are included in prevention measures, nor does it obligate the government to adopt a gender-sensitive approach when formulating prevention measures. In its Concluding Observations on Indonesia, the CEDAW Committee noted a lack of awareness among women in Indonesia about their rights under CEDAW.²⁰⁰ The lack of awareness among Indonesian women about their rights impairs their ability to exercise those rights,²⁰¹ and seek access to justice and effective remedies when their rights are violated, including, for example, by filing criminal complaints for acts of OGBV.

Recommendations

In light of the above concerns, the ICJ recommends that the Indonesian authorities should:

- Adopt the GRs to implement Law 12/2022 on the prevention of sexual violence;
- Ensure that prevention programmes are formulated with a gender-sensitive approach, providing information about the gender-based causes and harms associated with OGBV and informing women of the legal processes available to obtain redress for acts of OGBV;
- Allocate adequate budgetary and institutional resources to ensure that the UPTD PPA may fulfil its functions, and to facilitate the effective implementation and monitoring of prevention programmes.

¹⁹⁸ A/HRC/38/47, paras. 97 and 110.

¹⁹⁹ Law 12/2022, art. 79(3).

²⁰⁰ CEDAW/C/IDN/CO/8, para. 11.

²⁰¹ CEDAW/C/GC/33, para. 32.

IV. Role of Online Platforms and Tech Companies

A. Online platforms

Internet intermediaries, such as online platforms and tech companies, play a central role in providing digital spaces for interaction and, as such, have specific human right responsibilities to protect women from acts of OGBV.²⁰² Under the United Nations Guiding Principles on Business and Human Rights,²⁰³ businesses have the responsibility to respect human rights, meaning that they “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.²⁰⁴ The responsibility to respect human rights requires businesses to conduct human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights.²⁰⁵ When human rights violations are identified, particularly when instances of OGBV are present on their platform, tech companies should provide for or cooperate in their remediation through legitimate processes, including through operational-level grievance mechanisms and cooperation with judicial mechanisms.²⁰⁶

Major social media platforms such as Facebook, X (formerly Twitter) and TikTok address OGBV primarily through their respective Community Guidelines. These guidelines prohibit users from posting harmful content, such as sexual harassment, incitement to violence and non-consensual sharing of sexual images. In addition to Community Guidelines, some tech companies have taken positive measures to address OGBV on their platforms. In Indonesia, LBH APIK has reported that they have actively collaborated with private companies such as Meta and Twitter to more effectively address OGBV on their platforms, such as improving clarity to allow women users to report instances of OGBV.²⁰⁷

Meta established the Oversight Board in 2019, which is authorized to review and issue decisions on content moderation actions taken by Meta in accordance with Meta’s content policies and values.²⁰⁸ So far, the Oversight Board has issued decisions relating to gender identity and dissemination of videos containing sexual violence.²⁰⁹ The Oversight Board has also issued a Policy Advisory Opinion on the sharing of private residential information.²¹⁰ Recognizing the harms arising from doxing,²¹¹ the Oversight Board recommended Meta, among others, to remove an exception that allowed the sharing of private residential information when it is considered “publicly available”,²¹² and to establish mechanisms to enable Meta to respond more quickly to situations of increased risk.²¹³ The advisory opinion sets a positive standard for addressing the role of online platforms to prevent and mitigate OGBV, which should be considered by other platforms.

Despite these positive developments, online platforms and tech companies have been observed to breach their responsibility to respect human rights, sometimes enabling acts of OGBV. The Special Rapporteur on freedom of expression has emphasized that the business model of social media platforms, one that seeks to maximize user engagement by promoting inflammatory and controversial content, hinders the moderation of harmful content and may amplify instances of severe online harassment.²¹⁴ In the context of Indonesia, perpetrators of OGBV take advantage of the lack of proactive content moderation on platforms such as Facebook and Twitter to amplify the harms caused by acts of OGBV on their victims/survivors. For example, women human rights defenders have been doxed with the aim of discrediting them and exposing them to offline physical harm.²¹⁵

²⁰² A/HRC/38/47, para. 71.

²⁰³ The Guiding Principles were endorsed by the UN Human Rights Council in 2011 in Resolution 17/4: UN Human Rights Council, “Resolution adopted by the Human Rights Council 17/4: Human rights and transnational corporations and other business enterprises”, UN Doc. A/HRC/RES/17/4, 6 July 2011. OHCHR, *UN Guiding Principles on Business and Human Rights*, HR/PUB/11/04, 2011 (“UNGPs”), available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf.

²⁰⁴ UNGPs, principle 11.

²⁰⁵ UNGPs, principle 15.

²⁰⁶ UNGPs, principle 22.

²⁰⁷ LBH APIK Annual Report, pp. 51 – 52.

²⁰⁸ Available at: <https://www.oversightboard.com/governance/>.

²⁰⁹ Oversight Board, “Gender identity and nudity”, 2022, available at: <https://www.oversightboard.com/decision/BUN-IH313ZHJ/>; Oversight Board, “India sexual harassment video”, 2022, available at: <https://www.oversightboard.com/decision/IG-KFLY3526/>.

²¹⁰ Oversight Board, “Policy Advisory Opinion 2021-01 on the Sharing of Private Residential Information”, 2021 (“Oversight Board Advisory Opinion”), available at: <https://www.oversightboard.com/decision/PAO-2021-01/>.

²¹¹ *Ibid*, para. 26.

²¹² *Ibid*, paras. 29 – 33.

²¹³ *Ibid*, paras. 62 – 64.

²¹⁴ A/76/258, para. 85.

²¹⁵ SAFENet HRD Report, pp. 82 – 83.

Recommendations

Recognizing the responsibility of tech companies to respect human rights and protect women from OGBV, the ICJ recommends tech companies to:

- Adopt transparent complaint mechanisms for cases of OGBV and ensure that policies and procedures for reporting and requesting the removal of harmful content amounting to OGBV are easily accessible and transparent;
- Publish a clear and comprehensive content moderation policy. Platforms should ensure that content moderation policies and decisions are:
 - o Guided by international human rights law and standards, such as the principles of legitimate purpose, legality, necessity, proportionality and non-discrimination; and
 - o Involve contextual analysis of local languages and contexts, and are informed by local civil society;
- Carry out regular human rights impact assessments to identify and mitigate systemic risks that cause or contribute to OGBV;
- Develop and make available policies on safety from OGBV, with full transparency in relation to algorithms, practices and decision-making processes, in an accessible, non-technical manner in Bahasa Indonesia; and
- Ensure data security and privacy, and ensure that the use of data is in compliance with international human rights law and has the fully informed consent of data providers.

B. Right to be forgotten

The right to be forgotten refers to the right of users to request companies to erase personal data concerning themselves without undue delay.²¹⁶ Under European Union (EU) Law, this right to erasure applies across the board, not just to search engines, meaning that victims/survivors of revenge porn have a way of not only deleting links to disseminated images, but also with a means of removing images from source websites, at least within the EU jurisdiction.²¹⁷ Due to the seriousness of the harms caused by OGBV, the data processor may not refuse to erase the requested personal data for economic interests.²¹⁸ The right to be forgotten may only be limited where the processing of data is necessary for the exercise of the right of freedom of expression and information, and complies with its legal obligations, and it is for public interest purposes.²¹⁹

Implementing the right to be forgotten may provide an additional legal basis for victims/survivors to obtain redress for the harms caused by OGBV. In Indonesia, the right to be forgotten is provided under article 8 of the PDP Law, which provides that:

Personal Data Subjects shall have the right to end processing, delete, and/or destroy Personal Data regarding themselves in accordance with provisions of law and regulations.

The sole inclusion of the right to be forgotten within the PDP Law has the potential risk that the implementation of the right will not be gender-sensitive, resulting in non-gender sensitive implementation that is unable to assess the harms caused by OGBV and the need for immediacy in removing harmful content comprising OGBV.

Recommendation(s)

In light of the above, the ICJ hereby recommends tech companies to:

- Guarantee the right to be forgotten in a gender-sensitive manner, by ensuring timely and adequate responses to requests of personal data erasure.

²¹⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 ("EU GDPR"), art. 17.

²¹⁷ Adriane van der Wilk, p. 23.

²¹⁸ Court of Justice of the European Union, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 13 May 2014, para. 81.

²¹⁹ EU GDPR, art. 17(3).

V. Conclusion

The adoption of Law 12/2022 is a positive development towards fulfilling Indonesia’s international human rights obligation to prevent and punish OGBV. Key provisions under Law 12/2022 on criminalizing acts of “electronic-based sexual violence”, explicitly mandating justice sector actors to apply a gender perspective when processing cases of sexual violence, and providing a legal mechanism for removal of harmful content, are important steps towards the effective protection of women from OGBV and ensuring effective access to justice for victims/survivors. In this regard, the ICJ notes that the government has been closely working with relevant stakeholders to draft the GRs implementing Law 12/2022, with the aim of adopting the GRs before the end of 2023.²²⁰ This presents an opportunity to address key outstanding issues of concern that would enable Law 12/2022 to protect women from OGBV and ensure victims’ access to justice, such as broadening the definition of “electronic-based sexual violence” and establishing the legal process for the prevention and removal of harmful content comprising OGBV. The rapid development of digital technology brings with it increasingly complex forms and harms of OGBV, requiring the Indonesian authorities to act appropriately in line with international human rights law and standards to ensure that the digital space is a safe space, free from OGBV for all women.

VI. Annex – Table of Recommendations

<p>Restrictive scope of OGBV</p> <ul style="list-style-type: none"> • Broaden the definition of “electronic-based sexual violence” under article 14(1) of Law 12/2022 or enact additional laws to explicitly criminalize additional forms of OGBV – such as: (i) online threats of physical and/or sexual violence; (ii) severe harassment online, including sexual harassment; (iii) doxing; (iv) non-consensual distribution of intimate contents (“revenge porn”); and (v) threats to share intimate content – inflicting or threatening substantial harm to victims/survivors, and amounting to violations of their human rights, including their right to physical, sexual or psychological integrity; • Ensure that provisions criminalizing additional forms of OGBV and their enforcement be consistent with international human rights law and general principles of criminal law, including the principles of legality, harm and proportionality; and • Ensure that laws and regulations on OGBV be constantly reviewed to ensure that they are responsive to contemporary and relevant forms of OGBV.
<p>Gender-sensitive implementation of law 12/2022</p> <ul style="list-style-type: none"> • Adopt the GRs implementing Law 12/2022 to facilitate the effective prevention of OGBV and protection of OGBV victims; • Provide adequate and continuous capacity-building training to justice sector actors, including law enforcement officials, public prosecutors, judges, lawyers and government service officials, on the application of international human rights law and standards that are particularly relevant to the investigation, prosecution, adjudication and sentencing of OGBV-related criminal offences; and • Increase the justice sector actors’ understanding of: (i) the harms associated with OGBV, (ii) how to identify and respond appropriately to the specific needs of women victims/survivors of OGBV, (iii) how to avoid revictimization and the use of stereotyping language, and (iv) the gender-based causes and impacts of OGBV. The trainings should also increase their understanding of intersectional discrimination, the compounding negative impacts suffered by someone with multiple identities, and how to avoid using stereotyping language.

²²⁰ KemenPPPA, ‘KEMENPPPA KOORDINASIKAN PENYUSUNAN PERATURAN PELAKSANA UU TPKS’, 2 February 2023, available at: <https://kemenpppa.go.id/index.php/page/read/29/4372/kemenpppa-koordinasikan-penyusunan-peraturan-pelaksana-uu-tpks>.

<p>Prevention and removal of harmful online content</p> <ul style="list-style-type: none"> • Explicitly guarantee judicial oversight for the prevention and removal of harmful content amounting to OGBV, requiring authorities to obtain approval from an independent and impartial judicial authority before restricting online content, in accordance with the principle of the separation of powers, due process and international human rights law of legality, necessity, proportionality and non-discrimination; • Amend the term “public interest” under article 47 of Law 12/2022 to ensure that it is enforced in a manner conforming to the narrower purpose of “preventing the harms caused by offences provided under this law”; • Explicitly establish which parties may request the prevention or removal of harmful content, including the victim’s family, the victim’s lawyer and the Integrated Services for the Protection of Women and Children (UPTD PPA); and • Establish an expedited judicial process to address urgent requests to prevent and remove harmful content. The legal mechanism should explicitly guarantee that requests may be filed, where necessary, on an <i>ex parte</i> basis; not be dependent on the initiation of a criminal case against the perpetrator; and the standard of proof that an applicant must discharge in order to be granted an order should not be the standard of proof in criminal cases. Instead, judges should be empowered to grant prevention or removal requests based on reasonable evidence of risk of OGBV. The removal order based on urgent requests should only be a temporary order, pending the outcome of proceedings in which the alleged perpetrator can put their case and seek the discharge of the temporary removal order.
<p>Protection orders</p> <ul style="list-style-type: none"> • Adopt the GRs to implement Law 12/2022 on victim protection. The GRs should stipulate that protection orders are available, when necessary, on an <i>ex parte</i> basis; irrespective of, or in addition to, other legal proceedings against the perpetrator; and not be contingent on the initiation of a criminal case; • Abolish the time limit to access the one-time extension of protection orders and provide victims access to protection orders beyond the maximum length of a protection order of twelve months as stipulated in article 45(2) of Law 12/2022; and • Ensure the effective implementation and monitoring of protection orders, imposing appropriate criminal punishments on perpetrators who breach protection orders.
<p>Criminalization of victims/survivors</p> <ul style="list-style-type: none"> • Explicitly provide that the legal protection from criminal charges and civil lawsuits guaranteed by article 69(g) of Law 12/2022 applies to victims/survivors of OGBV and all other forms of GBV, irrespective of whether the victim has reported his/her case to the authorities or not; and • Repeal or substantially amend laws that have the potential to be used as the basis for legal reprisals to silence victims/survivors of OGBV, including article 4(1) of the Pornography Law, articles 27(1) and 27(3) of the ITE Law, and article 412 of the New Penal Code.
<p>Intersectional discrimination</p> <ul style="list-style-type: none"> • Review Law 12/2022 with a view to addressing intersectional discrimination and the compounded negative impacts that OGBV has on women who may be subjected to one or multiple, intersecting grounds of discrimination prohibited by international human rights law, including, age; sex; sex characteristics; gender; sexual orientation; gender identity; gender expression; race; colour; national or social origin; nationality/citizenship; ethnicity; disability; immigration status; property; birth or descent, including on the basis of caste and analogous systems of inherited status; language; religion or belief; political or other opinion; membership of a particular social group; marital or family status; pregnancy; childbirth; parenthood; health status, including HIV status or drug dependence; economic and social status; occupational status; place of residence; indigenous identity or status; and minority or other status.

Gathering and securing digital evidence

- Adopt guidelines for law enforcement officers and public prosecutors on gathering and securing digital evidence for OGBV cases, guided by international human rights law and standards, including with respect to the right to privacy of the victim/survivor and/or of witness/es. Ensure that such guidelines use a confidential and gender-sensitive approach to avoid re-victimization of OGBV victims/survivors. Any digital evidence that is gathered should be kept and utilized solely for the purpose of investigating and prosecuting OGBV;
- Establish measures to authenticate digital evidence, such as ensuring that a qualified forensic expert recovers and/or examines the evidence;
- Establish measures to prevent mishandling digital evidence, such as requiring investigators to conduct a risk assessment prior to the seizure of digital devices or online data and establishing guidelines on digital evidence preservation to prevent unauthorized access;
- Sanction justice sector actors who, intentionally or as a result of negligence, mishandle digital evidence leading to the revictimization of OGBV victims/survivors; and
- Implement training programmes to develop the forensic capabilities of law enforcement officers on the gathering and securing of electronic evidence. Such training programmes should increase justice sector actors' understanding of the harms associated with OGBV and how to safely store and process digital evidence of OGBV.

Anonymity of perpetrators

- Establish a legal process to enable law enforcement officials to identify anonymous perpetrators of OGBV, for example, by linking digital identifiers, such as an IP address, to physical devices and perpetrators;
- Implement training programmes to develop the technical capabilities of law enforcement officers on the identification of anonymous OGBV perpetrators; and
- Ensure that identification processes be consistent with the principles of legality, necessity, proportionality and non-discrimination. This requires that identification processes be implemented with prior approval from an independent and impartial judicial authority, based on prior risk assessment, strictly necessary for the purpose of identifying perpetrators of OGBV, clearly limited in scope, focused on a specific target, and be adopted only when less intrusive means of investigation are not available.

Other appropriate measures to prevent OGBV under Law 12/2022

- Adopt the GRs to implement Law 12/2022 on the prevention of sexual violence;
- Ensure that prevention programmes are formulated with a gender-sensitive approach, providing information about the gender-based causes and harms associated with OGBV and informing women of the legal processes available to obtain redress for acts of OGBV;
- Allocate adequate budgetary and institutional resources to ensure that the UPTD PPA may fulfil its functions, and to facilitate the effective implementation and monitoring of prevention programmes.

Role of online platforms

- Adopt transparent complaint mechanisms for cases of OGBV and ensure that policies and procedures for reporting and requesting the removal of harmful content amounting to OGBV are easily accessible and transparent.
- Publish a clear and comprehensive content moderation policy. Platforms should ensure that content moderation policies and decisions are:
 - o Guided by international human rights law and standards, such as the principles of legitimate purpose, legality, necessity, proportionality and non-discrimination; and
 - o Involve contextual analysis of local languages and contexts, and are informed by local civil society.
- Carry out regular human rights impact assessments to identify and mitigate systemic risks that cause or contribute to OGBV;
- Develop and make available policies on safety from OGBV, with full transparency in relation to algorithms, practices and decision-making processes, in an accessible, non-technical manner in Bahasa Indonesia; and
- Ensure data security and privacy, and ensure that the use of data is in compliance with international human rights law and has the fully informed consent of data providers.

Right to be forgotten

- Guarantee the right to be forgotten in a gender-sensitive manner, by ensuring timely and adequate responses to requests of personal data erasure.

Commission Members

July 2023

President

Professor Robert Goldman, United States

Vice-Presidents

Professor Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee

Sir Nicolas Bratza, United Kingdom

(Chair) Dame Silvia Cartwright, New Zealand

Mr. Shawan Jabarin, Palestine

Ms. Nahla Haidar El Addal, Lebanon

Ms. Mikiko Otani, Japan

Professor Marco Sassòli, Italy/Switzerland

Mr. Wilder Tayler, Uruguay

Justice Qinisile Mabuza, Eswatini

Executive Committee Alternates

Justice Martine Comte, France

Ms. Ambiga Sreenevasan, Malaysia

Other Commission Members

Justice Azhar Cachalia, South Africa

Justice Moses Hungwe Chinhengo, Zimbabwe

Professor Michelo Hansungule, Zambia

Ms. Jamesina Essie L. King, Sierra Leone

Justice Qinisile Mabuza, Swaziland

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Willy Mutunga, Kenya

Justice Aruna Devi Narain, Mauritius

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Carlos Ayala, Venezuela

Mr. Reed Brody, United States

Ms. Catalina Botero, Colombia

Professor José Luis Caballero Ochoa, Mexico

Professor Sarah Cleveland, United States

Mr. Belisario dos Santos junior, Brazil

Ms. Leilani Farha, Canada

Professor Robert Goldman, United States

Professor Juan Méndez, Argentina

Professor Mónica Pinto, Argentina

Professor Victor Rodriguez Rescia, Costa Rica

Mr. Alejandro Salinas Rivera, Chile

Mr. Wilder Tayler, Uruguay

Dr. Rodrigo Uprimny Yepes, Colombia

Professor Bernard Duhaime, Canada

Professor César Landa, Peru

Professor Kyong-Whan Ahn, Republic of Korea

Justice Adolfo Azcuna, The Philippines

Dr. Elizabeth Biok, Australia

Dame Silvia Cartwright, New Zealand

Ms. Hina Jilani, Pakistan

Justice John O'Meally

Ms. Mikiko Otani, Japan

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms. Ambiga Sreenevasan, Malaysia

Justice Chinara Aidarbekova, Kyrgyzstan

Sir Nicolas Bratza, United Kingdom

Justice Martine Comte, France

Justice Radmila Dragicevic-Dicic, Serbia

Ms. Gulnora Ishankhanova, Uzbekistan

Ms. Åsne Julsrud, Norway

Professor José Antonio Martín Pallín, Spain

Justice Tamara Morshchakova, Russia

Justice Egbert Myjer, Netherlands

Dr. Jarna Petman, Finland

Professor Marco Sassòli, Switzerland

Justice Philippe Texier, France

Justice Stefan Trechsel, Switzerland

Professor Fionnuala Ni Aolain, Ireland

Ms. Hadeel Abdel Aziz, Jordan

Mr. Mazen Darwish, Syria

Mr. Gamal Eid, Egypt

Ms. Nahla Haidar El Addal, Lebanon

Mr. Shawan Jabarin, Palestine

Justice Kalthoum Kennou, Tunisia

Dr. Fatsah Ouguergouz, Algeria

Mr. Michael Sfard, Israel

Justice Marwan Tashani, Libya



International
Commission
of Jurists

P.O. Box 1740
Rue des Bains 3
CH 1211 Geneva 1
Switzerland

t +41 22 979 38 00
f +41 22 979 38 01
www.icj.org