



UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

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**RE: THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION OF VICTIMS AND SURVIVORS OF SEXUAL VIOLENCE AND EXPLOITATION**

Dear Special Rapporteur Khan,

1. We respectfully submit this brief to the Office of the Special Rapporteur on the promotion and protection of freedom of opinion and expression, to inform the thematic report on the right to freedom of opinion and expression and gender justice for the 76th session of the General Assembly. This brief is made pursuant to the **Call for submissions: Gender Justice and the Right to Freedom of Opinion and Expression**.
2. **Equality Now** is an international human rights NGO with ECOSOC status with the mission to achieve legal and systemic change that addresses violence and discrimination against all women and girls around the world. Founded in 1992, Equality Now is a global organization with partners and members in every region. Ending sexual violence, ending sex trafficking, ending harmful practices and achieving legal equality are the main areas of Equality Now's work.
3. We are writing to share concerns, gaps, challenges and good practices in addressing the protection of victims and survivors of sexual exploitation and violence. This brief details our concerns regarding **denial of freedom of expression in the context of defamation cases against survivors of sexual violence (see Section 1) and prioritization of freedom of expression over safety and protection from online sexual exploitation and abuse (see Section 2)**.

**Section 1:** *Survivors of sexual violence, particularly sexual harassment, are threatened with defamation lawsuits*

**What barriers, challenges and threats do women in the public sphere face in exercising their freedom of opinion and expression online and offline?**

4. Concerningly, and in direct violation of survivors' right to freedom of expression, we are seeing the emerging use of defamation lawsuits to silence and retaliate against survivors who speak out about their experiences of violence and discrimination. The right to freedom of expression<sup>1</sup> must include protecting the right of survivors of gender-based violence to talk publicly about their experiences of violence and discrimination. According to The Committee on the Elimination of Discrimination against Women (CEDAW Committee), freedom of expression for women is indivisible from and interdependent with their right to a life free from gender-based violence.<sup>2</sup> This is particularly important given the context in which sexual violence takes place - within the framework of prejudicial myths and stereotypes that often blame and shame women for the violence done to them. Speaking out about violence can fundamentally change the social discourse around this issue and shift the focus of accountability onto the perpetrator where it should belong. When women survivors share their experiences of violence and harassment, their right to do so is protected under international human rights law even when their public expressions offend, shock, disturb,<sup>3</sup> or, in some circumstances, when they disclose aspects of someone's private life.<sup>4</sup> Upholding survivors' right to speak out about their experiences is not only aligned with international human rights law but is a critical contributing factor to combating violence against women.
  
5. Globally, we are seeing a trend when, for example in the context of the #MeToo and #balancetonporc movements,<sup>5</sup> survivors speak out online and offline expressing their personal experiences of sexual harassment and denouncing inappropriate behaviour of a male

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<sup>1</sup> Demonstrating the global significance of this fundamental human right, the Freedom of expression is protected under numerous instruments, including article 10 of the European Convention on Human Rights (ECHR), article 19 of the International Covenant on Civil and Political Rights (ICCPR), article 19 of the Universal Declaration of Human Rights (UDHR) as well as in numerous regional human rights treaties.

<sup>2</sup> CEDAW/C/GC/35

<sup>3</sup> Freedom of expression is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. See, *Pedersen and Baadsgaard v. Denmark*, Appl. no. 49017/99 Judgment of 17 December 2004, § 71

<sup>4</sup> The ECtHR has held that aspects of someone's private life may be disclosed on account of the interest that the public may have in being informed about certain personality traits of the public figure concerned. See *Couderc and Hachette Filipacchi Associés v. France*, Appl. no. 40454/07, Judgment of 10 November 2015, § 99, referring to *Ojala and Etukeno Oy v. Finland*, Appl. no. 69939/10, Judgment of 14 January 2014 §§ 54-55, and *Ruusunen v. Finland*, no.

<sup>5</sup> #MeToo is a social movement against sexual abuse and sexual harassment where survivors publicise their own experiences of sexual harassment and abuse to raise awareness, empower and bring solidarity among survivors, and help to combat sexual harassment against women. The phrase "Me Too" was initially used in this context on social media in 2006, on Myspace, by sexual harassment survivor and activist Tarana Burke and, following the 2017 allegations of sexual abuse and assault perpetrated by producer Harvey Weinstein, the #MeToo movement grew and sparked its own iterations in countries across the world; the French version is #BalanceTonPorc, widely translated as "squeal on your pig".

counterpart, the male counterpart responds by suing the survivor for defamation in an effort to silence, discredit, and restrict her voice. Examples of this can be seen in India,<sup>6</sup> Russia,<sup>7</sup> the Netherlands,<sup>8</sup> the USA,<sup>9</sup> France<sup>10</sup> and Kazakhstan.<sup>11</sup>

6. The Special Rapporteur on Violence Against Women has stated that the act of threatening survivors with legal proceedings in an attempt to prevent them from reporting their situation is another form of gender-based violence.<sup>12</sup> The Special Rapporteur on Violence Against Women cautions that the use of defamation lawsuits against women who speak out about their experiences “may form part of a pattern of domestic violence and abuse.”<sup>13</sup> To allow a defamation lawsuit to be used in this manner not only effectively muzzles<sup>14</sup> the survivor as an advocate of her human rights but allows for the potential of further gender-based violence and discrimination against the survivor by the perpetrator and others, and potentially muzzles those that would be silenced by her treatment.
7. Professor of Law David B. Oppenheimer studied and examined cases of defamation from around the world<sup>15</sup> that were launched by men in response to women speaking out about their sexual harassment. He found that “defamation law has been weaponized to silence women who complain about sexual harassment, and others who report misconduct.” Rather than defamation law shielding women survivors, the law silences them. Oppenheimer also noted that “if the law fails to protect the right to speak out about abuses like sexual harassment and violence, those who benefit from unequal power will use that power to sustain inequality, including gender inequality.” Finally, Oppenheimer cautions that unless free speech protections are afforded to women survivors, then the cost will be grave and intolerable.<sup>16</sup>

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<sup>6</sup> The Court of Shri Ravindra Kumar Pandey, New Delhi, Mobashar Jawed Akbar v. Priya Ramani, 17 February 2021 (India).

<sup>7</sup> The Supreme Court of the Russian Federation, Aleksey Alekseyevich Migunov v. Ekaterina Alekseyevna Fyodorova & Ors, Case No. 2-2979/2020, 28 January 2021 (Russia)

<sup>8</sup> The Court of Amsterdam, claimant v. TMG Landelijke Media B.V., 2018 (The Netherlands)

<sup>9</sup> Supreme Court of the State of New York, Sagaille v. Carrega, Case No. 2020-02369 154010/18, 9 March 2021 (USA) and Court of Appeal of State of California, Wentworth v. Hemenway, 5 June 2019 (USA)

<sup>10</sup> Cour d'Appel de Paris, Muller c/ Brion, Arrêt du 31 mars 2021, N° RG 19/19081 (France)

<sup>11</sup> Women’s human rights defender faces defamation charges in Kazakhstan, Equality Now, Jan 2020, [https://www.equalitynow.org/womens\\_rights\\_lawyer\\_faces\\_defamation\\_charges\\_in\\_kazakhstan](https://www.equalitynow.org/womens_rights_lawyer_faces_defamation_charges_in_kazakhstan)

<sup>12</sup> A/HRC/38/47 (n 31) para 31.

<sup>13</sup> A/HRC/38/47 (n 31) para 31.

<sup>14</sup> The UN Human Rights Committee which interprets the provisions of the ICCPR specifically cautions “that States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Specifically, [article 19] paragraph 3 [the protection of the reputation or rights of others] may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.”

<sup>15</sup> Professor of Law David B. Oppenheimer is a Clinical Professor of Law Faculty and Co-Director, Pro Bono Program Director, at the Berkeley Center on Comparative Equality and Anti-Discrimination Law. In his research, he examined cases of defamation from China, United Kingdom, France, Egypt, United States, Israel and Australia.

<sup>16</sup> David. B. Oppenheimer, *Defamation Law is Being Weaponized to Destroy the Global #MeToo Movement: Can Free Speech Protections Help Counter the Impact?*, Chapter 40

8. While the right to respect for private life is invoked by the perpetrator to try to restrict the survivor's right to freedom of expression, we urge the Special Rapporteur to recognize that when balancing the right to private life and the right to freedom of expression of survivors of sexual violence, that the restriction on the survivor's freedom of expression is frequently inappropriate and a violation of international law. As you may be aware, the European Court of Human Rights balances relevant factors<sup>17</sup> because restricting freedom of expression can have a significantly detrimental impact and lead to the silencing of important voices in a society. The protection of the reputation or rights of others is also provided for under article 19, paragraph 3<sup>18</sup> of the International Covenant on Civil and Political Rights (ICCPR). Especially relevant is that the UN Human Rights Committee specifically cautions "that States parties should put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression. Specifically, paragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights." It is important to note that when survivors speak out about their experiences of sexual violence, harassment or discrimination, they are often advocating not only for their own human rights to be upheld but for the rights and protection of other women in the fight against gender-based violence.

**Please provide examples of good practices by States, internet intermediaries or other stakeholders to enhance women's right to freedom of opinion and expression and empowerment and public participation of women.**

The following are examples of jurisprudence upholding survivor's freedom of expression in defamation lawsuits:

Cour d'Appel de Paris, Muller c/ Brion, Arrêt du 31 mars 2021, N° RG 19/19081 (France)

9. In *Cour d'Appel de Paris, Muller c/ Brion*,<sup>19</sup> a French woman posted tweets denouncing the sexist comments and inappropriate behaviour of a male counterpart as part of the #Metoo and

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<sup>17</sup> When balancing freedom of expression and the right to respect for private life, the ECtHR uses relevant factors which may include: "The contribution to a debate of public interest; The degree to which the person concerned is well known and the subject of the report; Prior conduct of the person concerned; The method of obtaining the information and its veracity; and, The content, form and consequences of the publication. (see, Von Hannover v. Germany (no. 2), Appl. nos. 40660/08 and 60641/08, Judgment of 7 February 2012, §§ 109-113; Axel Springer AG v. Germany, Appl. no. 39954/08, Judgment of 7 February 2012, §§ 89-95)

<sup>18</sup> International Covenant on Civil and Political Rights, Article 19. 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

<sup>19</sup> Cour d'Appel de Paris, Muller c/ Brion, Arrêt du 31 mars 2021, N° RG 19/19081 (France)

#balancetonporc movements<sup>20</sup>. She was sued in the French courts for defamation against the plaintiff and damage to his reputation. The Court of Appeal found that she was within her rights to denounce these physical or verbal assaults likely used to undermine the dignity of women and which have long been tolerated or passed over in silence and cannot be perpetuated. In such circumstances, the court stated, a conviction, even if only civil, would be a disproportionate interference with freedom of expression and would be likely to have a deterrent effect on the exercise of the freedom of expression.<sup>21</sup> The court further stated that information disclosed was based on sufficient evidence for the public good and in the public interest for the protection for other women's interest in general regarding sexual harassment.<sup>22</sup>

The Court of Shri Ravindra Kumar Pandey, New Delhi, Mobashar Jawed Akbar v. Priya Ramani, 17 February 2021 (India)

10. Demonstrated by the Delhi High Court of India, in its recent defamation case, *Mobashar Jawed Akbar v. Priya Ramani*,<sup>23</sup> the right to freedom of expression is inherently linked to a woman's right to live a life free from gender-based violence. In this matter, MJ Akbar filed a defamation lawsuit against P. Ramani after she made statements in print media and online platforms calling MJ Akbar a sexual predator. MJ Akbar's claims were dismissed because the court recognised that P. Ramani disclosed the truth regarding the incident of sexual harassment against her and that she made the publication in good faith and for the protection of other women's interest regarding sexual harassment at the workplace.<sup>24</sup>
11. In this landmark case, the Judge stated that "sexual abuse, if committed against [a] woman, takes away her dignity and her self confidence" and when the woman speaks out about her sexual abuse experience and in turn makes an "attack on the character of [the] sex-abuser or offender" the woman's expression is "self defence after the mental trauma suffered by the victim regarding the shame attached with the crime committed against her."<sup>25</sup> As the accused, P. Ramani, felt it was important to speak out about her personal experience of sexual violence not just for herself but for other women, the judge equated P. Ramani's expression of her experience to self-defense. A self-defense that was not outweighed by the offender's right to reputation.

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<sup>20</sup> #MeToo is a social movement against sexual abuse and sexual harassment where survivors publicise their own experiences of sexual harassment and abuse to raise awareness, empower and bring solidarity among survivors, and help to combat sexual harassment against women. The phrase "Me Too" was initially used in this context on social media in 2006, on Myspace, by sexual harassment survivor and activist Tarana Burke and, following the 2017 allegations of sexual abuse and assault perpetrated by producer Harvey Weinstein, the #MeToo movement grew and sparked its own iterations in countries across the world; the French version is #BalanceTonPorc, widely translated as "squeal on your pig".

<sup>21</sup> Cour d'Appel de Paris, Muller c/ Brion, Arrêt du 31 mars 2021, N° RG 19/19081 (France)

<sup>22</sup> *Id.* at page 11, §4.

<sup>23</sup> The Court of Shri Ravindra Kumar Pandey, New Delhi, Mobashar Jawed Akbar v. Priya Ramani, 17 February 2021 (India).

<sup>24</sup> *Id.*, at page 72.

<sup>25</sup> *Id.*, para 37, page 90

12. Furthermore, the court reasoned that "the right of reputation cannot be protected at the cost of the right of life and dignity of women, and right of equality before the law and equal protection of the law guaranteed under the Indian Constitution. The woman has a right to put her grievance at any platform of her choice and even after decades."<sup>26</sup> It is of utmost importance that the "right of reputation" is not protected at the cost of the rights of women survivors of gender-based violence and discrimination, including their right to freedom of expression and to live a life free from violence.

The Supreme Court of the Russian Federation, Aleksey Alekseyevich Migunov v. Ekaterina Alekseyevna Fyodorova & Ors, Case No. 2-2979/2020, 28 January 2021 (Russia)

13. In *Aleksey Alekseyevich Migunov v. Ekaterina Alekseyevna Fyodorova & Ors*,<sup>27</sup> the claimant claimed that the respondent's allegation of rape, posted on Facebook and disseminated by the two other respondents, defamed his honour, dignity and business reputation. The Supreme Court of the Russian Federation pointed out that the case constituted a conflict between the right to freedom of expression of a woman who had experienced sexual violence and the protection of reputation.<sup>28</sup> The court reasoned that citizens' right to the protection of their honour, dignity and business reputation is their constitutional right, but courts must ensure a balance between this right on the one hand, and other rights and freedoms guaranteed by the Constitution of the Russian Federation including freedom of thought, speech, mass information, and the right to freely speak, receive, transmit, produce and disseminate information by any lawful means. Ultimately, the Supreme Court decided in favor of the respondent and cautioned that cases involving the sexual abuse of a woman have peculiarities of consideration<sup>29</sup> due to their high social significance.<sup>30</sup>

The Supreme Court of the State of New York, Appellate Division, First Judicial Department., Sagaille v. Carrega, 9 March 2021 (US)

14. In the United States, the Supreme Court of the State of New York in *Sagaille v. Carrega*<sup>31</sup> reasoned that defamation suits may constitute a form of retaliation against those with the

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<sup>26</sup> *Id.*, at page 90.

<sup>27</sup> The Supreme Court of the Russian Federation, Aleksey Alekseyevich Migunov v. Ekaterina Alekseyevna Fyodorova & Ors, Case No. 2-2979/2020, 28 January 2021 (Russia)

<sup>28</sup> *Id.* at page 2, §6

<sup>29</sup> For example, the Supreme Court of the Russian Federation found that the lower court should have considered both specific phrases and the entire text posted by the respondents on Facebook to establish whether the purpose of the statement was to accuse the claimant of committing a specific offence or whether it was a statement about the survivor's experience, which she perceived as violence due to her subjective perception. The latter likely falls under the freedom of thought, speech, mass information, the right to freely speak, receive, transmit, produce and disseminate information by any lawful means. (see *Id.* at Page 2, §8-9 and Page 3, §17)

<sup>30</sup> *Id.* at page 3, §15

<sup>31</sup> *Sagaille v. Carrega*, 2021 N.Y. Slip Op. 1369 (N.Y. App. Div. 2021) at Page 2, column 2, §3.

courage to speak out since most survivors cannot afford years of litigation, nor do they want to be retraumatized through the discovery or endure continued unwanted interaction with the person alleged to have assaulted them through the litigation process.

Court of Appeal of State of California, *Wentworth v. Hemenway*, 5 June 2019 (US)

15. The Court of Appeal of the State of California found in *Wentworth v. Hemenway*<sup>32</sup> that the plaintiff who filed a defamation lawsuit against a woman who accused him of sexual harassment brought the lawsuit to silence her, thus unduly interfering with her free speech rights on an important issue of public concern.

The Court of Amsterdam, *claimant v. TMG Landelijke Media B.V.*, 2018 (The Netherlands)

16. In a Court of Amsterdam case, *claimant v. TMG Landelijke Media B.V.*,<sup>33</sup> the claimant, who had been given an award by the Dutch government for helping families from Suriname in a vulnerable situation, sued a newspaper that published an article that claimed he had conducted pedophile actions and touched underaged girls inappropriately. After learning that the claimant had been nominated for the award, girls had come forward with allegations of pedophilia against him. While the interest of the claimant lay in the fact that he should not be exposed to frivolous accusations, the court considered the chance that the girls lied to be small and acknowledged the journalist ensured sufficient due diligence in reporting. Most importantly, the judge noted the importance that the newspaper be able to publicly express itself in a critical, informative, opinion-forming and cautious manner on matters of general interest and that sexually transgressive behavior is abusive conduct that affects the whole of society.<sup>34</sup>

Human Rights Defender, Dina Smailova, faces five defamation cases after speaking out on behalf of survivors of sexual violence, 2020-2021 (Kazakhstan)

17. Dina Smailova is a women's rights defender in Kazakhstan and head of NeMolchi Foundation ("Do Not Be Silent" in Russian). NeMolchi provides legal support for victims of sexual violence.
18. In 2020 Dina Smailova faced criminal charges for defamation after she publicly criticized Tanirbergen Berdongarov, a well-known Kazakh blogger and former parliamentarian, after he shared a video of the parents of one of the gang rapists revealing the survivor's personal information (including her name, address, and place of work) and slandered her, stating that

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<sup>32</sup> Court of Appeal of State of California, *Wentworth v. Hemenway*, 5 June 2019 (US) at page 9, col.1 §1, and col 2, §2

<sup>33</sup> The Court of Amsterdam, *claimant v. TMG Landelijke Media B.V.*, 2018 (The Netherlands)

<sup>34</sup>*Id.* at para 4.8

she harassed the rapists and had been extorting money from the rapists' families.<sup>35</sup> This led to the survivor becoming the target of harassment and bullying. After the trial, Berdongarov conducted a survey on his Youtube channel aimed at casting doubt on the court's guilty verdict and the investigation. In the survey, he asked his audience: "Which side is lying?" A third of those who responded said that they thought it was the survivor. In response to Berdongarov's statement, Dina Smailova wrote that he had "reached the bottom". Berdongarov sued Dina for defamation. Dina Smailova had to face massive online bullying but ultimately won the court of first instance and the appeal against Berdongarov.

19. Right now in 2021 Dina Smailova has five defamation cases pending against her as a result of her writing about sexual crimes, domestic violence crimes and ineffective work by the responsible institutions and officials on social media as well as one criminal case in the Police Department of Almaty for "spreading false information" after she wrote about the rape case mentioned above on her Facebook page. However, Dina had indicated only the details which were confirmed by the forensic examination and no further information

**What in your view are the key elements of a gendered perspective on the human right to freedom of opinion and expression? What would a feminist perspective add to the understanding of this right?**

20. A gendered and feminist perspective on the human right to freedom of opinion and expression, would include:
  - a. Recognising that freedom of expression is indivisible from and interdependent with the right to a life free from gender-based violence;
  - b. Preventing lawsuits, such as defamation, to be wielded in a manner that restricts or prevents women from expressing their experiences of violence and discrimination, as this will only serve as an additional barrier to access to justice for survivors, stifle the prevention of future violence, and have a chilling effect on women exercising their freedom of expression;
  - c. Recognising that when survivor's speak out against sexual harassment/abuse this speech is often a matter of public interest as it brings awareness to the issue and could protect others from future violence;
  - d. Upholding the rights of women in a "catch-22" situation where survivors want to speak out against sexual harassment/abuse, while likely not having a judgment to support their claims (which could provide the truth defense) given the treatment of gender-based violence cases in the criminal justice system - low investigation, prosecution and investigation rates, rendering survivors particularly vulnerable to defamation suits;

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<sup>35</sup> [https://www.equalitynow.org/womens\\_rights\\_lawyer\\_faces\\_defamation\\_charges\\_in\\_kazakhstan](https://www.equalitynow.org/womens_rights_lawyer_faces_defamation_charges_in_kazakhstan)



- e. Taking a holistic approach to address discrimination against women, promote equality, and empower women to speak out against discrimination and violence;
- f. Establishing preventive measures such as age-appropriate compulsory sex and relationship education in schools from an early age to break down gender, race and disability stereotypes, teach equality and respect; and,
- g. Developing and delivering regular and updated training in public institutions, including law enforcement and the judiciary, to dismantle gender stereotypes, especially those that fall at the intersection of race, caste, ethnicity, sexual orientation, gender identity, disability, age, socio-economic, migrant or refugee or other status.

## **Section 2: Freedom of Expression Online and Online Gender Based Violence**

**What legal administrative, policy or other measures exist in your State to protect women from sexual and gender based violence and harassment online? How effective are they? What impact have they had on women’s empowerment and public participation, including freedom of expression?**

21. Globally, we have noted that much of the legal protection from sexual and gender based violence and harassment online is provided for children, with limited protection being provided specifically for women. There is a general consensus on what constitutes online sexual abuse against children, and there are some legal policies and other measures in place to protect children online. However, with regard to adult women, although it is accepted that women experience online sexual and gender based violence and harassment, there is not much in the way of laws and policies that protect women from it. Where legislation exists there are numerous gaps and therefore women are not fully protected. Some laws that make digital platforms liable for exploitation and abuse on their platforms have been challenged on the grounds that they infringe on the right to freedom of expression online. This was the case in the US where constitutional legal challenges were brought on the grounds that the Stop Enabling Sex Traffickers Act and Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA-SESTA) infringes on the First Amendment right to free speech.<sup>36</sup> However, during 2021 the court in *United States v. Martono* held that FOSTA-SESTA was not unconstitutional, vague or over the top.<sup>37</sup>
22. We have noted a trend by just a few States to adopt laws that provide protection from some forms of sexual and gender based violence and harassment online, such as image-based sexual abuse<sup>38</sup>. For example, in Australia, the Enhancing Online Safety Act<sup>39</sup> prohibits the posting of or threatening to post intimate images without consent. This prohibition has been in effect for several years, with the e-Safety Commissioner, an Independent Body, mandated to protect Australians online. However, the challenge that persists is that sexual and gender based violence and harassment online are borderless offences and abuses, therefore having a seemingly effective regulation in one State does not adequately address the multi-

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<sup>36</sup> *Woodhull Freedom Found. v. United States*, No. 18-5298, 2020 WL 398625 (D.C. Cir. Jan. 24, 2020). See also *United States v. Martono*, Crim. Action No. 3:20-CR-00274-N-1 (N.D. Tex. Jan. 5, 2021)

<sup>37</sup> *United States v. Martono*, Crim. Action No. 3:20-CR-00274-N-1 (N.D. Tex. Jan. 5, 2021)

<sup>38</sup> For example Australia, New Zealand, South Africa, the UK, and the United States have enacted laws to address image-based abuse. Image-based sexual abuse can be defined as the non-consensual distribution of sexually explicit images or videos of an individual

<sup>39</sup> Enhancing Online Safety Act, Article 44B, (1) *A person (the first person) must not post, or make a threat to post, an intimate image of another person (the second person) on: (a) a social media service; or (b) a relevant electronic service; or (c) a designated internet service; if: (d) the first person is ordinarily resident in Australia; or (e) the second person is ordinarily resident in Australia.*

jurisdictional nature of the problem and protect women online in cases where the perpetrator is domiciled in one State, the digital platform in another and the victim in yet another State.

23. Another trend noted is that where laws on image-based abuse exist some of them tend to focus on the intention to cause harm or to distress,<sup>40</sup> or place focus on intimate images taken or distributed by former romantic partners<sup>41</sup>. Thus, provisions in these laws do not take into account taking and sharing of images where the motivation is other than to cause distress, e.g. there is a lack of provisions providing for situations where the taking and sharing of intimate images is motivated by the desire to gain popularity, done out of malice, for fun or for financial gain or where they are shared by people not in an intimate relationship with the victim. For instance, in England and Wales, the Criminal Justice and Courts Act creates a specific offence for someone to disclose private sexual photos and films.<sup>42</sup> One of the requirements is that disclosure be done with the intention of causing distress to the person depicted<sup>43</sup>. Accordingly, if the disclosure is not done with the intention to cause distress to the person depicted, then the requirements of the offence will not be met, thereby leaving victims/survivors unprotected.

24. Other challenges that arise in legal policies and measures adopted by States, across the globe are:

- There are gaps in the law due to the evolution of technology. Many of the laws on gender based violence were adopted before the proliferation of the internet, and are therefore not fully fit for purpose.
- There is a patchwork of laws, with many of the laws overlapping and using different terms.
- There are no provisions for altered or manipulated images (e.g. photoshopped images or deepfakes).
- There are not many laws that take into account the taking or sharing of intimate images of people who are not wearing expected or chosen religious or cultural attire. This violates a victim/survivor's reasonable expectation of privacy and her dignity, and in some cases, results in victim/survivors being shamed, ostracised, harassed, and sometimes physically harmed.<sup>44</sup>

25. An example of the above challenges can be found in England and Wales where sexual communications or communications for the purposes of obtaining sexual gratification are

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<sup>40</sup> e.g. the UK's Criminal Courts and Justice Act (2015), Malta's Criminal Code (2016), Nigeria's CyberCrimes (Prohibition, Prevention) Act (2015)

<sup>41</sup> e.g. In India the Court in *State of West Bengal v Animesh Boxi*, C.R.M. No. 11806 of 2017, GR/1587/2017 at page 105 defined image based abuse as "sexually explicit images of a person posted online without that person's consent especially as a form of revenge or harassment".

<sup>42</sup> The Criminal Justice Act 2015 (UK), Section 33

<sup>43</sup> The Criminal Justice Act 2015 (UK), Section 33

<sup>44</sup> See [https://consult.justice.gov.uk/law-commission/intimate\\_image\\_abuse/](https://consult.justice.gov.uk/law-commission/intimate_image_abuse/)

provided for in a number of laws, that is, the Sexual Offences Act<sup>45</sup>, the Communications Act<sup>46</sup>, the Malicious Communications Act<sup>47</sup>, the Protection from Harassment Act<sup>48</sup> and the Criminal Justice and Courts Act<sup>49</sup>. Due to the patchwork nature of the laws and inadequacies and protection gaps that result, the UK Law Commission is currently in the process of researching and consulting on a possible amendment to the criminal law applicable in England and Wales.<sup>50</sup>

26. For women to be able to fully and freely participate online they need to be protected from sexual and gender based violence and harassment across all platforms. Without adequate protection online such participation will remain impacted. As noted by the United Nations Special Rapporteur on Violence Against Women in her Combating Violence against Women Journalists Report<sup>51</sup> the internet is enabling “new forms of online violence against women.” The new forms of online violence mentioned in the Report include the searching or publishing of a particular person’s personal information with malicious intent, known as “doxing”, “online sexual coercion and extortion” and “image-based sexual abuse.”<sup>52</sup> The Report also considers the impact of online violence against women journalists, noting that “non-consensual distribution of intimate content [is] being used to defame and silence women journalists”.<sup>53</sup> Although the Report specifically refers to women journalists, the impact of sexual and gender based violence and harassment online, amongst other things, causes censorship of women online<sup>54</sup> and silences women online overall<sup>55</sup>. “We need to address online violence because it limits our right to free and full participation, our freedom of expression”.<sup>56</sup>
27. Furthermore, gender-based violence and aggression targeted at women through online platforms not only defame and silence women but deter women from participating in public life. Surveys conducted of women MPs, journalists, television presenters, columnists or otherwise publicly visible figures, reveal that they attract disproportionately aggressive and misogynistic responses from men who threaten to rape and commit other acts of sexual

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<sup>45</sup> Sexual Offences Act, 2003 (UK)

<sup>46</sup> The Communications Act, 2003 (UK)

<sup>47</sup> Malicious Communications Act, 1988 (UK)

<sup>48</sup> Protection from Harassment Act 1997 (UK)

<sup>49</sup> The Criminal Justice Act 2015 (UK), Section 33

<sup>50</sup> See Equality Now’s Submission to the UK Law Commission:

[https://www.equalitynow.org/submission\\_uk\\_law\\_commission\\_intimate\\_image\\_abuse\\_2021](https://www.equalitynow.org/submission_uk_law_commission_intimate_image_abuse_2021)

<sup>51</sup> UN. Human Rights Council. Special Rapporteur on Violence against Women. Combating violence against women journalists : report of the Special Rapporteur on Violence against Women, Its Causes and Consequences,

<sup>52</sup> *Id.* Para 39

<sup>53</sup> *Id.* Para 42

<sup>54</sup> See <https://www.unwomen.org/en/news/stories/2020/7/take-five-cecilia-mwende-maundu-online-violence> ; See also <https://www.reuters.com/article/us-socialmedia-women-idUSKBN1DK05W>

<sup>55</sup> See <https://www.amnesty.org/en/latest/research/2018/12/rights-today-2018-violence-against-women-online/>

<sup>56</sup> See <https://www.globalfundforwomen.org/online-violence-just-because-its-virtual-doesnt-make-it-any-less-real/>

violence when they disagree with the woman's opinion.<sup>57</sup> For example, a woman lawyer and contributor to the blog, Legal Feminist, recently received an email from a man (presumably) who disagreed with her viewpoints and "proposed to change [her] mind through rape and violence – conduct that would result in more than 10 years in prison if it took place. Included [in the email] were 3 separate photos illustrating different young women being whipped and sexually assaulted."<sup>58</sup> Such abhorrent threats of violence in response to women exercising their right to freedom of expression and participating in public life reasonably contribute to women choosing to step down from public roles out of fear of violence or weariness from the incessant online abuse and deter other women and girls from speaking up and taking on public roles. Efforts to combat and prevent aggression and misogyny, especially in the form of threats of rape and sexual and other physical violence, must be enhanced and enforced to protect women's freedom of expression and right to enjoyment of a public life.

**Do you see any legal gaps, inconsistencies or controversies that should be clarified in this report, e.g. between protecting the right to freedom of expression and protecting women from ICT violence? Please indicate any specific issues in the international legal framework that in your view would benefit from further analysis in this report.**

28. As noted above, there are several legal gaps which negatively impact the protection of women from sexual and gender based violence and harassment online. The ICCPR provides a framework for limiting freedom of expression, when that expression infringes on, amongst other things, the rights and reputation of others. The right to freedom of expression and this particular restriction, as framed in the ICCPR, can be found in many national constitutions. National courts will need to determine on a case by case basis whether any limitation imposed on freedom of expression is legal, necessary and proportionate. Digital platforms are also playing the role of balancing between freedom of expression and protection from ICT violence in their content moderation, and making decisions on whether to limit freedom of expression in order to protect women from ICT violence on their respective platforms. However, there may be challenges in restricting freedom of expression on grounds that the right to protection from sexual and gender based violence and harassment online has been infringed if there is no legal clarity on what that violence and harassment constitutes. In addition, legal clarity on the relationship between freedom of expression online and online violence and harms towards women is required. Accordingly, we respectfully request that the Special Rapporteur recommend to UN Member States to define ICT violence, and exclude speech or expression that is in fact sexual and gender based violence and harassment from freedom of expression protection. This would be similar to the case of children, where States

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<sup>57</sup> Disagreeing with a Woman: Threats of Rape and Violence, Legal Feminist, June 8 2021, <https://legalfeminist.org.uk/2021/06/08/disagreeing-with-a-woman-threats-of-rape-and-violence/>

<sup>58</sup> *Id.*

categorically exclude offers or requests to obtain Child Sexual Abuse Material (CSAM) from freedom of expression protections.<sup>59</sup>

29. We also respectfully request that the Special Rapporteur highlight these challenges and recommend adoption of an international legal framework that defines online ICT violence taking into account all its different forms, and provides legal protection from it, and clarifies the relationship and interaction between freedom of expression and protection from ICT violence, as well the role and accountability of digital platforms in upholding human rights principles when balancing competing rights in content moderation. This may include calling for the adoption of the draft Business and Human Rights Treaty<sup>60</sup> which will affirm that “victims in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms”<sup>61</sup>. The draft treaty recognizes that digital platforms can no longer be regarded only as mere conduits of user generated content, but should uphold human rights principles and play a role in ensuring the protection of all their users from ICT violence on their platforms. The draft treaty also acknowledges the role of States in holding digital platforms and intermediaries domiciled in their jurisdiction accountable for any infringements on human rights, including sexual and gender based violence and harassment.<sup>62</sup>

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<sup>59</sup> For instance, in the US, First Amendment constitutional rights on freedom of speech and expression categorically exclude offers or requests to obtain Child Sexual Abuse Material (CSAM) from freedom of expression protections. In the UK, the right to freedom of expression under Article 10 (1) European Convention on Human Rights is limited by criminal provisions contained in the Obscene Publications Act. Whilst in Kenya, laws that protect from sexual exploitation and abuse and criminalize the production and possession of CSAM both online and offline such as the Sexual Offences Act, the Children’s Act, the Penal Code and the Computer Misuse and Cybercrimes Act have provisions that limit the right to freedom of expression on the basis of protecting children from abuse and exploitation.

<sup>60</sup> Legally Binding Instrument to Regulate International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises available at [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG\\_Chair-Rapporteur\\_second\\_revised\\_draft\\_LBI\\_on\\_TNCs\\_and\\_OBEs\\_with\\_respect\\_to\\_Human\\_Rights.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf)

<sup>61</sup> Business and Human Rights Treaty Second Revised Draft, *Article 4*

<sup>62</sup> Business and Human Rights Treaty Second Revised Draft, *Article 16*

## **Conclusion:**

**What do you believe States should do to a) uphold women's human right to freedom of opinion and expression b) protect women from violence, harassment and intimidation online and offline and c) promote women's public participation?**

**30. We respectfully request that the Special Rapporteur recommend to UN member states to a) uphold women's human right to freedom of opinion and expression by:**

- Recognising that freedom of expression is indivisible from and interdependent with the right to a life free from gender-based violence and when survivor's speak out against sexual harassment/abuse this speech should be considered a matter of public interest as it brings awareness to the issue and potentially protects others from future violence.
- Preventing lawsuits, such as defamation, to be wielded in a manner that aims to silence women from expressing their experiences of violence and discrimination.
- Taking a holistic approach to address discrimination against women, promote equality, and empower women to speak out against discrimination and violence.
- Upholding the rights of women in a "catch-22" situation where survivors want to speak out against sexual harassment/abuse so as to bring awareness to the issue and protect others but are particularly vulnerable to defamation suits because the harassment against them has not been established on a legal basis.

**b) protect women from violence, harassment and intimidation online and offline by:**

- Recommending adoption of an international legal framework that:
  - Defines ICT violence, taking into account all its different forms and manifestations,
  - provides legal protection from ICT violence,
  - clarifies the relationship and interaction between freedom of expression and protection from ICT violence,
  - clarifies the role and accountability of digital platforms in upholding human rights principles when balancing competing rights in content moderation,
  - provides a framework on international cooperation that seeks to address the multi-jurisdictional nature of ICT violence, and provide guidance in specific areas such as prosecutions and investigations.

- Establishing preventive measures such as age-appropriate compulsory sex and relationship education in schools from an early age to break down gender, race and disability stereotypes, teach equality and respect.
- Developing and delivering regular and updated training in public institutions, including in law enforcement and the judiciary, to dismantle gender stereotypes, especially those that fall at the intersection of race, caste, ethnicity, sexual orientation, gender identity, disability, age, socio-economic, migrant or refugee or other status.

**c) promote women's public participation by:**

- Combatting online aggression and misogyny, especially in the form of threats of rape and sexual and other physical violence, from men who disagree with the opinions of women in public positions, such as MPs, in order to protect women's freedom of expression and their participation in public life.