

Buenos Aires, June 14, 2021

Ms. Irene Khan

Special Rapporteur on the promotion and protection of freedom of opinion and expression

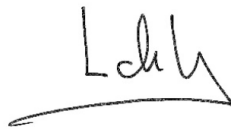
Dear Madam:

We are submitting this report in response to the call for information on gender justice and the right to freedom of opinion and expression.

Started in 1979, the Center for Legal and Social Studies (CELS) is an organization dedicated to the defense and protection of human rights in Argentina, with an intersectional feminist agenda.

We are available to expand or clarify anything you deem necessary.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lchky', with a long horizontal stroke underneath.

**Paula Litvachky**  
Directora Ejecutiva  
Centro de Estudios Legales y Sociales

## **Enhanced protection for expressions regarding gender-based violence and discrimination issues**

As this Special Rapporteur knows, gender-based violence is a huge global concern. Some may argue that violence against women and other gender and sexual identities, inflicted mostly by heterosexual and cis-gender men, is a not-so-much-silent pandemic that accounts for thousands of premature deaths worldwide.<sup>1</sup>

In addition to suffering violence in public spaces by strangers, women are victims of mistreatment and abuse by their acquaintances: friends, coworkers, relatives and romantic partners perform also as victimizers. In their homes, in their places of study, in their classrooms and college campuses, and in their workplaces, women are often exposed to the possibility of being victims of the most diverse attacks on their physical and mental integrity.

To speak about these situations, to enunciate these episodes, is difficult and often traumatic. Particularly when the aggressor is a close person or with whom the victim has a subordinate or dependent relationship.

Since guilt, shame and fear are common feeling surrounding these experiences, it may take a long time to overcome these obstacles and to talk about these episodes with others, to actually put in words the fact of being a victim. Even more difficult is to publicly talk about it and to confront the aggressor.

Even when these obstacles have been overcome, not all victims have the determination to take their complaint before a judicial court. Not all victims want to expose their life to the Court, nor do they all have the money and time that it takes to pursue a judicial process against the aggressor. And when they do so, it is not uncommon to be made long after the episode of violence took place, which may lead to the complaint being dismissed as untimely, because the possibility of suing has expired on statutory grounds.

And even when women have the courage to publicly denounce and decide to initiate a judicial process against the aggressor – and they do so in a timely manner in accordance with the statutory prescription requirements – it is not an easy task to demonstrate beyond a reasonable doubt before a court of law that the episode of aggression actually took place as the victim recalls it.

And even when the episode can be factually demonstrated before a court of law, the gender stereotypes that are deeply rooted in our societies and courts, often lay a judging look on the qualities of the victim, while casting doubts on her story. Inquires on how she was dressed at the moment are brought up in the courtroom; perhaps she was too provocative for a workplace? “She was no saint, she already had relationships with other men in the office”. “There is no need to overreact, what happened was actually a misunderstanding, she misinterpreted the intentions of her boss”. “Why did she wait so

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<sup>1</sup> Regarding femicide, the Special Rapporteur on violence against women, its causes and consequences has cautioned that it “is a global phenomenon that takes place in both the private and public spheres” and that it is “not an isolated phenomenon that had arisen suddenly and unexpectedly but (is) instead the final stage of violence after an extended and ignored continuum of violence that had progressively escalated.” Report of the Special Rapporteur on violence against women, its causes and consequences, September 26, 2016, A/71/398, paras. 27 and 28.

long to speak about this?” “Maybe she was just jealous because of a rejection.” “Since women are emotional by nature, it is not unusual to find a spiteful woman that all she wants is to ruin the man’s reputation or to get public attention or to get money”. “And, lets us not forget, not all men are violent or sexual predators.”

To reach a judicial decision that actually endorses what the victim of abuse has managed to put into words is not easy and is not common.

Not all of the gender-based violence victims “speak in time”, nor do they all decide to promote a judicial process against the aggressor. And even when they do, they hardly get a positive response from the judiciary.

But still, it is important that they can do so, freely and fearless. It is important that they may speak about it if they want to. It is in the interest of the society as a whole that gender-based violence victims may publicly express in words what has happened in private, without fear of retaliation.

But, as we know, speaking out against situations of violence or abuse, can bring upsetting consequences. Certainly, aggressors may respond with more aggression, be it physical or verbal.

And those women will not only be called liars in a public way, their allegations diminished with arguments loaded with prejudices and their intimacies aired in public. Also on many occasions, those who are called aggressors may respond with legal strategies, such as slander and defamation suits. These strategies, if successful, may lead women into poverty.

To this issue is to which we want to focus on: legal retaliation for speaking of experiences of violence or abuse.

Legal retaliation is an issue of great concern when it comes to gender-violence claims. Defamation suits filed by those accused of gender-based violence not only intimidate and silence individual victims that chose to speak out, but they have a chilling effect on reporting and disclosure of gender-based violence by other victims and society as a whole.

Gender-based violence is already a grossly under-reported phenomenon and legal retaliation further underpins silence and fear.

Regarding this Special Rapporteur mandate, it is worth noting that freedom of expression plays a critical role in countering gender-based violence. It has a special value, insofar as it transfers violence from the sphere of the individual experience and the private interest, to the realm of collective interest and public communication.

Silence has been a fertile ground for gender violence perpetuation. Freedom of expression takes gender violence out of closed doors where shame and fear have relegated it. It is the first, unavoidable step to begin to deal with it.

**Legal retaliation against gender-based violence claims is not an unusual phenomenon.**

In Argentina there have been several cases in which men pointed as violent or harassers have resort to legal actions so as to silence women.

Juan Darthes is a famous Argentinean actor who was accused by several actresses of harassment, abuse, groping, mistreatment, inappropriate behavior of a sexual nature and the rape of an adolescent actress. Darthes ultimately fled to Brazil when the rape prosecution began to advance. But before, he sued the actresses for libel and slander, both in civil and criminal courts. For example, when the first abuse complaint was made public, the actor sued the complainant, demanding financial compensation for the damage to his reputation.<sup>2</sup> Also, when another actress publicly denounced that he had sexually assaulted her, the actor filed a criminal libel suit, which was dismissed in 2019.<sup>3</sup> It was recently reported that the actor would be prosecuted for rape in Brazil.<sup>4</sup>

Likewise, when a feminist music writer and stand-up performer publicly accused her stand-up professor of sexually assaulted her while she was a teenager<sup>5</sup>, the man sued her and the female journalist that helped her to expose him.<sup>6</sup>

Also, in late 2018 a judge dismissed a criminal complaint for slander and defamation promoted by an actor against a group of feminist actresses that have signaled as a harasser. The judge ruled that the facts referred to violence deployed against women in its physical, mental, economic and sexual dimensions, which was a matter of public concern. He asserted that, with international conventions as CEDAW and Belem do Pará<sup>7</sup> as a backdrop, gender-based violence is a public interest matter, and that the protection of women against any type of violence deserves particular attention. He explained that granting the request promoted by the man “would undermine the right to freedom of expression enshrined in art. 13 of the ACHR in its instrumental dimension at the service of the protection of violence against women.” For this reason, he said, “although the expressions may not be true, or may be offensive, they have been excluded from the scope of criminal sanction for being related to matters of public interest”.<sup>8</sup>

This was the criterion that the Chamber of Criminal Cassation, the country’s highest criminal court, had established in 2014 in another similar case. There it acquitted the defendant who had been criminally charged by her ex-husband for defamation and slander, and warned that “restricting the possibility of reporting possible situations of gender violence in the mass media could put the obligation of the state at risk. to guarantee

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<sup>2</sup> Infobae, “Juan Darthes no asistió a la audiencia en Tribunales con Calu Rivero: qué pasará con la causa”, December 13, 2018, available at: <https://www.infobae.com/teleshows/infoshows/2018/12/13/juan-darthes-y-calu-rivero-tendran-una-nueva-audiencia-se-duda-sobre-la-asistencia-del-actor/>

<sup>3</sup> Clarín, “La actriz Anita Coacci fue sobreseída en la causa que le inició Juan Darthes por injurias”, October 5, 2019, available at: [https://www.clarin.com/sociedad/actriz-anita-coacci-sobreseida-causa-inicio-juan-darthes-injurias\\_0\\_wMmx4XIO.html](https://www.clarin.com/sociedad/actriz-anita-coacci-sobreseida-causa-inicio-juan-darthes-injurias_0_wMmx4XIO.html)

<sup>4</sup> Página 12, “Juan Darthes fue acusado formalmente en Brasil por la denuncia de violación a Thelma Fardín”, April 8, 2021, available at: <https://www.pagina12.com.ar/334327-juan-darthes-fue-acusado-formalmente-en-brasil-por-la-denunc>

<sup>5</sup> @Vicuvillanueva, “#YaNoNosCallamosMas”, December 6, 2017, available at: <https://twitter.com/Vicuvillanueva/status/938543606482259968>

<sup>6</sup> Radio Cut, “Noelia recibe carta documento del violín Biffi”, December 22, 2017, <https://radiocut.fm/audiocut/noelia-recibe-carta-documento-del-violin-biffi/>; Página 12, “Más fuerte que el trueno”, May 19, 2019, available at: <https://www.pagina12.com.ar/192527-mas-fuerte-que-el-trueno>

<sup>7</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belem Do Pará”, available at: <https://www.oas.org/juridico/english/treaties/a-61.html>

<sup>8</sup> ELA, “Las denuncias públicas en redes sociales no constituyen calumnias e injurias”, January 28, 2019, available at: <http://www.ela.org.ar/a2/index.cfm?muestra&codcontenido=3696&plcontempl=12&aplicacion=app187&cni=4&opc=50>

women who have been subjected to this situation effective access to a timely and effective trial in defense of their rights”<sup>9</sup>

Also in Argentina, in 2020 a Federal Civil Chamber rejected a man's request for Facebook to block the links in which he was accused of having committed acts of gender violence. The court warned that the man did not present evidence to refute the publications and that he just claimed that they were libelous and defamatory.<sup>10</sup>

In Chile, Francisca was a law student who in 2016 agreed to go to a bar with a public prosecutor. After a few drinks, he sexually assaulted her. The court dismissed her complaint and stated that the sexual relationship was consensual. A few months later, the prosecutor filed a criminal proceeding for slander against her. In the slander trial, the police officer who received the student's complaint testified that although the young woman was crying when she reported the assault, “it was not a cry of rape”. She was found guilty and convicted to 3 years of prison.<sup>11</sup> “#FranciscaYoTeCreo” (“#FranciscaBelieveYou”) was prominently used by feminist activism in Chile those months. In 2019 the Chilean Supreme Court overturned the conviction and acquitted Francisca.<sup>12</sup>

This is not an issue circumscribed to Argentina or a particular national context. Quite the contrary, in every corner of the world where a woman speaks out, exposes herself to legal retaliation.

As this Special Rapporteur may know, Hollywood star Johnny Depp filed a libel suit against a newspaper that reported on the actor’s violent record, which was dismissed in 2020.<sup>13</sup> Meanwhile, Depp sued his former wife for defamation shortly after she published an Op-Ed at the Washington Post, describing her experience with Depp.<sup>14</sup> Depp is claiming USD 50 million as compensation in the ongoing process.<sup>15</sup>

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<sup>9</sup> Cámara Federal de Casación Penal, Sala IV, E., L.S., CCC 23835/2012/CFC1, Reg. 2328/14, November 5, 2014, available at: <https://www.mpf.gob.ar/ebooks/genero/II.%20Delitos%20en%20particular/11.%20CFCP%20Sala%20IV%202014.11.05%20E.%20L.S..pdf>

<sup>10</sup> Diario Judicial, “La violencia de género no se censura”, September 30, 2020, available at: <https://www.diariojudicial.com/nota/87531>

<sup>11</sup> CNN Chile “El caso de Francisca Díaz, la joven que denunció abuso sexual y terminó condenada por injurias y calumnias”, November 27, 2018, available at: [https://www.cnnchile.com/pais/el-caso-de-francisca-diaz-la-joven-que-denuncio-abuso-sexual-y-termino-condenada-por-injurias-y-calumnias\\_20181127/](https://www.cnnchile.com/pais/el-caso-de-francisca-diaz-la-joven-que-denuncio-abuso-sexual-y-termino-condenada-por-injurias-y-calumnias_20181127/)

<sup>12</sup> CNN Chile, “Corte Suprema absuelve a Francisca Díaz, la joven condenada por denunciar abuso sexual de abogado de la Fiscalía”, February 6, 2019, available at: [https://www.cnnchile.com/pais/corte-suprema-absuelve-a-francisca-diaz-la-joven-condenada-por-denunciar-abuso-sexual-de-abogado-de-la-fiscalia\\_20190206/](https://www.cnnchile.com/pais/corte-suprema-absuelve-a-francisca-diaz-la-joven-condenada-por-denunciar-abuso-sexual-de-abogado-de-la-fiscalia_20190206/)

<sup>13</sup> BBC, “Johnny Depp loses libel case over Sun 'wife beater' claim”, November 2, 2020, available at: <https://www.bbc.com/news/uk-54779430>

<sup>14</sup> The Washington Post, “Opinion: Amber Heard: I spoke up against sexual violence — and faced our culture’s wrath. That has to change”, December 18, 2018, available at: [https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36\\_story.html](https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html)

<sup>15</sup> It is worth noting that, although neither Depp nor his ex-wife live in Virginia, Depp is suing in that state, since, until 2020, it did not have what in the US are known as anti-SLAPP (Strategic Lawsuit Against Public Participation) laws. Under these laws, the person sued for defamation can make a motion to strike the suit because it involves protected speech. She may argue that domestic violence is a matter of public concern protected by the US First Amendment. Then, the plaintiff will have the burden of showing a

Similarly, in a 2019 ruling, the Minnesota Supreme Court dismissed a defamation claim brought by a man against his ex-wife and a nonprofit that supports victims of domestic violence. Years after the marriage was over, the woman claimed that she was a survivor of domestic violence, while the nonprofit give her a platform and support her. In its ruling the Court gave special weight to the nature of public concern of the issues at stake and the applicability of the real malice standard.<sup>16</sup>

In the United States, TIME'S UP Legal Defense Fund, a non-profit that provides legal assistance for sexual harassment victims asserts that 18% of the cases they have involve helping women to defend themselves against defamation suits after they spoke out. "Survivors speak out publicly about the harassment, and harassers sue them", they illustrate.<sup>17</sup>

In China, a woman who worked as accountant at the World Wildlife Fund (WWF) accused in Weibo –a Chinese social media– a top official of the WWF local brand of forcibly kissed her. He then sued her for defamation.<sup>18</sup> Also in that country, a 25-year-old woman who worked as an intern at China's state broadcaster accused one of the most renowned Chinese TV host of groped and forcibly kissed her. The TV host sued her, demanding compensation for almost a 100,000 USD, along with the cost of the legal fees.<sup>19</sup> In 2019 the New York Times recorded that, in a year, six men publicly accused of sexual assault or harassment in China have sued for defamation their accusers, or people who have publicized those accusers' claims.<sup>20</sup>

In Canada there is an ongoing judicial process initiated by a Canadian author, who worked as a university creative literature professor in British Columbia. He is suing for defamation against a former female student who accused him of sexual assault and against the people who supported the victim's position, back in 2015. After he was fired, in 2018 he decided to sue her and her supporters, claiming that he had a consensual sexual relationship with the student and that his reputation was damaged.<sup>21</sup>

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probability that he will prevail in the suit. And if the plaintiff cannot meet this burden, the defamation suit can be dismissed and the claimant will have to pay respondent's legal fees. See, Court House News Service, "Heard Turns to Virginia Anti-SLAPP Law to Beat Depp Defamation Case", January 29, 2021, available at: <https://www.courthousenews.com/heard-turns-to-virginia-anti-slapp-law-to-beat-depp-defamation-case/>; The Washington Post, "Va. legislature passes bills aimed at lawsuits by Devin Nunes, Johnny Depp", February 12, 2020, available at: [https://www.washingtonpost.com/local/public-safety/va-house-passes-bill-aimed-at-lawsuits-by-devin-nunes-johnny-depp/2020/02/11/865115f4-4cef-11ea-9b5c-eac5b16dafa\\_story.html](https://www.washingtonpost.com/local/public-safety/va-house-passes-bill-aimed-at-lawsuits-by-devin-nunes-johnny-depp/2020/02/11/865115f4-4cef-11ea-9b5c-eac5b16dafa_story.html)

<sup>16</sup> Global Freedom of Expression, Columbia University, "Maethner v. Someplace Safe, Inc.", available at: <https://globalfreedomofexpression.columbia.edu/cases/maethner-v-someplace-safe-inc/>

<sup>17</sup> <https://nwlc.org/wp-content/uploads/2020/04/2019-Annual-Report-Final.pdf>

<sup>18</sup> South China Morning Post, "#MeToo hits WWF China as executive sues woman who accused him of sexual assault", October 12, 2018, available at: <https://www.scmp.com/news/china/society/article/2168376/metoo-hits-wwf-china-executive-sues-woman-who-accused-him-sexual>

<sup>19</sup> South China Morning Post, "China's #MeToo movement takes a legal turn as woman applies to counter sue television star Zhu Jun", September 27, 2018, available at: <https://www.scmp.com/news/china/politics/article/2165974/chinas-metoo-movement-takes-legal-turn-woman-applies-counter-sue>

<sup>20</sup> New York Times, "They Said #MeToo. Now They Are Being Sued", December 26, 2019, available at: <https://www.nytimes.com/2019/12/26/business/china-sexual-harassment-metoo.html>

<sup>21</sup> Now Magazine, "Op-ed: Lawsuit filed by ex-UBC prof Steven Galloway takes aim at sexual assault accusers", April 24, 2021, available at <https://nowtoronto.com/news/lawsuit-filed-by-former-ubc-prof->

In 2019 in Australia, Oscar-winning Geoffrey Rush won a defamation case against a newspaper that published articles over his sexual misconduct while rehearsing and performing as King Lear in a play. The actress involved gave testimony in the courtroom and she asserted that the actor made “groping” and “cupping” gestures toward her breasts, that in two occasions before going on stage he placed his hand underneath her shirt “up to the line of her jeans” and traced the skin above the waistband, and that he had also deliberately touched her breast in front of the audience. She said that she did not complain at the time because, as a junior member of the cast, she felt intimidated before a superstar. The court granted a 2 million compensation for Rush to be paid by the newspaper.<sup>22</sup>

In 2018 in India a former high-profile newspaper editor, and minister of foreign relations at that moment, was accused of sexual harassment by various women. One female journalist wrote an article about his inappropriate behavior and got sued for defamation because of it. “I spoke because women before me spoke up ... I spoke so people after me can speak up”, she asserted in 2019. She was recently acquitted.<sup>23</sup>

In France, Sandra Muller has been one of the most vocal representatives against sexual harassment in the entertaining business. In 2017 she launched the hashtag #balancetonporc (“expose your pig”) an uncovered TV executive Eric Brion’s behavior. In September 2019 a judge ordered her to pay Brion 15,000 euros.<sup>24</sup> In March 2021, a French Court of Appeals overturned the defamation conviction.<sup>25</sup>

### **The need to clarify an enhanced standard to protect freedom of expression**

The report that this Special Rapporteur is preparing is a great opportunity to clarify what International Human Rights Law requires from judges when it comes to assess these kinds of legal retaliation.

A firmly established criterion to analyze if any restriction on freedom of expression is in accordance with International Human Rights Law, consists in granting greater protection to those expressions that refer to matters of public interest or public concern.

In this regard, the Inter-American Court of Human Rights, the Human Rights Committee and the European Court of Human Rights have emphasized time and again that, especially

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[steven-galloway-takes-aim-at-sexual-assault-accusers](#) ; The Globe and Mail, “Sexual harassment among the reasons author Galloway fired from UBC, court told”, April 16, 2021, available at <https://www.theglobeandmail.com/canada/british-columbia/article-sexual-harassment-among-the-reasons-author-galloway-fired-from-ubc/>

<sup>22</sup> The Guardian, “Geoffrey Rush defamation trial: Eryn Jean Norvill 'utterly honest' witness, court told” November 7, 2018, available at: <https://www.theguardian.com/film/2018/nov/07/geoffrey-rush-defamation-trial-eryn-jean-norvill-utterly-honest-witness-court-told> ; New York Times, “Geoffrey Rush Wins Defamation Case Against Australian Newspaper Publisher”, April 11, 2019, available at: <https://www.nytimes.com/2019/04/11/world/australia/geoffrey-rush-defamation.html> ; New York Times, “Geoffrey Rush Awarded \$2 Million in Defamation Case, a Record for Australia”, May 23, 2019, available at <https://www.nytimes.com/2019/05/23/world/australia/geoffrey-rush-defamation.html>

<sup>23</sup> Al Jazeera, “Indian ex-minister loses high-profile #MeToo defamation case”, February 17, 2021, available at: <https://www.aljazeera.com/amp/news/2021/2/17/indian-ex-minister-loses-high-profile-metoo-defamation-case>

<sup>24</sup> New York Times, “French #MeToo Movement’s Founder Loses Defamation Case”, September 25, 2019, available at: <https://www.nytimes.com/2019/09/25/world/europe/france-sandra-muller-verdict.html>

<sup>25</sup> The Guardian, “French woman overturns conviction for accusing man of sexual harassment”, March 31, 2021, available at: <https://www.theguardian.com/world/2021/mar/31/french-woman-sued-by-man-she-accused-of-sexual-harassment-wins-appeal-case>

when it comes to matters of public interest, freedom of expression protects expressions that may offend or that some people may deeply disagree with.

The Human Rights Committee has explained that the protection of article 19.2 of the Covenant “embraces even expression that may be regarded as deeply offensive”, which may only be limited in accordance with the norms of article 19 and 20.<sup>26</sup> Similarly, the Inter-American Court of Human Rights has clearly established that in “in the domain of political debate on issues of great public interest, not only is the expression of statements which are well seen by the public opinion and those which are deemed to be harmless protected, but also the expression of statements which shock, irritate or disturb public officials or any sector of society”.<sup>27</sup> The same has been pointed out by the European Court of Human Rights for more than forty years and up to today: the protection of freedom of expression in Article 10 of the European Convention “it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”<sup>28</sup>

Authorities, particularly the judiciary, must carry out an in-depth analysis of the context in which the speech takes place, the public interest involved in it, and the pressing social need that, where appropriate, would require the adoption of some restrictive measure, such as the payment of fines or a financial reparation in defamation or slander lawsuits.

When the speech is deemed a form of protected speech insofar as it expresses issues that are of public concern or social interest, it demands from judges to apply a strict scrutiny on the admissibility of any restriction of such expression.

This criterion is called to play a major role in defamation lawsuits against gender violence victims who spoke about their experiences.

Gender-based violence is a matter of public concern and, as such, public discourse about it should be granted with greater protection before any action aimed at undermining expression. Both when it comes to the victims themselves who speak about their personal experience, as well as when the media report on the complaints and when civil society organizations support the victims and give them a platform.

As a first matter, it would be important for this Rapporteur to confirm that when it comes to opinions or expressions that do not refer to concrete and individualized facts, the expressions cannot be subjected to a truthfulness test. And that, when expressing opinions

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<sup>26</sup> Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression, September 12, 2011, CCPR/C/GC/34, para. 11.

<sup>27</sup> IACtHR, Case of *Kimel V. Argentina*, Judgment of May 2, 2008 (Merits, Reparations and Costs), para.88, Case of “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) v. Chile Judgment of February 5, 2001 (Merits, Reparations and Costs), para. 69; Case of *Ivcher-Bronstein v. Peru* Judgment of February 6, 2001 (Merits, Reparations and Costs), para. 152 and Case of *Ricardo Canese v. Paraguay* Judgment of August 31, 2004 (Merits, Reparations and Costs), para. 83.

<sup>28</sup> ECtHR, Case of *Handyside V. UK* (Application no. 5493/72), Judgment December 7, 1976, para. 49, Case of *Lingens V. Austria*, (Application no. 9815/82), Judgment July 8, 1986, para. 41, Case of *Oberschlick V. Austria* (Application No. 11662/85), Judgment May 23, 1991, para. 57, Case of *Tuşalp V. Turkey* (Applications Nos. 32131/08 And 41617/08), Judgment February 21, 2012, para.48, Case of *Mariya Alekhina and Others v. Russia* (application no. 38004/12), Judgment July 17, 2018, para. 197



in the arena of public debate, freedom of expression covers those expressions that may shock or annoy third parties, such as when a man is called “a pig” or is referred to as a sexist individual.

Just as the European Court has stated that telling a person that he is a Nazi or neofascist<sup>29</sup>, a leech<sup>30</sup>, an idiot<sup>31</sup> or a shit<sup>32</sup> is an opinion that is not subjected to a truthfulness test and that, in a context of public concern matters, does not constitute an excess of free speech, the same standard should apply when, for example, an individual is called “sexist”.

This standard of protection should be applied to protect the expression of both victims and those who give them support and a platform to express themselves. And this should be the case regardless of the form the discourse takes: a public statement on social networks, an artistic performance, a satirical or parodic expression, a journalistic report, etc.

Meanwhile, on the other hand, when it comes to statements of fact and not just opinions, the protection of expressions regarding gender violence should not be contingent on whether those facts have been proven, for example, in a court of law.

Some gender violence events will not necessarily reach a court of law for a factual determination. Some expressions of gender violence may not constitute a crime, nor is it clear that they should be: inappropriate comments about a person's body and sexuality, inappropriate proposals and advances of sexual nature may never reach a court of law. Sandra Muller's accusation, for example, may be understood as such. Her public complaint referred to facts that are certainly reprehensible and need to be eradicated in an egalitarian society.<sup>33</sup> But those facts would hardly reach the severity threshold to be considered a crime. And because of that, they would not reach the jurisdiction of a court of law for a judge to endorse that the events actually occurred as Muller says. But this lack of factual determination - which in some cases will be impossible - should not imply the lack of protection of Muller's speech. A different solution would only have the consequence of dissuading other people who might want to speak publicly about their experiences of violence and harassment.

As a matter of public concern, this kind of speech deserves special protection so that the consequences of legal retaliation do not deter public discussion over gender base violence, nor chill victims of speak up.

And, in any case, to assess the legitimacy of a restriction on a given statement on matters of fact, the standard to be applied is that of actual malice.<sup>34</sup> By virtue of this criterion, civil reparations cannot be ordered for defamatory expressions except when it is proven that the person who made those statements of fact acted with actual malice. Those who

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<sup>29</sup> ECtHR, Case of Balaskas v. Greece (Application no. 73087/17), Judgment November 5, 2020.

<sup>30</sup> ECtHR, Case of Fuentes Bobo (Application no. 39293/98), Judgment February 29, 2000.

<sup>31</sup> ECtHR, Case of Oberschlick V. Austria (Application no. 11662/85), Judgment July 1, 1997.

<sup>32</sup> ECtHR, Case of U.J. v. Hungary (Application no. 23954/10), Judgment July 19, 2011.

<sup>33</sup> “You have big breasts. You are my type of woman. I will make you cum all night long” Eric Brion ex boss of Equidia #balancetonporc!” <https://twitter.com/LettreAudio/status/918872353727184898>

<sup>34</sup> SCOTUS, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), March 9, 1964.

express falsehoods that cause damage will only be liable when the expression was made known to be false or with reckless disregard of whether it was true or false.

As mentioned, freedom of expression plays a critical role in countering gender-based violence. But legal retaliation strategies, such as slander and defamation suits, can have harmful effects on the society as a whole. These actions intimidate victims and have a chilling effect on the rest of the people. Gender-based violence is a public concern and, as such, speech regarding gender violence should be granted with special protection against actions that aim to further perpetuate silence.