

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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ALEJANDRA MARCELA MATUS ACUÑA ET AL. :  
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CHILE :  
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Case 12.142 :  
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**BRIEF OF COMMITTEE TO PROTECT JOURNALISTS  
AS AMICUS CURIAE IN SUPPORT OF  
ALEJANDRA MARCELA MATUS ACUÑA ET AL.**

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**BRIEF OF THE COMMITTEE TO PROTECT JOURNALISTS  
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The Committee to Protect Journalists (“CPJ”) is a nonprofit organization that works to protect the freedom of journalists around the world. CPJ is dedicated to the principle that all journalists everywhere should be able to report freely and without fear of reprisal – in particular, that no journalist should ever be threatened with jail for what she publishes or broadcasts. This case presents the Inter-American Commission on Human Rights (the “Commission”) with an important opportunity to promote that principle. Accordingly, CPJ submits this amicus brief in support of Alejandra Marcela Matus Acuña and the other petitioners in this case (collectively, “Petitioners”).

**Preliminary Statement**

Chile’s criminal prosecution of Ms. Matus, for allegedly defaming a judge by making critical statements about him in a serious work of investigative journalism, violates Article 13 of the American Convention on Human Rights (the “American Convention”) and other international norms of free expression. CPJ supports the decision

of the Commission to admit this case. CPJ also supports the Commission’s preliminary determination that the petitioners’ allegations state a violation of the rights guaranteed by the American Convention.<sup>1</sup> CPJ urges the Commission to call upon the Chilean government to (a) abandon its criminal prosecution of Ms. Matus, (b) allow the distribution of her book, and (c) repeal the laws that permit Chile to bring criminal defamation prosecutions and to censor the press.

This case illustrates why criminal defamation statutes are so dangerous to freedom. As the Commission has recognized, laws that criminalize speech have an “inevitable chilling effect . . . on freedom of expression,” and must not apply unless “there is an obvious and direct threat of lawless violence.”<sup>2</sup> Such a threat of violence simply does not exist in this case or in any defamation case. Ms. Matus’s book, *The Black Book of Chilean Justice* (“*The Black Book*”), is an important and thoughtful examination of corruption and lack of independence in the Chilean judiciary. The functioning of the judiciary is exactly the type of issue that the press must be free to examine in order for governments to function well. Public order is promoted, not threatened, when the institutions of government are open to scrutiny.

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<sup>1</sup> See Inter-American Commission on Human Rights, Case of Alejandra Marcela Matus Acuña, Chile, Report No. 55/00, Case 12.142 (Oct. 2, 2000), ¶ 39.

<sup>2</sup> Inter-American Commission on Human Rights, Annual Report 1994, Ch. V: Report on the Compatibility of “*Desacato*” Laws With the American Convention on Human Rights (Feb. 17, 1995) (“*Desacato* Report”).



So-called *desacato* laws, such as Article 6(b) of Chile’s State Security Law, the statute invoked against Ms. Matus, are a particularly troubling form of criminal defamation statute. Article 6(b) shields only high government officials from negative portrayals in the press. It therefore prevents Chile’s press and citizens from holding their leaders accountable. The Commission rightly has concluded that *desacato* laws “repress[] the debate that is critical to the effective functioning of democratic institutions” and violate Article 13 of the American Convention on Human Rights.<sup>3</sup> The use of laws like Article 6(b) to threaten journalists with jail has no place in a democratic society.

This case also presents an important opportunity to establish that no defamation liability (civil or criminal) should be permitted unless there is proof of both falsity and “actual malice.” The falsity requirement means that liability should be imposed only for statements that are factually false, and never for statements that are true but happen to offend the powerful. The actual malice requirement means that liability should be imposed only for statements that the journalist published while knowing or strongly suspecting that the statements were false. The actual malice rule is an important protection for free debate about public officials and public figures, because it means that honestly made errors -- which are inevitable in robust public discourse -- cannot be punished. CPJ is aware of no evidence that Ms. Matus’s book contains any factually

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<sup>3</sup> *Id.*; see also Inter-American Commission on Human Rights, 108<sup>th</sup> Sess., Inter-American Declaration of Principles on Freedom of Expression, Principle 11 (2000) (“Laws that penalize offensive expressions directed at public officials, generally known as ‘*desacato laws*,’ restrict freedom of expression and the right to information.”).

false statements or of any evidence that Ms. Matus published her book with actual malice. Her carefully researched book should not put her at risk of a jail sentence.

Likewise, no government should be allowed to seize books that offend it, as Chile seized Ms. Matus's book. Censorship is disfavored around the globe. Article 13 of the Convention sets forth an absolute prohibition on the seizure of books and all other forms of censorship.<sup>4</sup> The Commission should call upon Chile to allow the distribution of *The Black Book*, and to repeal the laws that permit the government to censor the press.

### **Statement of Interest**

CPJ is a nonprofit organization based in New York that advocates for the freedom of journalists worldwide. The Honorary Chairman of CPJ is Walter Cronkite of CBS News. The Chairman of CPJ is Gene Roberts, former managing editor of The New York Times. CPJ's Executive Director is Ann Cooper, formerly a senior correspondent for National Public Radio. CPJ's board includes leaders of many of the world's major news organizations, such as Tom Brokaw, anchor and managing director of the NBC Nightly News; Dan Rather, anchor and managing editor of the CBS Evening News; and representatives of The New York Times, ABC News, CNN, Time Magazine, The Los Angeles Times and The Miami Herald.

CPJ defends the rights of all journalists who are threatened by legal or physical attacks. CPJ performs its mission in a number of ways:

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<sup>4</sup> See Inter-American Court of Human Rights, Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Nov. 13, 1985 ("OC-5/85") ¶¶ 38, 54.

- CPJ collects information about individual cases where press freedom is threatened. CPJ’s staff follows cases in every part of the world, including the Americas.
- CPJ issues public protests and lobbies government officials on behalf of journalists who are under attack, in jail or are threatened with jail. Together with other non-governmental organizations, CPJ has succeeded in winning the freedom of many imprisoned journalists.
- CPJ’s public information and advocacy efforts include:
  - an annual report entitled *Attacks on the Press* that reports on the jailing of journalists, physical attacks on journalists, and other threats to press freedom worldwide;
  - a website<sup>5</sup> and semi-annual magazine;<sup>6</sup>
  - an annual list of the world’s Ten Worst Enemies of the Press; and
  - the International Press Freedom Awards, given each year to heroic journalists who have fought for freedom of expression against repressive governments and other enemies.

Through these efforts, CPJ has become recognized worldwide as an advocate and expert on issues of press freedom.<sup>7</sup>

Since its founding in 1981, CPJ has monitored violations of press freedom in the Americas. It has worked with governments, journalists and legal scholars throughout the Americas to reform repressive laws directed at the gathering and reporting of news. In

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<sup>5</sup> See [www.cpj.org](http://www.cpj.org).

<sup>6</sup> See Committee to Protect Journalists, *Dangerous Assignments*, Fall 2000.

<sup>7</sup> See Sherry Ricchiardi, *Journalism’s Red Cross*, *American Journalism Review*, Dec. 1997, at 34 (“What the international Red Cross is to victims of famine and floods, the Committee to Protect Journalists has become to hundreds of reporters and editors operating under siege in the deadliest spots for the media around the globe.”).

June 2000, CPJ co-sponsored a conference on press freedom in Buenos Aires. The conference was attended by dozens of prominent journalists, academics and lawyers from throughout the Americas, including Commission member Claudio Grossman and the Commission's Special Rapporteur for Freedom of Expression, Santiago Canton. The conference resulted in the Buenos Aires Declaration, which states in part:

[L]aws that penalize expression (contempt, slander, libel, or defamation) directed against public officials, public persons, or private individuals who have voluntarily involved themselves in matters of public interest are incompatible with the protection accorded to all people under the American Convention on Human Rights.<sup>8</sup>

CPJ has consistently protested the Chilean government's actions against Ms. Matus and her colleagues. Just one week after the Chilean government seized Ms. Matus's book, CPJ sent an open letter to Chile's President, Eduardo Frei Ruiz-Tagle, urging repeal of the laws that authorize censorship and prosecution of journalists.<sup>9</sup> In May 1999, a CPJ representative met with Chile's then-Ambassador to the United States, Genaro Arriagada. Ambassador Arriagada expressed his opposition to Ms. Matus's prosecution.<sup>10</sup>

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<sup>8</sup> Committee to Protect Journalists, et al., Buenos Aires Declaration (Jun. 9, 2000).

<sup>9</sup> See Letter from Ann K. Cooper, Executive Director, CPJ, to His Excellency Eduardo Frei Ruiz-Tagle, President of the Republic of Chile (Apr. 22, 1999). CPJ wrote a second open letter to President Frei on June 17, 1999 to protest the arrest and indictment of the editor and publisher of Ms. Matus's book.

<sup>10</sup> See Press Release of Chilean Ambassador to the United States (May 28, 1999).

Through its two decades of work, CPJ has gained special knowledge of global legal standards governing the press. CPJ recognizes the efforts made in the Americas in recent years to create a legal regime that more effectively protects the freedom of the press. With this brief, CPJ hopes to assist the Commission by describing how a decision in favor of the Petitioners would reinforce these efforts. By declaring that Ms. Matus should not be punished or censored, the Commission can promote strong legal protections for the press in the Americas that are consistent with international standards for the protection of free speech.

### **Statement of Facts**

From 1973 until 1990, Chile was governed by a military regime that often did not respect basic human rights. This regime brought Chile into disrepute in the international community. In recent years, Chile has made important steps toward becoming a democratic society that fully respects human rights.<sup>11</sup>

*The Black Book of Chilean Justice* was published in Chile on April 13, 1999. The author, Ms. Matus, is a distinguished professional journalist. For nearly five years Ms. Matus covered the Chilean judiciary as a reporter for the newspaper La Época. She later worked for the award-winning investigative unit of the periodical La Nación. Ms. Matus wrote *The Black Book* to investigate the possibility that corruption and lack of independence in the judiciary will undercut Chile's effort to rebuild its democratic

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<sup>11</sup> See generally U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, Chile Country Report on Human Rights Practices for 1999 (2000).

traditions. In preparing *The Black Book*, Ms. Matus interviewed 80 people and reviewed numerous documentary sources.<sup>12</sup> *The Black Book* carefully chronicles the Chilean judiciary from its inception to the present. It includes detailed profiles of several senior judges.

As soon as *The Black Book* was published, the Chilean government halted distribution of the book and seized all copies. The seizure was by order of the Santiago Appeals Court at the behest of Judge Servando Jordán. Judge Jordán claimed he was defamed by passages in *The Black Book* that report allegations that he committed improper and corrupt acts while in office.<sup>13</sup>

Chile's State Security Law provided the legal authority for the confiscation of *The Black Book*. Article 16 of the State Security Law provides, in part:

If a crime against the Security of the State is committed using the press, radio or television, the competent court may suspend the publication of up to ten editions of the guilty newspaper or magazine and for up to ten days the broadcasting of programs of the transgressing radio station or television channel. Notwithstanding this decision, in aggravated cases, the court may order the immediate confiscation of any edition in which the abuse in advertising [i.e., offending statement] is expressly manifested.

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<sup>12</sup> See Ali Quinn, *Living in Exile* (Apr. 4, 2000) (available at <http://dfn.org/focus/chile/matus.htm>).

<sup>13</sup> *Requerimiento por Ley de Seguridad del Estado ante la Corte de Apelaciones de Santiago*, Ingreso No. 023322-99, pp. 2-8, de fecha 13 de Abril de 1999 (complaint of Judge Servando Jordán).

Similarly, Article 30 of the State Security Law provides:

In any proceeding begun under this law, the presiding judge shall order as a first step, notwithstanding the provisions of Article 7 of the Penal Procedure Code, that all printed materials, books, pamphlets, records, movies, tapes and all objects that might have been used to commit a crime be collected and put at the disposition of the court.

One day after the Chilean government confiscated *The Black Book*, the government also initiated a criminal defamation action against Ms. Matus under Article 6(b) of the State Security Law. Article 6(b) imposes criminal penalties on:

[t]hose who publicly insult the flag, the coat of arms or the national anthem, and those who defame, slander, or libel the President of the Republic, Ministers of State, Senators or Deputies, members of the superior courts, the Comptroller General of the Republic, Commanders-in-Chief of the Armed Forces, or the Director General of the National Police, whether or not this defamation, slander, or libel was committed by reason of the office of the victim.

Article 6(b) defines the offense as “[a] crime against public order.” Article 6(b) is not limited on its face to false statements of fact. It appears that even a true statement – for example, a legitimate accusation that a judge is corrupt – can be punished under Article 6(b) because the statement is insulting to a high public official.<sup>14</sup>

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<sup>14</sup> See Human Rights Watch, Chile: Progress Stalled--Setbacks in Freedom of Expression Reform 18 (2001) (“Although [prosecutions under the State Security Law] are invariably initiated by government officials intent on defending their public reputations or honor, courts do not accept the defense of truth as a defense, apparently violating the [Chilean] constitutional precept that this defense be considered grounds for acquittal where a public interest is involved.”).

Ms. Matus was summoned to appear in court on May 6, 1999. She did not appear because she had fled Chile to escape prosecution. As a result, Ms. Matus was declared in contempt of court on May 14, 1999.

Ms. Matus faces a maximum penalty of five years in prison if she returns to Chile and is convicted under Article 6(b) of the State Security Law.<sup>15</sup> She also may face jail time as a result of the government's contempt proceeding.

In addition to confiscating *The Black Book* and initiating a criminal defamation action against Ms. Matus, the Chilean government invoked Article 6(b) of the State Security Law to arrest and charge Bartolo Ortiz and Carlos Orellana, executives of the company that published Ms. Matus's book. Mr. Ortiz and Mr. Orellana were detained for two days in June 1999 before being released on bond. The Santiago Appeals Court dropped the charges against them several weeks later.

*The Black Book* remains banned. Ms. Matus remains in exile. Simply because of what she wrote, Ms. Matus remains at risk of prosecution and imprisonment if she returns to Chile.

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<sup>15</sup> See Human Rights Watch, *The Limits of Tolerance: Freedom of Expression and the Public Debate in Chile* 58 (1998).



## Argument

### **I. CHILE’S CRIMINAL PROSECUTION OF MS. MATUS VIOLATES INTERNATIONAL STANDARDS OF DEFAMATION LAW**

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Criminal defamation laws are disfavored worldwide. Criminal prosecution of journalists is especially disfavored where a government seeks to prosecute a journalist for reporting on public officials and matters of public concern. The Commission has given vital support to the international criticism of criminal defamation laws, both with its 1994 Report on *desacato* laws and the recent Inter-American Declaration of Principles on Freedom of Expression. Article 6(b) of the Chilean State Security Law is among the worst criminal defamation laws in the hemisphere. The Commission should urge Chile to repeal Article 6(b) and other, similar provisions of Chilean law.

#### **A. Defamation Should Never Be Criminalized**

##### **1. Criminal Defamation Laws Chill Important Speech**

A journalist cannot report from behind prison bars. The mere threat of criminal prosecution can prevent journalists from reporting and publishing important stories. The Commission has recognized that “the coercive power of [a State’s] criminal justice system” has an “inevitable chilling effect” on freedom of expression, and that speech may be criminalized only “in those exceptional circumstances when there is an obvious and direct threat of lawless violence.”<sup>16</sup> Thus, the Commission has stated that a State should

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<sup>16</sup> See *Desacato* Report § V.

provide “protection against intentional infringement on honor and reputation through civil actions” only, and through a right of reply.<sup>17</sup>

CPJ strongly supports the position that civil suits, without risk of criminal penalties, should be the only remedy for defamation. Defamatory statements do not disturb the security of the community in a manner that justifies criminal punishment.<sup>18</sup> The experience of democratic countries around the world demonstrates that defamation simply does not create “an obvious and direct threat of lawless violence.”

Indeed, while some nations still have criminal defamation statutes, fewer and fewer are enforcing them. In Britain, for example, the crime of libel has almost never been prosecuted since the early twentieth century.<sup>19</sup> The United States Supreme Court struck down two criminal defamation statutes as unconstitutional almost forty years ago,<sup>20</sup> and since then the doctrine of criminal defamation has been widely repudiated in

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<sup>17</sup> *See id.*

<sup>18</sup> *See Garrison v. Louisiana*, 379 U.S. 64, 69-70, 78-79 (1964) (striking down criminal libel statute and quoting Model Penal Code draft that described the near-disappearance of criminal libel actions in the United States).

<sup>19</sup> *See* J.R. Spencer, Criminal Libel—A Skeleton in the Cupboard, 1977 Crim L. Rev. 383, 383; *see also* Toby Mendel, Article 19, Background Paper on Freedom of Expression and Defamation for the International Seminar on Promoting Freedom of Expression With the Three Specialised International Mandates (Nov. 29, 2000) (available at <http://www.article19.org/docimages/914.htm>) (noting that the criminal libel statutes “lay dormant for many years”).

<sup>20</sup> *See Ashton v. Kentucky*, 384 U.S. 195, 200-01 (1966) (invalidating criminal defamation statute as unconstitutional because of vagueness); *Garrison*, 379 U.S. 64, 77 (1964).

the United States.<sup>21</sup> Most continental European nations recognize criminal defamation in name only. The court process used in such cases, and the fines that may be levied, are essentially civil in nature. Arrest and pretrial detention do not occur, and the possibility of post-conviction imprisonment is remote.<sup>22</sup>

Intergovernmental and nongovernmental organizations have condemned the use of criminal defamation actions. The General Conference of UNESCO, in adopting a recent declaration on the promotion of independent and pluralistic media in the Arab world, stated that “arrest and detention of journalists because of their professional activities are a grave violation of human rights.” The declaration urged “governments that have jailed journalists for these reasons to release them immediately and unconditionally,” and went on to state that “[j]ournalists who have had to leave their countries should be free to return and to resume their professional activities.”<sup>23</sup> In

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<sup>21</sup> See, e.g., *State v. Powell*, 839 P.2d 139, 143 (N.M. 1992) (striking down criminal libel statute as applied to public statements on matters of public concern and noting that “criminal libel laws serve very little, if any, purpose.”); *Commonwealth v. Armao*, 446 Pa. 325, 338, 286 A.2d 626, 632 (1972); Libel Defense Resource Center, 50 State Survey 2000-2001: Media Libel Law (2000) (stating that criminal defamation statutes do not exist or have been repealed in Arizona, California, Delaware, New Jersey, New York and Texas, among many other states).

<sup>22</sup> See, e.g., Bonnie Docherty, Note, Defamation Law: Positive Jurisprudence, 13 *Harv. Hum. Rts. J.* 263, 282 (2000) (“In many European and Commonwealth countries, custodial sanctions remain on the books, but courts rarely impose penalties for criminal defamation other than fines.”).

<sup>23</sup> UNESCO General Conference, 29<sup>th</sup> Sess., Res. 34, Declaration of Sana’a (Nov. 1997); see also Mendel, *supra* note 19, at nn. 22-27 (listing publications in which U.N. Human Rights Committee and U.N. Commission on Human Rights have expressed concern about the threat of incarceration for defamation).

November 1999, the U.N. Special Rapporteur on Opinion and Expression, the OSCE Representative on Freedom of the Media, and the Commission's own Special Rapporteur on Freedom of Expression declared that criminal defamation laws "unduly restrict the right to freedom of expression." These experts urged governments "to review these laws with a view to bringing them into line with their international obligations."<sup>24</sup>

In addition, last year, an international group of legal experts organized by Article 19, the worldwide anti-censorship group, recommended that "[a]ll criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."<sup>25</sup> And just this month, Human Rights Watch recommended in a detailed report that the government of Chile "should permanently abolish all laws that criminalize defamation in recognition of the principle that conflicts arising out of libel and calumny allegations should be resolved by civil litigation rather than criminal prosecution."<sup>26</sup>

In this case, the Commission should affirm the conclusion stated in its *Desacato* Report: Only speech that creates a direct threat of lawless violence should ever give rise

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<sup>24</sup> U.N. Special Rapporteur on Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression, International Mechanisms for Promoting Freedom of Expression, Joint Declaration (1999).

<sup>25</sup> Article 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, § 2, Principle 4(a) (2000) (available at <http://www.article19.org/docimages/714.htm>).

<sup>26</sup> Human Rights Watch, *Chile: Progress Stalled--Setbacks in Freedom of Expression Reform 9* (2001).

to criminal liability. Defamation never falls into this category, and should never be punished criminally.

## **2. “Public Order” Is Threatened, Not Promoted, By The Criminalization Of Defamation**

Article 6(b) of the Chilean State Security Law rests on the erroneous idea that insulting high government functionaries endangers “public order.” Under Article 13 of the American Convention, a State may not simply invoke an interest in “public order” to repress free speech. Freedom of expression itself is “the primary and basic element of the public order of a democratic society.”<sup>27</sup>

Government leaders cannot achieve true “public order” in a democracy by insulating their official acts from criticism, even criticism that is insulting. Rather, government officials must accept monitoring by the public — often in the form of journalistic coverage that may be harsh or offensive — in order to be truly responsible to the people they represent.<sup>28</sup> In a democracy, “we shall find that the censorial power is in

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<sup>27</sup> OC - 5/85 ¶ 69; *See also* Tollett v. United States, 485 F.2d 1087, 1096 (8<sup>th</sup> Cir. 1973) (describing harm to reputation as a “weak and questionable basis for governmental intrusion into the delicate area of regulating expression”).

<sup>28</sup> *See* Inter-American Commission on Human Rights, Report of the Special Rapporteur for Freedom of Expression, Ch. II § B.1 (1999) (available at <http://www.cidh.oas.org/annualrep/99eng/Volume3.htm>) (hereinafter “1999 Report of the Special Rapporteur”). *See also* Address of President John F. Kennedy Before The American Newspaper Publishers Association (Apr. 27, 1961) (available at <http://www.cs.umb.edu/jfklibrary/j042761.htm>) (In a democracy, “from scrutiny comes understanding; and from that understanding comes support or opposition. And both are necessary. . . . I have complete confidence in the response and dedication of our citizens whenever they are fully informed.”).

the people over the Government, and not in the Government over the people.”<sup>29</sup> Thus, international norms forbid governments from protecting their own conception of public order by punishing their critics. The U.N. Human Rights Committee, for example, has called upon Mexico to repudiate the criminal offense of “defamation of the State.”<sup>30</sup>

The Chilean government cannot justify its prosecution of Ms. Matus by arguing that her profile of a senior judge somehow disturbs the “public order” by interfering with the administration of justice. *The Black Book* contributed to proper public debate about the decisions and conduct of judges. Far from interfering with the administration of justice, this type of public debate is needed to hold judges accountable.

**B. Government Officials Should Have No Special Protection From Criticism**

The prosecution of Ms. Matus also violates principles of free expression because Article 6(b) of Chile’s State Security Law gives government officials special protection from insulting or offensive statements. The Commission and nearly every democratic nation on earth condemn such special protections.

As a statute that criminalizes criticism of public officials, Article 6(b) is a *desacato* law. *Desacato* laws originated long ago, in an era when monarchs ruled without regard to the consent of the people they governed and therefore saw no reason to permit

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<sup>29</sup> New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964) (quoting a speech of James Madison, a chief author of the U. S. Constitution, to the U.S. House of Representatives in 1794).

<sup>30</sup> U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: Mexico, CCPR/C/79/Add.109 ¶ 14 (July 27, 1999).

criticism of their decisions.<sup>31</sup> The very purpose of *desacato* laws is to shield the government from criticism.<sup>32</sup>

Article 6(b) and other *desacato* laws should be repudiated. These laws criminalize the most important form of political speech: criticism of the official conduct of government leaders. Moreover, Article 6(b) and similar laws rest on the misguided notion that insulting high government functionaries endangers “public order.” Public officials cannot truly maintain order if they are immune from criticism. In addition, laws such as Article 6(b) do not require proof that a statement is false or that the statement was published with “actual malice,” that is, with knowledge of its falsity or with serious doubt as to its truth.<sup>33</sup> Indeed, laws like Article 6(b) are often applied to punish *true* statements simply because the statements are offensive to persons in power. These laws therefore discourage honest, critical reporting and prevent the public from accurately determining whether its leaders are doing a good job.

In short, Article 6(b) is a dangerous anachronism. The Commission has concluded that *desacato* laws violate the American Convention and should be repealed

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<sup>31</sup> See *Desacato* Report § II (discussing origin and characteristics of *desacato* laws); see also Inter-American Commission on Human Rights, Report of the Office of the Special Rapporteur for Freedom of Expression, n.62 (1998) (stating that Article 6(b) of Chile’s State Security Law functions as a *desacato* provision); Human Rights Watch, *The Limits of Tolerance: Freedom of Expression and the Public Debate in Chile*, at 3 (1998) (stating that Article 6(b) and Articles 263 and 264 of Chile’s Penal Code are *desacato* laws that punish defamation of high public officials).

<sup>32</sup> See *Desacato* Report § II.

<sup>33</sup> See § I(c)(1), *infra*.

throughout the Americas. The Commission has rightly emphasized that criminal penalties for defamation must never apply when “the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.”<sup>34</sup> The Commission’s position should be applied in this case to condemn Article 6(b) and the prosecution of Ms. Matus.

Free political debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>35</sup> And as the Inter-American Court has observed, “journalism is the primary and principal manifestation” of free political expression.<sup>36</sup> Courts around the world therefore have rejected criminal prosecutions against journalists for reporting critically on the conduct of public officials and public figures.

In *Thorgeirson v. Iceland*, an Icelandic court had convicted a journalist of criminal defamation for his reporting on alleged acts of brutality by police officers. The European Court of Human Rights held that the journalist’s conviction violated Article 10

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<sup>34</sup> Inter-American Commission on Human Rights, 108<sup>th</sup> Sess., Inter-American Declaration of Principles on Freedom of Expression, Principle 10 (2000); *accord* 1999 Report of the Special Rapporteur Ch. II § B.1.b (stating that libel and slander should be decriminalized “when they are used to protect discourse that is critical of government”). CPJ and many leaders of the Latin American legal community expressed their support for the position of the Commission and Special Rapporteur in the Buenos Aires Declaration of June 9, 2000.

<sup>35</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>36</sup> OC-5/85 ¶¶ 70-71.



of the European Convention on Human Rights.<sup>37</sup> The court reasoned that although the journalist's articles "were framed in particularly strong terms," they "bore . . . on a matter of serious public concern." Therefore, the Iceland court's ruling that the journalist was criminally liable would "discourag[e] open discussion" and hamper the press in "its vital role of 'public watchdog.'"<sup>38</sup> In *Oberschlick v. Austria*, the European Court held that the conviction of a journalist for defamation and insult of the leader of a political party violated the European Convention.<sup>39</sup> The court emphasized that "the limits of acceptable criticism . . . are wider with regard to a politician acting in his public capacity than in relation to a private individual."<sup>40</sup>

National courts all over the world have refused to impose criminal liability for criticism of public officials and public figures. A court in Taiwan acquitted journalists who were charged with criminal defamation for reporting on alleged corruption by a leader of the ruling party. The court emphasized that the journalists had reported in good faith on a matter of public importance. This ruling was affirmed by Taiwan's appeal

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<sup>37</sup> 14 Eur. H.R. 843, 867 (1992).

<sup>38</sup> *Id.* at 865, 867.

<sup>39</sup> *See* 25 Eur. H.R. 357, 368 (1998).

<sup>40</sup> *Id.* at 367; *see also* *Nilsen & Johnsen v. Norway*, 30 Eur. H.R. 878, 912-13 (2000) (holding that expert who participated actively in public debate regarding police brutality should tolerate higher degree of criticism from police officials engaged in same debate, and therefore defamation conviction of officials for statements against expert violated officials' right to free expression).

court.<sup>41</sup> Likewise, a trial court in Zagreb, Croatia dismissed the criminal indictments of two newspaper reporters for criticizing the Croatian president.<sup>42</sup>

Often, the nations that still criminally punish journalists for the content of their writings about public officials are those with the worst records on basic human rights. Cuba is currently imprisoning one journalist for writings critical of the government, and independent journalists there are continually at risk of prosecution. The Commission's Special Rapporteur for Freedom of Expression has stated that Cuba is an undemocratic state where "[f]reedom of expression does not exist" and "basic rights" go unrecognized.<sup>43</sup> China is imprisoning 22 journalists for speaking out against the government or its officials.<sup>44</sup> The United States Department of State has criticized China for "continu[ing] to commit widespread and well-documented human rights abuses" and imposing "severe restrictions on freedom of speech [and] press."<sup>45</sup>

Nations in Latin America have begun to reform their laws to better protect press freedom. In some cases, these efforts have led to significant reform. In other cases the

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<sup>41</sup> See *Liu v. Ying Chan*, Taipei Dist. Ct., Republic of China (Taiwan), Apr. 22, 1997, at 10-11, 15, affirmed on Dec. 29, 2000 by Taiwan's High Court. CPJ participated in the case as *amicus curiae*.

<sup>42</sup> Committee to Protect Journalists, *Attacks on the Press in 1996* at 222 (1997). CPJ submitted an *amicus* brief to the court in Croatia.

<sup>43</sup> 1999 Report of the Special Rapporteur, Ch. II, § E.1.a.

<sup>44</sup> Committee to Protect Journalists, *Attacks on the Press in 2000* at 178 (2001).

<sup>45</sup> U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, *China Country Report on Human Rights Practices for 1996* (1997) at 1.

reform efforts have not yet succeeded. In all cases, the efforts are commendable. Argentina made a great stride toward press freedom in 1993 when it repealed its own *desacato* laws. Argentina's more recent efforts to completely decriminalize the defamation of public officials and public figures have not yet succeeded, but deserve the Commission's strong encouragement.<sup>46</sup> In Costa Rica, a bill that would have introduced the "actual malice" standard into criminal defamation prosecutions was rejected by a legislative committee in early 2000.<sup>47</sup> Bills to reduce the exposure of the press to criminal liability have also been introduced in Brazil, the Dominican Republic and Panama, but enactment of significant reforms is far from certain.<sup>48</sup>

Chile has taken important steps to reform its own press laws, but so far its efforts have fallen short. Ms. Matus's case spurred Chilean legislators to consider the repeal of Article 6(b) and the elimination of other *desacato* laws contained in Chile's Penal Code. Unfortunately, these reforms have not been enacted. Moreover, proposals currently under consideration would not effectively protect press freedom effectively because (a) they do not eliminate the *desacato* provisions in the Penal Code, and (b) they provide that the ordinary criminal offense of libel or slander will be aggravated if the victim is a high

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<sup>46</sup> Compare 1999 Report of the Special Rapporteur Ch. I, § B (describing proposed reforms to Argentine law) with CPJ, Attacks on the Press in 2000 at 134-36 (March 2001) (describing factors that have halted Argentina's reform bill).

<sup>47</sup> See CPJ, Attacks on the Press in 2000 at 143-44 (2001).

<sup>48</sup> See *id.* at 137-39, 146-47, 158-59.

public official.<sup>49</sup> A strong report by the Commission in the petitioners' favor will help support the drive toward greater freedom of expression in Chile and throughout the Americas.

**C. Proof of Falsity And "Actual Malice" Should Be Required**

To be clear, CPJ believes that there should never be any criminal liability for defamation. CPJ also believes that in civil cases (and, to the extent that they are still prosecuted, in criminal cases), proof of falsity and "actual malice" should always be required before any liability is imposed. A strong regime of legal protections for free speech requires no less.

**1. A Falsity Requirement Is An Essential Protection For Free Speech**

Article 6(b) of Chile's State Security Law punishes "those who defame, slander, or libel" high government officials. On its face, the law does not provide for a defense of truth. This violates a fundamental tenet of free expression, which holds that speaking the truth simply cannot be defamation.<sup>50</sup> Speech that is merely offensive or expresses an opinion, but is not factually false, should never be the basis of a defamation charge. As

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<sup>49</sup> See Felipe González, *Leyes de Desacato y Libertad de Expresion* 255-59 (2000). See also Human Rights Watch, *Chile: Progress Stalled--Setbacks in Freedom of Expression Reform* 2-3, 6, 33-35 (2001) (discussing shortcomings of proposed reforms, and observing that Chile's lawmakers have failed to "seriously challenge[]" the fundamentally flawed principle "that authorities of state deserve special protection against 'unreasonable' criticism").

<sup>50</sup> See, e.g., *Castells v. Spain*, 14 Eur. H.R. 445, 463-64 (1992) (Supreme Court of Spain violated European Convention by refusing to consider evidence that allegedly defamatory statements were true).

the U.S. Supreme Court has stated, “there is no such thing as a false idea.”<sup>51</sup> In appropriate circumstances, the publication of false facts is properly remedied through civil damages. The publication of offensive or controversial ideas is properly remedied only through debate.

Courts around the world recognize that free expression is best protected when the plaintiff or prosecutor in a defamation case must *prove the falsity* of the allegedly defamatory statements. As the Commission has explained, laws that require the defendant in a defamation action to prove the truth of his statements “inevitably inhibit the free flow of ideas and opinions.”<sup>52</sup>

## **2. An Actual Malice Requirement Is An Essential Protection For Free Speech**

Even when an allegedly defamatory statement is proved to be false, there should be no liability -- criminal or civil -- unless the plaintiff or prosecutor also proves that the challenged statements not only were false, but also were made with “actual malice.”<sup>53</sup> “Actual malice” means that at the time of publication, the defendant either knew the statement at issue was false or acted with reckless disregard as to its truth or falsity. The

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<sup>51</sup> See, e.g., *Gertz v. Robert Welch*, 418 U.S. 323, 339 (1974).

<sup>52</sup> *Desacato* Report § IV.B; see also *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) (defamation plaintiff must bear burden of proving falsity “[t]o ensure that true speech on matters of public concern is not deterred”).

<sup>53</sup> See *Philadelphia Newspapers*, 475 U.S. at 773 (endorsing “actual malice” standard).

term “reckless disregard,” in turn, means that the defendant seriously doubted the truth of his publication, and in fact was aware that the publication was probably false.

The Commission, as well as jurisdictions around the world, has endorsed intent requirements that resemble the “actual malice” standard. The Commission has declared that in defamation cases, a public official or public figure must prove that the disseminator of a false statement “had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news.”<sup>54</sup> Argentina’s Supreme Court has stated that a defamation plaintiff “must prove that the person who produced [the damaging false statement] acted with malice.”<sup>55</sup> In South Korea, “it constitutes no unlawful act for a newspaper to publish a defamatory story for a public interest when the newspaper has a sufficient reason to believe it to be true.”<sup>56</sup> Courts in India, Australia and South Africa have set forth similar rules.<sup>57</sup> In adopting the “actual malice” standard, these jurisdictions

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<sup>54</sup> Inter-American Commission on Human Rights, Inter-American Declaration on Principles of Freedom of Expression, Principle 10 (2000).

<sup>55</sup> 1999 Report of the Special Rapporteur, Ch. II, § B.1.a (quoting *Vago v. Ediciones La Urraca S.A.*, as published in G. Badeni, *Libertad de Prensa*, Editorial Abeledo Perrot, Buenos Aires, at 414-17 (1997)).

<sup>56</sup> *Yi Ui-hynag v. Dong-A Ilbo-Sa*, 82 Kahap 4734 (Civil District Court 1984), reprinted in *Kungnae Ollon Kwangye Pallyechip* [Collection of Court Decisions on Korean Press] at 229, 233.

<sup>57</sup> *See Rajagopal v. State of Tamil Nadu*, A.I.R. 1995 S.C. 264, 277 (holding that a public official may not recover damages for defamation unless he proves that the defendant published a false statement “with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove

have followed the lead of the United States Supreme Court, which adopted the “actual malice” standard almost forty years ago.<sup>58</sup>

The “actual malice” standard performs a vital democratic function. If public officials too easily can punish the press, journalists will be dissuaded from reporting on matters of public concern. When reporters stop covering controversial stories, the people are less informed and thus less able to participate in matters of state. Because “erroneous statement is inevitable in free debate,” occasional errors “must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’”<sup>59</sup>

This case presents the Commission with an opportunity to emphasize that a State’s law should never impose *any* liability for defamation—whether criminal liability or civil liability—unless the “actual malice” standard is satisfied. CPJ is aware of no evidence that Ms. Matus’s allegedly defamatory statements were false, let alone evidence

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that he acted after a reasonable verification of the facts”); *Theophanus v. Herald & Weekly Times Ltd.*, 124 A.L.R. 1 (Australia 1994) (holding that a defendant cannot be held liable for defamation if it shows that “(a) it was unaware of the falsity of the material published; (b) it did not publish the material recklessly, that is, not caring whether the material was true or false; and (c) the publication was reasonable in the circumstances”); *Holomisa v. Argus Newspapers Ltd.*, (6) B.C.L.R. 836 (South Africa Supreme Court, Witwatersrand Local Division 1996) (“a defamatory statement which relates to free and fair political activity is constitutionally protected even if false, unless the plaintiff shows that, in all the circumstances of its publication, it was unreasonably made”).

<sup>58</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see also* *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (defining “actual malice”); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (similar; striking down criminal defamation law).

<sup>59</sup> *New York Times v. Sullivan*, 376 U.S. at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

that Ms. Matus acted with reckless disregard for the truth. To the contrary, the facts show that Ms. Matus firmly believed *The Black Book* to be entirely true and followed standard journalistic practices in citing sources for what she wrote. Ms. Matus spent six years meticulously researching *The Black Book*. She has stated publicly that she took pains to present balanced profiles of the judges who appear in it.<sup>60</sup>

## **II. CHILE'S SEIZURE OF MS. MATUS'S BOOK VIOLATES INTERNATIONAL STANDARDS AGAINST CENSORSHIP**

The Chilean government's seizure of *The Black Book* flagrantly violates the American Convention. The plain language of Article 13(2) of the Convention absolutely prohibits prior censorship.<sup>61</sup> Indeed, only five years ago the Commission held that Chile violated Article 13 when the Santiago Appeals Court enjoined the distribution of another work of investigative journalism.<sup>62</sup>

By confiscating *The Black Book*, Chile has become the only democracy in the Americas in recent years to violate the American Convention's edict against censorship. CPJ is unaware of any other instance in the last four years in which the government of

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<sup>60</sup> See Ali Quinn, *Living in Exile* (April 4, 2000) (available at <http://dfn.org/focus/chile/matus.htm>).

<sup>61</sup> See OC-5/85 ¶ 38. The only exception to this prohibition is for laws directed at "public entertainments" for the "sole purpose" of protecting the morals of children. American Convention Art. 13 § 4. This exception does not apply here.

<sup>62</sup> Inter-American Commission on Human Rights, *Case of Francisco Martorell, Chile*, Report No. 11/96, Case 12.230 (May 3, 1996) ¶¶ 56, 73-74.



any nation in the Americas—except for Cuba—censored a journalistic work because it allegedly defamed public officials.

Legal norms around the world hold that government officials cannot censor their critics. The Supreme Court of India, for example, has ruled that the government could not prevent a publisher from releasing a book that accused prison officials of corruption.<sup>63</sup> The court stated that in defamation cases, “[t]he remedy of public officials/public figures, if any, will arise only after the publication.”<sup>64</sup> The U.N. Special Rapporteur for Freedom of Expression has stated that “any system of prior restraint on freedom of expression carries with it a heavy presumption of invalidity under international human rights law.”<sup>65</sup> The United States Supreme Court reached the same conclusion in the well-known “Pentagon Papers” case, *New York Times v. United States*.<sup>66</sup> As Justice William Brennan wrote in that case, there can be “absolutely no prior

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<sup>63</sup> See *Rajagopal v. State of Tamil Nadu*, A.I.R. 1995 S.C. 264, 276.

<sup>64</sup> *Id.*

<sup>65</sup> U.N. Commission on Human Rights, Report on the Mission to the Republic of Korea of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. ESCOR, 52d Sess. Agenda Item 8, at 8, U.N. Doc. E/CN.4/1996/39/Add. 1 (1995); see also Docherty, *supra* note 22, at 281 (“National and international authorities have condemned prior restraint, which stifles expression before the public can evaluate it.”).

<sup>66</sup> 403 U.S. 713, 714 (1971).

judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result.”<sup>67</sup>

Here, the Chilean government’s illegal censorship of *The Black Book* has lasted nearly two years. The Commission should call upon Chile to immediately lift its ban on Ms. Matus’s book.

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<sup>67</sup> *Id.* at 725-26 (Brennan, J., concurring).

### Conclusion

For the foregoing reasons, CPJ respectfully requests that the Commission issue a report that supports:

- the rejection of all efforts to criminalize defamation, and in particular the repeal of Article 6(b) of Chile's State Security Law;
- the dismissal of all charges against Ms. Matus;
- the adoption of the principle that only statements that are factually false can give rise to liability for defamation;
- the adoption of an "actual malice" standard for all defamation cases involving public officials or public figures;
- the rejection of all prior censorship, and in particular the repeal of Articles 16 and 30 of Chile's State Security Law; and
- the distribution of *The Black Book* in Chile without legal penalty, and the return of all copies of *The Black Book* seized by the government.

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Respectfully submitted,

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