



# Criminalization of Discriminatory Expression in the Americas: The Case of Non-Consensual Pornography Regulation in Argentina

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# Criminalization of Discriminatory Expression in the Americas: The Case of Non-Consensual Pornography Regulation in Argentina<sup>1</sup>

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## Resumen Ejecutivo

Este artículo, basado en una contribución para el informe de la Relatora Especial de Naciones Unidas sobre violencia contra la mujer de 2018, aborda la tendencia creciente en América Latina a la criminalización del discurso en línea. Muchas veces, iniciativas que persiguen objetivos bienintencionados de combatir la discriminación y la violencia pueden, paradójicamente, afectar los derechos de los grupos a los que se intenta proteger. En este sentido, este trabajo analiza, desde una perspectiva de la libertad de expresión, el caso concreto de las iniciativas legislativas que tienen como objetivo regular la pornografía no consentida en Argentina —definida como la publicación no consentida de imágenes sexuales en internet o utilizando medios electrónicos.

Como conclusión, cabe resaltar que provisiones vagas y desproporcionadas en estas iniciativas colisionan con los estándares de libertad de expresión establecidos por el Sistema Interamericano de Derechos Humanos. Por último, este informe brinda recomendaciones desde una perspectiva de la libertad de expresión respecto de alternativas para combatir la pornografía no consentida y otras formas de violencia y discriminación contra las mujeres. En esta línea, se recomienda explorar:

- **Cooperación público-privada:** siguiendo los lineamientos de la declaración conjunta sobre violencia de género en línea emitida por representantes de Naciones Unidas,<sup>2</sup> la cooperación entre las distintas partes interesadas es clave. En tanto los intermediarios de internet están incluyendo distintas soluciones en sus políticas y términos de referencia,<sup>3</sup> modelos como el de códigos de conducta pueden ser explorados como alternativas a la legislación. Estos códigos deberían estar en línea con los estándares interamericanos en materia de libertad de expresión y derechos de las mujeres. Mecanismos que garanticen el cumplimiento de estos códigos y transparencia en su implementación son claves para que este modelo funcione;

<sup>1</sup> This policy brief is based on the submission to the United Nations Special Rapporteur on violence against women, its causes and consequences, Ms. Dubravka Šimonović. Both documents have been written by Verónica Ferrari (vferra7@palermo.edu) and Maia Levy Daniel (mlevy3@palermo.edu), researchers with the Center for Studies on Freedom of Expression and Access to Information (CELE), with the comments of Agustina Del Campo, CELE's Director.

<sup>2</sup> UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and UN Special Rapporteur on violence against women, its causes and consequences. "UN experts urge States and companies to address online gender-based abuse but warn against censorship," 8 March 2017. Available at: <http://bit.ly/2nedOac>

<sup>3</sup> See, for example, Shieber, Jonathan, "Twitter makes another rule change; this time tackling revenge porn," *TechCrunch*, October 27, 2017. Available at: <http://tcrn.ch/2gHlhMo> and *The Guardian*, "What Facebook says on sextortion and revenge porn," May 22, 2017. Available at: <http://bit.ly/2zjvNGo>

- **Capacitación y concientización:** un acercamiento desde una perspectiva de derechos humanos contempla medidas complementarias que apuntan a “atacar” las causas estructurales del problema. Estas medidas incluyen políticas públicas y acciones de capacitación tanto en temas de género como en seguridad digital a fin de combatir y prevenir la violencia y discriminación contra las mujeres;
- **Soluciones administrativas:** en línea con las recomendaciones de la Relatoría para la Libertad de Expresión de la Organización de Estados Americanos, entes independientes pueden —a la manera de *watchdogs* o como la actual Defensoría del Público en medios audiovisuales en Argentina— jugar un papel importante canalizando denuncias sobre contenido que podría ser discriminatorio y en garantizar que cualquier solución esté en línea con estándares de derechos humanos. Estos entes administrativos de ninguna manera pueden intervenir o monitorear contenidos, sino que se recomienda el trabajo conjunto entre el ente y el/la autor/a del contenido potencialmente discriminatorio para lograr la concientización sobre la temática y soluciones respetuosas del derecho a la libertad de expresión;<sup>4</sup>
- **Respuestas punitivas como último recurso:** Las soluciones basadas en el derecho penal deben ser desalentadas debido a los riesgos que pueden implicar para el derecho a la libertad de expresión. En caso de que se decidiera implementar soluciones penales, los términos en los que se planteen deben ser claros y específicos a fin de evitar el uso discrecional de la ley o la sobre criminalización de discurso legítimo que pueda poner un freno al debate público;
- **Datos y estadística:** los datos sobre los casos de pornografía no consentida y la evidencia en relación con la efectividad de las soluciones basadas en la criminalización son escasos en Argentina y en varios países de América Latina. A efectos de entender qué aspectos necesitan ser abordados, el trabajo de investigación, tanto desde el sector privado como de la sociedad civil y la academia, debe estar enfocado en la generación de datos sobre esta forma de violencia en línea para poder informar las soluciones de política pública y la regulación que intenta resolver la problemática.

## Introduction

Over the last few years, different legal initiatives that seek to combat discrimination and promote equality have emerged in Latin America. However, in many cases, these proposals include criminal provisions that, paradoxically, could compromise the right to freedom of expression of the vulnerable groups that seek to protect.

This article will explore this regional regulatory trend and its potential unintended consequences through the case of non-consensual pornography and the initiatives that try to regulate it in Argentina. In the first place, this report introduces freedom of expression standards in the Americas, and how regulatory initiatives on discrimination issues could pose risks to freedom of expression. The next part briefly explains what is non-consensual pornography and the debates around its regulation. Then, the piece focuses on current initiatives that try to regulate it in Argentina, and provides an analysis through the lens of freedom of expression standards. Lastly, this article offers conclusions and proposes alternative responses to non-consensual pornography in accordance with freedom of expression standards.

## Freedom of Expression Standards in the Americas

Article 13 of the American Convention on Human Rights (ACHR), key instrument within the regional system for human rights protection, provides a broad protection for the right to freedom of expression. Guarantees in the ACHR “(...)

<sup>4</sup> Inter-American Commission on Human Rights, “Hate Speech and Incitement to Violence Against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas.” November 12, 2015, B6. Available at: <http://bit.ly/2gB0COo>.

were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.”<sup>5</sup>

Under Inter-American standards the right to freedom of expression is crucial for “the balance of power among the components of society” and in guaranteeing the right to equality of members of groups that have suffered from historical discrimination, such as women.<sup>6</sup> Within the Inter-American Human Rights System equality and freedom of expression are “mutually supportive.”<sup>7</sup>

The ACHR states that the exercise of the right to freedom of expression shall not be subject to prior censorship but subject only to ulterior liability. As it is not an absolute right, limitations could be established if they comply with three basic conditions —the “three-part test”—:

- 1) They should be expressly established by law;
- 2) They must respond to a legitimate purpose recognized by the ACHR namely the “respect for the rights or reputation of others,” and “the protection of national security, public order, or public health or morals”; and
- 3) Limitations must be necessary in a democratic society for the attainment of the aims pursued, suitable for accomplishing the intended objective, and be proportionate to the interest that justifies it.<sup>8</sup>

Building on this, key organs within the Inter-American Human Rights System such as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have expressed that “(...) any restriction imposed on the right to freedom of expression should be established in advance, expressly, restrictively, unambiguously and clearly in law – in the formal and material sense.”<sup>9</sup> Moreover, according to the Inter-American Court, when limits to the right to freedom of expression are imposed by Criminal Law, terms should be strict and unequivocal “(...) clearly restricting any punishable behavior, which in turn requires “a clear definition of the incriminated behavior, setting its elements and defining the behaviors that are not punishable or the illicit behaviors that can be punishable with non-criminal measures.”<sup>10</sup>

According to several joint declarations signed by the Organization of American States, United Nations, Organization for Security and Co-operation in Europe, and the African Commission on Human and Peoples’ Rights representatives on freedom of expression,<sup>11</sup> the right to freedom of expression applies fully to the internet, and online limitations are only acceptable if they comply with the aforementioned three-part test.

Over the last years, the issue of violence and discriminatory acts online and offline has taken an important part of the political and legislative agendas in Latin America. A great number of bills have been introduced to increase penalties for existing crimes with the aim of eradicating violence and discrimination, whether online or offline. Different Latin American countries have offered criminal solutions to these problems. For example, in Argentina around 30 bills on discriminatory acts have been submitted to Congress since 2012<sup>12</sup> and nearly all of them propose increasing sanc-

<sup>5</sup> OAS, Inter-American Court of Human Rights, *Advisory Opinion OC-5/85*, November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights), par. 50.

<sup>6</sup> Organization of American States, American Convention on Human Rights, Article 13.2. Available at: <http://bit.ly/2cF0KHR> and Inter-American Commission on Human Rights, “Hate Speech and Incitement to Violence Against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas.” November 12, 2015, B6. Available at: <http://bit.ly/2gB0COo>

<sup>7</sup> *Idem*.

<sup>8</sup> *Idem*.

<sup>9</sup> OAS, Inter-American Commission on Human Rights (IACHR), *Violence Against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, OAS/Ser.LV/II.rev.1 Doc. 36, November 12, 2015, par. 237. Available at: <http://bit.ly/2gB0COo>

<sup>10</sup> OAS, *supra* note 7, par. 238; I/A Court H.R., *Case of Usón Ramírez v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2009, Series C No. 207, par. 55; IACHR. *Annual Report 2009*. Report of the Office of the Special Rapporteur for Freedom of Expression. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). OEA/Ser.LV/II. Doc. 51. December 30, 2009, par. 73.

<sup>11</sup> See, for example, UN, OSCE, OAS, and ACHPR, “Joint Declaration on Freedom of Expression and the Internet,” June 1, 2011. Available at: <http://bit.ly/1wnld8U>, and “Joint Declaration on Freedom of Expression and Responses to Conflict Situations,” May 4, 2015. Available at: <http://bit.ly/2yYwRhE>

<sup>12</sup> Center for Studies on Freedom of Expression and Access to Information (CELE), Legislative Observatory on Freedom of Expression (forthcoming).

tions already established in the existing Law on Discriminatory Acts.<sup>13</sup> Moreover, in general, the definition of a discriminatory act is not specifically detailed in the bills, including broad language such as “(...) acts or omissions with the aim of arbitrarily preventing, blocking, limiting, or in any case diminishing, temporarily or permanently, the egalitarian exercise of rights and liberties recognized by the National Constitution (...)”.<sup>14</sup>

Although the objective may be well-meant, criminalizing speech may imply serious risks for the right to freedom of expression. As stated by the Inter-American Commission on Human Rights, “The rights to equality and freedom of expression are ‘mutually supportive’ and have an ‘affirmative relationship,’ as they make a ‘complementary and essential contribution to the securing and safeguarding of human dignity’ ”.<sup>15</sup> Many of these bills have not been specifically revised from a freedom of expression perspective, since in many cases the issue of restricting discourse and its possible risks is not taken into account in the analysis. Limitations on the right to freedom of expression can be risky not only for society in general, but also for the vulnerable groups the initiatives are willing to specifically protect, having a chilling effect on them.

Bearing in mind the importance of the right to freely express for the exercise of other human rights, and although the aim of these bills is not to affect this right, limitations established in legislative proposals should be exceptional and comply with rigorous requirements already mentioned above.

## Non-Consensual Pornography Regulation

Non-consensual pornography, defined as the distribution of sexually explicit images<sup>16</sup> without the consent of the person portrayed, is a particular form of online violence that disproportionately affects women<sup>17</sup> The United Nations Special Rapporteur on violence against women addressed this practice in one of her reports in 2015, highlighting how the distribution of this content is used to harass women, and encouraging States to implement remedies on this subject.<sup>18</sup>

Countries have started regulating (and mainly criminalizing) non-consensual pornography. The Philippines, England, Canada, Wales, Scotland, Northern Ireland, and Israel, among other countries, have introduced legislation on this issue; in the US, more than 30 laws on non-consensual pornography were approved at the state level.<sup>19</sup> Legislative proposals on this issue also arose in Latin America namely in Mexico, Chile, Argentina, and Peru.<sup>20</sup>

Concerns regarding freedom of expression online arose around some of these initiatives globally. Internet freedom advocates argued that the vagueness in the drafting of some of these bills could lead to unintended consequences such as the criminalization of protected discourse and chilling effects on free speech.<sup>21</sup>

<sup>13</sup> National Law 23.592. Available at: <http://bit.ly/2rcZdRP>

<sup>14</sup> Ferreyra and Segarra, *Ley 23.592 de actos discriminatorios y sus modificatorias: abrogación. Modificación del Código Penal*, 4395-D-2015. Available at: <http://bit.ly/2xzWr9j>

<sup>15</sup> IACHR, *supra* note 7, par. 218.

<sup>16</sup> For the purposes of this report, and following Mary Anne Franks’ *Drafting an Effective ‘Revenge Porn’ Law: A Guide for Legislators of 2015* (p. 9), the notion of “image” includes pictures, videos, audios, among others.

<sup>17</sup> See, for example, Franks, Mary Anne. *Drafting an Effective ‘Revenge Porn’ Law: A Guide for Legislators*. August 17, 2015, pp. 2-3; Vargas de Brea, Paula, “La regulación de la pornografía no consentida en Argentina,” Center for Studies on Freedom of Expression and Access to Information (CELE), 2015.

<sup>18</sup> UN Special Rapporteur on violence against women, its causes and consequences. Mission to the United Kingdom of Great Britain and Northern Ireland. A/HRC/29/27/Add.2, United Nations - Human Rights Council, 2015.

<sup>19</sup> Franks, Mary Anne. *Drafting an Effective ‘Revenge Porn’ Law: A Guide for Legislators*. August 17, 2015, p. 3. Available at: <https://ssrn.com/abstract=246882>

<sup>20</sup> Tapia, Danae. “Violencia de género: ¿Es necesaria una ley contra la porno venganza?,” *Derechos Digitales*, August 28, 2014. Available at: <http://bit.ly/2pY1jEO> and Guerrero, Carlos, “Presentan Proyecto de Ley para combatir la difusión de pornografía no consentida en Perú,” *Hiperderecho*. Available at: <http://bit.ly/2xssvm>

<sup>21</sup> See, for example, American Civil Liberties Union (ACLU). “First Amendment Lawsuit Challenges Arizona Criminal Law Banning Nude Images,” September 23, 2014. Available at: <http://bit.ly/2nTfc6e> and Sydell, Laura. “Calif. Bans Jilted Lovers From Posting ‘Revenge Porn’ Online.” *National Public Radio (NPR)*, October 2, 2013. Available at: <http://n.pr/2mDCdu8>

# The Bills on Non-consensual Pornography in Argentina: An Overview

Argentina is one of those countries discussing legislative initiatives that aim at finding solutions for non-consensual pornography. Currently, there are three bills on this issue in Congress and, in line with the aforementioned trend on solutions to violence and discrimination, these projects seek to criminalize this practice. These initiatives propose to amend the Criminal Code to impose imprisonment to the person that, by any means, publishes or distributes non-consensual pornography.<sup>22</sup>

## Analysis

Even though eradicating violence and discrimination online and, particularly, non-consensual pornography, is crucial owing to the negative impact this practice already has for women,<sup>23</sup> there are some problems when applying the “three-part” test to the different projects submitted to the Argentine Congress.

### 1) Limitations Should be Expressly Established by Law

As the Inter-American Commission on Human Rights stated in its annual 2015 report, in many cases, proposals that seek to tackle forms of violence and discrimination include vague and broad definitions that could compromise freedom of expression.<sup>24</sup> According to the Commission, over the last years different initiatives have been proposed in the Americas to promote equality, but many of them do not meet the legality standards.<sup>25</sup>

The principle of legality states that limitations to freedom of expression must be clearly and precisely defined in a law. As a prominent scholar on this issue, Danielle Citron, states, the wording of non-consensual pornography laws should be precise and well crafted, and must contain specific definitions of which is the practice that is being punished.<sup>26</sup> Moreover, as stated by David Kaye, UN representative on freedom of expression, vaguely crafted laws and regulations that, for example, “prohibit nudity or obscenity could have a significant and chilling effect on critical discussions about sexuality, gender and reproductive health.”<sup>27</sup>

For example, two of the projects in Argentina seek to criminalize the person who, by any means, distributes “videos or images or any material on nudity or semi-nudity, or any part of the body of which its sexual nature is emphasized, or material of erotic or sexual content, without authorization of the subject involved”.<sup>28</sup> Proposals submitted to Argentine Congress

<sup>22</sup> Bergman, Bullrich and Spinozzi. *Código Penal: incorporación del artículo 155 bis, sobre delito por difusión de imágenes o videos íntimos que violen la privacidad*, 2015, 5201-D-2015; Riofrío, Mirkin and Durango, *Penalización de la publicación y/o difusión de imágenes no consentidas de desnudez total o parcial y/o videos de contenido sexual o erótico de personas*, S-2119/16, 2016 [approved by the Senate in 2016]; Alonso, Paso, Brezzo, Ehcosor and Selva, *Código Penal. Incorporación de los artículos 131 bis, 131 ter y 131 quater, y modificación del artículo 153 bis, sobre difusión de material visual, audiovisual o datos sensibles y acoso virtual*. 3862-D-2017, 2017.

<sup>23</sup> Keats Citron, Danielle and Mary Anne Franks, “Criminalizing Revenge Porn.” 49 Wake Forest L. Rev. 347, 2014. Available at: <http://bit.ly/2psOG40>; Henry, Nicola, and Anastasia Powell. “Embodied Harms: Gender, Shame, and Technology-Facilitated Sexual Violence Against Women,” SAGE Publications, 21, no. 6, June 2015, 759; Lenhart, Amanda, Michele Ybarra, and Myeshia Price-Feeney. “Nonconsensual Image Sharing: One in 25 Americans has been a Victim of ‘Revenge Porn’,” Data & Society Research Institute, 2016.

<sup>24</sup> IACHR, *supra* note 7, par. 215.

<sup>25</sup> IACHR, *supra* note 7, par. 215.

<sup>26</sup> Citron Keats, Danielle, “How to Make Revenge Porn a Crime Without Trampling Free Speech,” *Slate*, November 7, 2013. Available at: <http://slate.me/2gltf9o>

<sup>27</sup> UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and UN Special Rapporteur on violence against women, its causes and consequences. “UN experts urge States and companies to address online gender-based abuse but warn against censorship,” 8 March 2017. Available at: <http://bit.ly/2nedOac>

<sup>28</sup> Bergman, et al., 2015, Article 1 and Riofrío, Mirkin and Durango, 2016, Article 1.

fail to meet the aforementioned criteria and, consequently, the legality condition set forth in Article 13 of the Convention. Vague provisions such as “nudity” or “semi-nudity”, or “any part of the body of which its sexual nature is emphasized” could alter the spirit and goals of the norm or could leave the door open for the criminalization of conducts that not necessarily fit the non-consensual pornography definition. Limitations to the right to freedom of expression are not clearly defined, which could entail a serious risk of over-inclusiveness, removing content that may be crucial for some groups.

Where limits on freedom of expression were established by criminal law, the Inter-American Court on Human Rights has established that “(...) they must further satisfy the principle of strict legality. The Court has held that should the restrictions or limitations be of a criminal nature, it is also necessary to strictly meet the requirements of the criminal definition in order to adhere to the principle of legality.”<sup>29</sup> Unequivocal terms should be used to restrict any punishable behavior.<sup>30</sup> However, the bills submitted to Congress do not meet these requirements, since terms such as “disseminate, reveal, publish, distribute or in any case put at third parties’ disposal”<sup>31</sup> or “make public audiovisual or visual content”<sup>32</sup> are vague and do not restrict the criminal conduct, which can lead to unintended limitations to circulation of information and ideas.

## **2) Restrictions Must Respond to a Legitimate Purpose Recognized by the American Convention on Human Rights**

According to the Special Rapporteurship on Freedom of Expression, the Inter-American System has paid special attention to some objectives in this respect, such as the notion of “public order” and the “protection of the rights of others”.<sup>33</sup> Bills on non-consensual pornography under review generally comply with the requirements. The proposals aim at eradicating discrimination and violence online, as well as protecting the right to privacy, and these objectives are aligned with the protection of human rights and the goals of the Inter-American Human Rights System in general.

## **3) Limitations Should be Necessary to Satisfy a Compelling Public Interest and be Proportionate to the Interest that Justifies Them**

Limitations should be necessary, which means that there is a clear and compelling need for its imposition and that the objective cannot reasonably be attained by any other less restrictive means.<sup>34</sup> Moreover, it is crucial that regulations include the options that restrict the right to freedom of expression the least.<sup>35</sup> Regarding this last requirement, taking into account that there may be other options available, such as administrative or civil measures that may attain the same results, punitive responses should be discouraged. Thus, the proposals do not meet the proportionality requirement.

Moreover, one of the proposals aggravates the punishment if content is distributed through the internet as opposed to any other means.<sup>36</sup> This particular initiative seems to consider the internet a particularly dangerous means of communication, which could open the door to disproportionate restrictions to online expression, as stated by the OAS Special Rapporteurship.<sup>37</sup>

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<sup>29</sup> IACHR, *supra* note 7, par. 238.

<sup>30</sup> *Idem*.

<sup>31</sup> See, for example, Bergman, et al., 2015, Article 1.

<sup>32</sup> See, for example, Alonso et al., 2017, Article 1.

<sup>33</sup> OAS, Inter-American Commission on Human Rights (IACHR), *Report of the Special Rapporteur for Freedom of Expression*, OEA/Ser.L/V/II. Doc. 51, December 30, 2009, par. 76. Available at: <http://bit.ly/2gPunlv>

<sup>34</sup> *Ibid*, par. 86.

<sup>35</sup> *Ibid*, par. 87.

<sup>36</sup> Bergman, Bullrich and Spinozzi. 2015. *Código Penal: incorporación del artículo 155 bis, sobre delito por difusión de imágenes o videos íntimos que violen la privacidad*. 5201-D-2015.

<sup>37</sup> OAS, Inter-American Commission on Human Rights (IACHR). *Annual Report of the Special Rapporteur for Freedom of Expression*. Washington, D.C., 2013, par. 74.



## Conclusions and Recommendations

As UN Special Rapporteurs on freedom of expression and on violence against women stated, online gender-based violence should be addressed urgently.<sup>38</sup> However, following UN experts, it is worth noting that responses to online abuse against women should comply with international human rights standards to avoid undermining the rights of the women these measures seek to protect. When analyzing legislative proposals on online violence, it is crucial to take into account the freedom of expression perspective, owing to its relevance as a tool for the exercise of other fundamental human rights, such as the right to equality. In order to be sure that proposals effectively guarantee the right to freedom of expression, they must meet the requirements established by the “three-part” test. Legislative proposals should include clear and specific definitions of the conduct to be legitimate.

Moreover, it is important to highlight that, as stated by the Inter-American Human Rights System, punitive responses may imply serious risks for the right to freedom of expression, so non-punitive alternatives should be considered first to comply with the proportionality requirement. In case punitive answers were chosen, limits on freedom of expression should satisfy the principle of strict legality. However, terms included in the proposals previously analyzed, such as “disseminate, reveal, publish, distribute or in any case put at third parties’ disposal” or “make public audiovisual or visual content”, do not comply with this standard. Terms used should be clear and specific enough for individuals to understand which conducts are criminalized. Overbroad language may affect the ability of laws to effectively protect women, rendering its application excessively burdensome or discretionary in nature.

Legislative proposals with this language can be detrimental for the rights of women, the group that these measures seek to protect. Additionally, the efficacy of punitive responses to eradicate online violence has not been yet proven. Future research efforts should address the impact and effectiveness of these measures, and States must promote discussion of this topic with key stakeholders to try to find solutions that are respectful of fundamental human rights.

Based on the previous conclusions, and with the aim of guaranteeing the right to freedom of expression, some recommendations on responses to non-consensual pornography and discrimination of women more broadly are listed below:

- **Public-Private Cooperation:** As UN Special Rapporteurs said in their joint statement on online gender-based abuse,<sup>39</sup> cooperation among the different interested parties is critical to combat all forms of violence against women within the digital realm. The industry has already started addressing the issue of non-consensual pornography in its policies and terms of service.<sup>40</sup> The development of guidelines for companies to deal with non-consensual pornography, following the model of codes of conduct, should be explored as an alternative to more traditional and strict regulatory measures. Inter-American standards, both on freedom of expression and women’s rights, should inform these guidelines, developed also in consultation with key stakeholders, such as academia and civil society actors. The effectiveness of this type of remedies heavily relies on enforcement mechanisms to hold companies accountable for their implementation;
- **Awareness Raising Measures:** As UN representatives claimed in their joint statement, human rights-based responses implemented by governments and other key actors should include education and other preventative responses to tackle digital abuse experienced by women. In Argentina, the existing national law on women’s protection<sup>41</sup> offers a comprehensive framework to develop policies that go beyond criminal remedies to combat all forms of violence against women. Non-consensual pornography could be addressed within this framework, and awareness raising measures on digital literacy and security online with a gendered-approach could be implemented to tackle the roots of this problem;

<sup>38</sup> UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and UN Special Rapporteur on violence against women, its causes and consequences. “UN experts urge States and companies to address online gender-based abuse but warn against censorship,” 8 March 2017. Available at: <http://bit.ly/2nedOac>

<sup>39</sup> UN, *supra* note 27.

<sup>40</sup> See, for example, Shieber, Jonathan, “Twitter makes another rule change; this time tackling revenge porn,” *TechCrunch*, October 27, 2017. Available at: <http://tcrn.ch/2gHlhMo> and *The Guardian*, “What Facebook says on sextortion and revenge porn,” May 22, 2017. Available at: <http://bit.ly/2zjvNGo>

<sup>41</sup> National Law 26,485 on the comprehensive protection of women, March 11, 2009.



- **Administrative Remedies:** As stated by the IACHR and its Office of the Special Rapporteur for Freedom of Expression, independent “watchdog” organisms could play an important role in receiving claims on discriminatory content, as well as in promoting the application of human rights standards. As the Special Rapporteur stated, the Ombudsperson of the Audience of Broadcasting Services in Argentina that promote the right to equality and non-discrimination on communication services could be an example to follow.<sup>42</sup> It is important to note that these entities should never intervene in the content, but they should work to raise awareness on the topic and solutions aligned with freedom of expression standards;
- **Punitive Responses as a Last Resort.** Solutions based on Criminal Law should be discouraged owing to the risks that may imply for the right to freedom of expression. In case criminal answers were chosen, terms should be clear and specific in order to avoid discretionary use of the law or over-criminalization of legitimate discourse that could curb public debate.
- **Data and Statistics:** Data on non-consensual pornography cases<sup>43</sup> and the evidence regarding the effectiveness of criminal solutions to address it in Argentina and many Latin American countries is still scarce. In order to understand which aspects need to be targeted, further research efforts, both from the public sector and civil society and academia, should be focused on generating data on this form of online violence to inform policy solutions and regulations aimed at tackling this phenomenon.

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<sup>42</sup> IACHR, *supra* note 7, par. 240.

<sup>43</sup> Vargas de Brea, Paula, “La regulación de la pornografía no consentida en Argentina,” Center for Studies on Freedom of Expression and Access to Information (CELE), 2015, p. 3.