

INTER-AMERICAN COURT OF HUMAN RIGHTS

----- X  
Jorge Fontevecchia and Hector D'Amico

vs.

The Republic of Argentina  
----- X

**BRIEF OF THE COMMITTEE TO PROTECT JOURNALISTS  
AS AMICUS CURIAE  
IN THE "FONTEVECCHIA & D'AMICO V. ARGENTINA" CASE**

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## Preliminary Statement

The Committee to Protect Journalists (“CPJ”) urges the Court to declare that Argentina violated Article 13 of the American Convention on Human Rights (the “Convention”). Journalists Hector D’Amico and Jorge Alberto Fontevicchia (“Petitioners”) wrote two important and responsible articles that explored the evidence that President Carlos Saúl Menem of Argentina abused his office to benefit his former mistress—herself an elected official—and their child. President Menem responded by bringing a baseless lawsuit for “invasion of privacy.” In violation of the Convention, Petitioners were held liable and ordered to pay a large damage award. This lawsuit was part of a sustained campaign by President Menem to punish Argentina’s free press through the court system, which he controlled. This Court should order Argentina to revoke the finding of liability. This Court also should order Argentina to compensate Petitioners for the amounts they paid in satisfaction of the judgment and the attorneys’ fees they paid to defend themselves.

This case demonstrates how abuse of the civil justice system can threaten the freedom of the press. CPJ’s mission is to defend the right of journalists to report the news freely. CPJ is uniquely knowledgeable about the threats that journalists face around the world. The threat of physical violence is well known and widely reported. Subjecting journalists to years of unjustified civil litigation and money damages is no less a threat. This Court should safeguard the right of the press to report on allegations and evidence of official misconduct and leaders’ suitability for office, without being silenced or intimidated through meritless civil lawsuits.

We urge the Court to hold that:

- *A public official’s use of a meritless civil lawsuit to intimidate the press infringes freedom of expression.* President Menem did not sue to protect a legitimate claim to privacy, but rather to retaliate for accurate reporting on his possible official misconduct. He was

awarded damages by judges who, as the State has conceded, were too close to the President to exercise true impartiality. This award violated Article 13 of the Convention.

- *Journalists never should be punished for truthful reporting about a public official on a matter of public concern.* Petitioners were held liable for articles of undisputed accuracy. They reported accurately that President Menem gave money and gifts to his former mistress, who was a congresswoman, and their child. These gifts were so generous as to raise obvious questions about whether they were paid for from unlawful sources. The congresswoman had publicly accused President Menem of previously ignoring his obligations to support his son; this too was accurately reported in the challenged articles. Petitioners also accurately reported that President Menem pulled strings to have Paraguay provide asylum to the congresswoman and child. All these topics clearly were of profound public concern.

By ruling in favor of Petitioners, this Court will make clear throughout the Americas that public officials may not use their states' judicial systems to help politicians harass the press because they do not like what it investigates and reports about matters of public concern.

### **Statement of Interest**

CPJ is a nonprofit organization founded in 1981 and based in New York. In performing its mission of defending journalists, CPJ collects information about individual cases where press freedom is threatened, including many cases in the Americas. CPJ issues public protests and engages government officials on behalf of journalists who are under attack, in jail, or threatened with criminal or civil sanctions.<sup>1</sup> CPJ publishes an annual report entitled *Attacks on the Press* that details threats to press freedom worldwide. CPJ also maintains a website where it publishes stories of violations of freedom of the press.<sup>2</sup> Finally, CPJ bestows the annual International Press Freedom Award on heroic journalists who have fought for freedom of expression against

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<sup>1</sup> See, e.g., Letter from Joel Simon, Executive Director, Committee to Protect Journalists, to Aleksandr Lukashenko, President of Belarus (Mar. 6, 2008), <https://cpj.org/protests/08ltrs/europe/belarus06mar08pl.html> (Letter of protest to the President of Belarus attempting to “draw to [his] attention [his] government’s selective use of politically motivated civil libel lawsuits against critics”).

<sup>2</sup> Committee to Protect Journalists, *Defending Journalists Worldwide*, [www.cpj.org](http://www.cpj.org) (last visited Aug. 25, 2011).

oppressive governments and other threats. Through these efforts, CPJ has been recognized worldwide as both an advocate and expert on issues of press freedom.<sup>3</sup>

Since its founding, CPJ has monitored violations of press freedom in the Americas. It has worked with journalists and legal scholars and advocated to governments throughout the Americas to reform repressive laws directed at gathering and reporting of news. Among other outreach efforts, CPJ co-sponsored the June 2000 conference on press freedom in Buenos Aires attended by dozens of prominent journalists, academics and lawyers from throughout the Americas. The conference resulted in the Buenos Aires Declaration, which states:

[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>4</sup>

The principles of the Buenos Aires Declaration apply equally to privacy cases.

CPJ has submitted numerous amicus briefs to national courts and international human rights bodies addressing cases of violations of freedom of expression. In February 2004, CPJ and several news organizations submitted a brief in the *Herrera Ulloa v. Costa Rica* case before this Court. In March 2001, CPJ submitted an amicus brief in the *Matus Acuña v. Chile* case before the Commission. In November 2009, CPJ joined other amici to submit written comments to the European Court of Human Rights in the case of *Sanoma Uitgevers B.V. v. the Netherlands*.

CPJ has followed this case closely for more than a decade. It has protested actions taken by the government of Argentina in the proceedings against Petitioners in the domestic courts.

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<sup>3</sup> See Sherry Ricciardi, *Journalism's Red Cross*, AM. JOURNALISM REV. (Dec. 1997), [www.ajr.org/Article.asp?id=1510](http://www.ajr.org/Article.asp?id=1510) (“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.”).

<sup>4</sup> Committee to Protect Journalists, et al., Buenos Aires Declaration (June 9, 2000).

On October 4, 2001, CPJ published a commentary noting that “[d]uring his decade in office, Menem used a flurry of lawsuits in an attempt to stifle the vibrant Argentine press.”<sup>5</sup> CPJ observed that the Argentine Supreme Court was “stacked with [Menem’s] supporters.”<sup>6</sup>

With this brief, CPJ seeks to assist the Court by sharing observations based on CPJ’s decades of experience combating threats to freedom of the press.

### **Statement of Facts**

Soon after he was elected to his second term as Argentina’s president in 1995, Carlos Menem sued Petitioners D’Amico and Fontevecchia over two articles that appeared in *Noticias* that November (the “*Noticias* Articles” or the “Articles”). *Noticias* was a weekly Argentine news magazine that reported on politics, economics, culture, science and sports. It was well known for conducting journalistic investigations.<sup>7</sup> D’Amico was the Managing Editor of the magazine. Fontevecchia was the magazine’s founder and Director.<sup>8</sup> Menem also sued the parent company of *Noticias*, Editorial Perfil.

The Articles discussed President Menem’s possible use of official resources to support his former mistress and their child, Carlos Nair, who was then fourteen years old. Petitioners described lavish gifts and significant sums of money that President Menem had given Nair and his mother, Martha Meza. The Articles also reported that in 1994, President Menem had asked Paraguay to grant political asylum to Meza and Nair after Meza stated in a television interview

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<sup>5</sup> Committee to Protect Journalists, *Supreme Court issues disastrous decision in case against newsmagazine*, <http://cpj.org/2001/10/supreme-court-issues-disastrous-decision-in-case-a.php> (last visited Aug. 25, 2011).

<sup>6</sup> *Id.*

<sup>7</sup> Fontevecchia y D’Amico v. Argentina, Case 12.524, Inter-Am. Comm’n H.R., Report No. 82/10, OEA/Ser.L/II.139, doc.22 (2011), ¶ 37 [hereinafter “Commission’s Application”]; see also SILVIO RICARDO WAISBORD, WATCHDOG JOURNALISM IN SOUTH AMERICA: NEWS, ACCOUNTABILITY AND DEMOCRACY 36 (stating that by 1994, the newsweekly *Noticias* was publishing notable investigative articles, including one that led to the gruesome murder of a *Noticias* journalist).

<sup>8</sup> *La CIDH le dio la razón a NOTICIAS y demandó al Gobierno*, NOTICIAS, [www.revista-noticias.com.ar/comun/nota.php?art=3073&ed=1775](http://www.revista-noticias.com.ar/comun/nota.php?art=3073&ed=1775) (last visited Aug. 23, 2011).

that she had received threats directed toward their son. When she met Menem in 1980, Meza was a schoolteacher. By the time the Articles were published in November 1995, Meza had been an elected state representative for Menem’s political party (*Partido Justicialista*) for eight years.<sup>9</sup>

After losing in the first instance court, Menem appealed the judgment and prevailed in the appellate court. The journalists then appealed to the Argentine Supreme Court. On September 25, 2001, the Supreme Court affirmed the appellate court and held D’Amico, Fontevecchia, and Editorial Perfil civilly liable for breaching President Menem’s right to privacy. The court ordered the defendants to pay Menem 60,000 pesos in civil damages (US\$60,000 in 2001) plus interest, court costs, and attorneys’ fees, for a total of 244,323.25 pesos (US\$84,000 in 2005 when the final payment was remitted).<sup>10</sup>

#### **A. Background: Attacks on Freedom of the Press in Argentina in the 1990s**

During Menem’s two terms as president between 1989 and 1999, Argentine journalists uncovered significant government malfeasance.<sup>11</sup> International watchdog organizations and political opponents agreed that Menem’s Argentina was rife with corruption.<sup>12</sup> Since his presidency ended, Menem has been accused of various forms of misconduct while in office.<sup>13</sup>

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<sup>9</sup> Meza was a congresswoman in Formosa province between 1987 and 1995. In 1999, she was elected a national congresswoman for the Formosa province. See Commission’s Application, *supra* note 7, at ¶ 41.

<sup>10</sup> *Id.* at ¶ 21.

<sup>11</sup> See WAISBORD, *supra* note 7, at 34 (“Exposés have also targeted government corruption” and “the Menem administration has been beset by a string of exposes and scandals.”).

<sup>12</sup> See, e.g., Beth Rubenstein, *Corruption Taint Hurts Argentina’s Trade Goals*, J. COM., Oct. 9, 1998, [www.joc.com/maritime/corruption-taint-hurts-argentinas-trade-goals](http://www.joc.com/maritime/corruption-taint-hurts-argentinas-trade-goals); Clifford Kraus, *2 Would-Be Presidents in Argentina Make Corruption an Issue*, N.Y. TIMES, Nov. 18, 1998; *Business Outlook in Argentina*, EIU BUS. LATIN AMERICA, Nov. 30, 1998; Christopher J. Walker, *Toward Democratic Consolidation? The Argentine Supreme Court, Judicial Independence, and the Rule of Law*, 18 FL. J. INT’L L. 745, 788 (2006) (explaining that “corruption, mismanagement, and unilateral decision-making” dominated the Menem administration).

<sup>13</sup> See, e.g., *Menem charged with arms-smuggling*, BBC NEWS, Nov. 28, 2008 (reporting that Menem was charged for his involvement in arms trafficking to Croatia and Ecuador between 1991 and 1995); *Argentina’s Menem charged with obstructing bomb probe*, AFP, Oct 1., 2009 (stating that Menem was charged for “instigating”

President Menem's administration was also characterized by its persecution of journalists. Journalists were often threatened, physically attacked, or penalized with legal sanctions for publishing stories criticizing the government.<sup>14</sup> For example, in 1997, *Noticias* photojournalist José Luis Cabezas was brutally “handcuffed, shot, and burnt alive”<sup>15</sup> after uncovering links between government officials and a drug trafficking scheme.<sup>16</sup> Many of the journalists targeted were reporting on corrupt practices in President Menem's government.<sup>17</sup>

Journalists also faced a sustained campaign of civil litigation sponsored by President Menem and his allies. As CPJ reported then, Menem and his advisors responded to stories about government corruption and malfeasance “not with promises to investigate the accusations but with a flurry of litigation.”<sup>18</sup> The Argentine press stated at the time that these legal attacks would discourage journalists from reporting on matters of public interest.<sup>19</sup> Journalists and news organizations were forced to pay large fines or face criminal sentences in lawsuits in which they

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several crimes, including concealing evidence and abuse of authority,” but enjoys congressional immunity); *Siemens Admits Corruption with Former Argentine Leaders*, AFP, Dec. 17, 2008 (reporting that Siemens admitted to paying bribes to Menem and others to win an Argentine contract bid).

<sup>14</sup> See *War on the Media in Argentina*, N.Y. TIMES, Sept. 16, 1997, [www.nytimes.com/1997/09/16/opinion/war-on-the-media-in-argentina.html](http://www.nytimes.com/1997/09/16/opinion/war-on-the-media-in-argentina.html) (reporting that Menem “seem[ed] to be encouraging violence” and “called for physical assaults against journalists who offended [the government]”); see also Amnesty International, *Journalism, A Dangerous Profession: Physical Attacks, Death Threats and Harassment of Journalists in Argentina*, January 1994; United Nations Economic and Social Council, *Civil and Political Rights, Including the Question of Freedom of Expression, Addendum – Mission to Argentina*, E/CN.4/2002/75/Add.1, Jan. 17, 2002, ¶¶ 19, 80 [hereinafter “*Civil and Political Rights*”].

<sup>15</sup> *Anti-Press Violence in Argentina*, QUILL, Dec. 1, 1997 (“The murder of Cabezas showed violence toward journalists escalating, as Menem and his men crack down on criticism.”).

<sup>16</sup> Amelia Barili, *Argentina Wages War Against Journalists Retaliation Sends a Chilling Message Against Freedom of Expression*, SAN JOSE MERCURY NEWS, Dec. 1, 1997.

<sup>17</sup> *Civil and Political Rights*, *supra* note 14, at ¶ 19 (“The pressure on the media was intense, in particular during the early 1990s. . . . The majority of attacks against journalists,” including death threats, physical attacks, harassment and prosecution “were motivated by their investigations into corruption involving criticism of authorities.”); *Argentine Informer Attacked, He Publicly Revealed Military Atrocities*, CHICAGO TRIB., Sept. 14, 1997.

<sup>18</sup> Committee to Protect Journalists, *Argentina, Attacks 1997*, [www.cpj.org/attacks97/americas/argentina.html](http://www.cpj.org/attacks97/americas/argentina.html) (last visited Aug. 19, 2011).

<sup>19</sup> *Civil and Political Rights*, *supra* note 14, at ¶ 82 (The press said that risk of legal action would discourage it from “reporting on issues that might be sensitive despite the fact that they are of public interest.”).

defended their freedom of expression.<sup>20</sup> Editorial Perfil was forced to defend nearly two dozen lawsuits brought by Menem during his presidency.<sup>21</sup>

Menem prevailed in many of his lawsuits against the press because, as the State concedes in its Reply, the judges on the Supreme Court were “too close to the President.”<sup>22</sup> When his suit against Petitioners came before the Supreme Court, six of the nine sitting justices had been appointed by Menem in a blatant effort to gain political control of the court.<sup>23</sup> As described by the State in its Reply, Menem’s success in politicizing the Supreme Court led to “highly questionable performance” that was “too deferential toward political power.”<sup>24</sup>

## **B. The *Noticias* Articles**

On November 5, 1995, *Noticias* published an article reporting that a fourteen-year old boy named Carlos Nair was known to be Menem’s son. The article accurately reported that since Meza gained a state congressional seat in 1987, she had been boasting that Menem was her son’s father. The article also discussed expensive gifts that Menem gave to Nair and Meza. It cited judicial records in which Meza described a November 1994 robbery where the thieves had

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<sup>20</sup> Jorge Fascetto, *The Plight of Journalists in Latin America*, CHICAGO TRIB., Oct. 14, 1999 (“In Argentina ... six journalists have been sentenced to jail and have to pay hefty fines because they criticized senior government officials, including President Carlos Menem.”).

<sup>21</sup> See Complaint at I.c., *Fontevecchia y D’Amico v. Argentina*, Caso 12.524 (I/A Ct. HR 2011) (citing *Reportaje a Carlos Menem*, DIARIO PERFIL, [www.diarioperfil.com.ar/edimp/0177/articulo.php?art=1135&ed=0193#2](http://www.diarioperfil.com.ar/edimp/0177/articulo.php?art=1135&ed=0193#2)); see also Testimony of Hector D’Amico, Inter-American Court of Human Rights, 92<sup>a</sup> Session, Bogota, Colombia, August 24, 2011 [hereinafter “D’Amico Testimony”] (stating that Menem brought 19 separate law suits against Editorial Perfil); Testimony of Jorge Fontevecchia, Inter-American Court of Human Rights, 92<sup>a</sup> Session, Bogota, Colombia, August 24, 2011 [hereinafter “Fontevecchia Testimony”] (same).

<sup>22</sup> Answer at 20, *Jorge Fontevecchia & Hector D’Amico v. Argentina*, 12.425 (I/A Ct. H.R. 2011).

<sup>23</sup> Committee to Protect Journalists, *Country Report: Argentina*, Dec. 31, 1998, [www.cpj.org/attacks98/1998/Americas/Argentina.html](http://www.cpj.org/attacks98/1998/Americas/Argentina.html) (last visited Aug. 19, 2011). Menem also controlled the lower courts. See Mugambi Jouet, *The Failed Invigoration of Argentina’s Constitution: Presidential Omnipotence, Repression, Instability, and Lawlessness in Argentina History*, 39 U. MIA. INTER-AMERICAN L. REV. 409, 448 (2008) (“Menem packed the lower criminal courts with pliant judges who would absolve functionaries and fail to aggressively investigate corruption allegations.”).

<sup>24</sup> Answer, *supra* note 22, at IV.C.

“stole[n] a gold Rolex with diamonds, that the president of the nation had given to me, other jewels, and 140 thousand pesos from me.”<sup>25</sup> The article quoted Meza’s former driver, Elisiano González, who said that he had collected about US\$50,000 for her in legislative salaries for fake employees. González also said that he used to drive Nair to Buenos Aires from Formosa once a month so that Nair could see Menem, whom Nair called “papa.”<sup>26</sup> The article reported that Menem paid Meza a monthly remittance of US\$20,000 and that “the deal had been sealed” after Meza had threatened a paternity suit unless Menem gave her US\$50,000.<sup>27</sup> According to the article, Meza had a congressional monthly salary of US\$3,808, and her stipends from President Menem allowed her to spend US\$350,000 building a home. The size of the gifts and financial support that President Menem gave to Nair and Meza raised obvious questions about where the president got the money to provide them.<sup>28</sup>

The second article was published one week later on November 12, 1995. It began by quoting a poster that Meza carried during Menem’s 1988 campaign for his party’s presidential nomination, which read: “If he doesn’t feed his son, how is he going to feed the country?” This article recounted how Meza had met Menem in 1980. At the time, Meza was a teacher, and Menem was the former governor of La Rioja, sentenced to house arrest in the Formosa region by the military dictatorship. The article stated that during this period, Menem “dreamed aloud about

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<sup>25</sup> Jimena Oto Carbonell, *Regalos Presidenciales*, NOTICIAS, Nov. 5, 1995 (Información General) [hereinafter the “November 5 Article”].

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (quoting sources in the Formosa region).

<sup>28</sup> See D’Amico Testimony, *supra* note 21 (explaining that the theft of the jewels and other items were a matter of public concern because their value exceeded two years’ worth of Menem’s annual salary); see also Oscar Serrat, *Piden investigar el origen de la fortuna de Menem*, EL NUEVO HERALD, Sept. 12, 1998, <http://www.latinamericanstudies.org/argentina/menem.htm> (stating that Menem’s salary, while in office, was 5000 pesos per month).

his presidential destiny.”<sup>29</sup> Quoting the bestselling book *El Jefe: Vida y Obra de Carlos Saúl Menem*,<sup>30</sup> the article reported that Menem, who was married at the time, had an affair with Meza that resulted in her pregnancy.<sup>31</sup>

The article cited statements made by one of Nair’s teachers to *Noticias* in 1994 that Nair was an “excellent and loving child, who was reticent to say who his father was.”<sup>32</sup> It reported that in 1994, the attorney for President Menem’s ex-wife in divorce proceedings tried to establish Menem’s alleged infidelity, and asked Meza why Nair referred to Menem as “dad.” Meza refused to answer the question.<sup>33</sup> When the Articles were published in November 1995, President Menem had not yet publicly recognized his son. He acknowledged his paternity in 2007.<sup>34</sup>

The November 12 Article also reported that during a political campaign in February 1994, Congresswoman Meza held the Argentine government responsible for the safety of her son and herself when her son was subjected to threats.<sup>35</sup> President Menem asked Paraguayan

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<sup>29</sup> Jimena Oto Carbonell & Carlos Dutil, NOTICIAS, *Un Tal Carlos*, Nov. 12, 1995, at 39 [hereinafter “November 12 Article”].

<sup>30</sup> *El Jefe* is a detailed account of Menem’s life by journalist Gabriela Cerruti published in 1993. When *El Jefe* was published, Cerruti worked for *Página / 12*, one of the leading newspapers in Argentina, as an editor and a special correspondent in Washington, New York, Paris, Brussels, Rome, Frankfurt, Mexico, Chile, Uruguay and Madrid. *El Jefe* was a bestseller. See Commission’s Application, *supra* note 7, ¶ 43; see also Gabriela Cerruti, [www.gabicerruti.com.ar/ar/2010/03/29/gabriela-carla-cerruti](http://www.gabicerruti.com.ar/ar/2010/03/29/gabriela-carla-cerruti).

<sup>31</sup> November 12 Article, *supra* note 29, at 39.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See also *Menem Reconoce Un Hijo Extramatrimonial*, available at [www.20minutos.es/noticia/264652/0/menem/hijo/extramatrimonial/](http://www.20minutos.es/noticia/264652/0/menem/hijo/extramatrimonial/). Menem only publicly recognized his son after Nair brought a paternity suit against him in 2006. Relying on genetic evidence, the judge determined that Menem was Carlos Nair’s father. See *Juez establece que Menem es padre de un joven de 25 años*, EFE MUNDO, Nov. 3, 2006; *Report: Judge rules Menem is father of 25-year-old man he refused to recognize*, ASSOCIATED PRESS, Nov. 4, 2006.

<sup>35</sup> Carbonell & Dutil, *supra* note 29, at 42. According to the Petitioners’ brief, in 1994 Martha Meza appeared in a TV show, *Hora Clave*, and said that her son’s life was at risk because he was Menem’s son. See Complaint, *supra* note 21, at 7; D’Amico Testimony, *supra* note 21 (describing the contents of the death threat, which stated that Nair’s head would be cut off and mailed to Menem).

President Juan Carlos Wasmosy to grant asylum and personal protection to Meza and Nair.<sup>36</sup> The article again cited Meza's former driver González, who said that after these events, Meza threatened to bring a paternity suit against President Menem. The article also reported that President Menem gave Congresswoman Meza a lifelong monthly stipend of US\$20,000, and a trust under Nair's name that was close to US\$1 million.<sup>37</sup> The article also included a section on Meza's "economic rise." This section reported on Meza's congressional salary and on real estate she had acquired in Argentina and Paraguay since joining Congress, including an apartment in Buenos Aires that was a gift from President Menem.<sup>38</sup>

In reporting these stories, the journalists relied on interviews with Meza, González, and Nair's teacher; the bestseller *El Jefe*; judicial records; and press interviews of Congresswoman Meza in which she identified President Menem as Nair's father.<sup>39</sup> Prior to publication, *Noticias* consulted its lawyers to confirm that the stories were of public concern, and met with Meza to confirm the accuracy of all the statements made in the articles.<sup>40</sup>

The articles were accompanied by photographs of President Menem with Congresswoman Meza and their son. One photograph depicted only Meza with a caption that read: "Martha Meza: From Teacher to Congresswoman, she rose with political patronage." Remaining photographs showed Menem, Meza, and Nair at the presidential residences in Olivos

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<sup>36</sup> November 12 Article, *supra* note 29, at 42 (reporting that the time in Paraguay was upsetting to Nair, who, as the article quotes, repeated that he wanted to "return to his country to be with his dad."); *see also* Complaint, *supra* note 22, at I.1, II.1.a; Commission's Application, *supra* note 7, at ¶ 57, 118.

<sup>37</sup> November 12 Article, *supra* note 29, at 42.

<sup>38</sup> *Id.* at 40.

<sup>39</sup> *See* Complaint, *supra* note 21, at II.2; *see also* D'Amico Testimony, *supra* note 21 (explaining that *Noticias* interviewed Meza, who personally confirmed the facts in the Articles prior to publication).

<sup>40</sup> *See* D'Amico Testimony, *supra* note 21.

and Chapadmalal.<sup>41</sup> Menem’s presidential staff took the photographs and gave them to the press for publication.<sup>42</sup> Journalists and television cameras are visible in several of the photographs.<sup>43</sup>

**C. Argentine Courts Hold D’Amico and Fontevecchia Liable for Breaching President Menem’s Right to Privacy**

In late 1995, then-President Menem sued D’Amico, Fontevecchia and Editorial Perfil in Argentina’s National Court of First Instance, the *Juzgado Nacional de Primera Instancia*. Menem did not contend that the information reported in the *Noticias* articles was false. Nevertheless, he sought 1,500,000 pesos in damages for alleged invasions of privacy due to the publication of details about his family life.<sup>44</sup> No legal action was ever brought alleging that the articles violated the privacy of Congresswoman Meza or Nair. The first instance court explained that the right to privacy should be interpreted narrowly.<sup>45</sup> On July 10, 1997, the court rejected President Menem’s claims and found in favor of the journalists, concluding that there was insufficient evidence to establish any “ridicule or harm” to Menem.<sup>46</sup>

President Menem appealed. The National Court of Civil Appeals in Buenos Aires, the *Cámara Nacional de Apelaciones en lo Civil de la Capital Federal*, reversed the lower court decision on March 11, 1998, and granted Menem 150,000 pesos in damages. The appellate court held that the Articles did not address a matter of public interest because they could not have affected the electoral process, as Menem was already back in office at the time of publication.<sup>47</sup>

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<sup>41</sup> November 12 Article, *supra* note 29, at 42.

<sup>42</sup> D’Amico Testimony, *supra* note 21.

<sup>43</sup> *Id.*

<sup>44</sup> Commission’s Application, *supra* note 7, at ¶ 61.

<sup>45</sup> Juzgado Nacional de primera Instancia en lo Civil no. 35 [primera instancia] [First Instance Court], 10 julio 1997, “Menem, Carlos Saúl c./ Editorial Perfil SA y Otros,” 117.391/96 (Arg.).

<sup>46</sup> *Id.*

<sup>47</sup> Commission’s Application, *supra* note 7, at ¶ 67(a). The appellate court’s reasoning was belied when Menem ran for an unprecedented third term as president in 1999, an effort that was declared unconstitutional. In 2003,

On April 1, 1998, the journalists appealed the decision to the National Supreme Court of Justice, the *Corte Suprema de Justicia de la Nación*, which was dominated by Menem appointees.<sup>48</sup> The Supreme Court acknowledged that freedom of expression “fundamentally protects the essence of democracy,” but nevertheless held that information about one’s family life is private and cannot be superseded by public interests.<sup>49</sup> The court gave little weight to Menem’s high public profile as the President of Argentina or to the Articles’ political relevance and accuracy. The court also ignored the fact that much of the purportedly private information in the Articles was already publicly known as a result of prior interviews and publications. The court concluded that “neither the transparency of a public figure nor the desire to create and maintain a robust marketplace of ideas justified the violation of the right to privacy in this instance.”<sup>50</sup> It ordered D’Amico and Fontevecchia to pay Menem 60,000 pesos in damages plus interest, court costs, and fees for a total of 244,323 pesos. The damages portion of the award was equivalent to US\$60,000 when judgment was entered in 2001, and the total amount granted was equivalent to US\$84,000 when the final payment was remitted in 2005.<sup>51</sup>

The damages award entered against D’Amico and Fontevecchia was two to three times higher than the awards ordered by the Supreme Court in similar civil suits in Argentina.<sup>52</sup> The award was paid by garnishing a substantial portion of D’Amico’s monthly salary for 21

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Menem again ran for president. See Larry Rohter, *Menem bows out in Argentina*, INT’L HERALD TRIB., May 16, 2003. Menem’s political career continues even now. He is currently a member of the Argentine national senate, representing La Rioja state. See *Argentina’s Menem says he’ll run for president in 2011*, EFE NEWS SERVICES (U.S.) INC., May 3, 2008.

<sup>48</sup> Commission’s Application, *supra* note 7, at ¶ 68; see also note 23.

<sup>49</sup> Sentencia emitida el 26 de Septiembre del 2001 por la Corte Suprema de Justicia de la Nación en relación con los autos Menem /c Editorial Perfil SA y otros [hereinafter “Supreme Court Decision”], ¶¶ 6, 16.d.

<sup>50</sup> *Id.*

<sup>51</sup> Commission’s Application, *supra* note 7, at ¶ 21.

<sup>52</sup> *Id.* at ¶ 170; see also Expert Report of Julie Cesar Rivera, Submitted to the Inter-American Court of Human Rights, Aug. 8, 2011, at 6.

months.<sup>53</sup> D'Amico was also required to obtain judicial authorization before leaving the country.<sup>54</sup> By the time of the judgment, Editorial Perfil had declared bankruptcy as a result of the financial crisis in Argentina. Its financial situation had been made even more precarious by the costs of defending against Menem's many civil suits.<sup>55</sup> The company therefore could cover only the remaining judicial expenses.<sup>56</sup>

#### **D. The Commission Finds that Argentina Violated Article 13**

On November 15, 2001, D'Amico and Fontevecchia submitted this case to the Commission. The journalists argued that the Supreme Court's decision had violated Argentina's obligations under the Convention to respect and protect freedom of expression. In its Report on the Merits on July 13, 2010, the Commission agreed with Petitioners. It found that the Supreme Court had imposed manifestly unnecessary limitations on the journalists' freedom of expression that were disproportionate to the alleged infringement of Menem's privacy. The Commission recommended that Argentina revoke the judgment against D'Amico and Fontevecchia, compensate the journalists, and distribute the Commission's report to Argentina's judicial branch to prevent future violations of the right to freedom of expression. On December 22, 2010, the Commission filed this case before the Court because Argentina had failed to comply with its recommendations.<sup>57</sup>

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<sup>53</sup> Complaint, *supra* note 21, at IV.1; *see also* D'Amico Testimony, *supra* note 21.

<sup>54</sup> D'Amico Testimony, *supra* note 21.

<sup>55</sup> *See* Fontevecchia Testimony, *supra* note 21.

<sup>56</sup> Complaint, *supra* note 21, at section IV.1.a.I.

<sup>57</sup> IACHR Press Release No. 124/10, IACHR *Takes Case Involving Argentina to Inter-American Court*, December 22, 2010.

## Argument

Journalists should never be legally harassed or punished for accurate reporting on matters of public concern involving public officials. In holding the journalists liable for invading President Menem's privacy, Argentina ignored the great political importance of the matters reported by *Noticias* and the fact that Menem suffered no cognizable harm from their publication. Argentina made an example of Petitioners and sent a clear and threatening message to its press: report on politicians and risk financial ruin.

This Court should not let that judgment stand. If responsible reporting on public officials can lead to legal harassment and high damage awards, journalists in Argentina and throughout the region will be deterred from reporting on matters of public concern. The resulting loss of investigative journalism and reporting on political controversies will deprive the public of valuable information about their elected leaders and impede efforts to hold leaders accountable.

### **I. President Menem's Abusive Civil Litigation Infringes Journalists' Freedom of Expression**

No less than an unjustified criminal prosecution, abusive civil litigation is a devastatingly effective means for powerful public officials to silence journalists who work to hold them to account. CPJ urges the Court to hold that it is a violation of the right to free expression for a public official to harass a journalist through a retaliatory civil lawsuit.

Petitioners were forced to defend against President Menem's lawsuit in Argentine courts for five years. Those proceedings culminated in 2001 in a 60,000-peso damages award entered by the Supreme Court, increased to over 244,000 pesos by adding interest, court costs and fees. In this Court, Petitioners are trying to recover the amounts they paid to satisfy the Supreme Court's judgment and to vindicate the articles they published more than fifteen years ago.

Petitioners have been forced to fight President Menem’s legal claims for all these years even though there was no merit to them. The articles were undisputedly accurate. Menem acknowledged in 2007 that Nair is his son. As discussed in Point II, below, the articles did not invade President Menem’s privacy. They caused him no legally cognizable harm.

It is clear that President Menem brought suit to punish Petitioners and Editorial Perfil for reporting on his possible official misconduct—the very watchdog function the press is meant to fulfill.<sup>58</sup> This lawsuit was part of a sustained campaign of litigation Menem waged against news organizations and journalists while he was president. He brought multiple other lawsuits against Editorial Perfil, contributing to the financial difficulties that drove the company into bankruptcy.<sup>59</sup> In this case, President Menem targeted Petitioners for publishing information that others already had published. His grudge against Editorial Perfil and its journalists ran deep.

President Menem knew he could rely on the Argentine courts to support his legal claims. The State admits that the judiciary was too close to Menem. Of the nine Supreme Court justices who heard Menem’s case against Petitioners, six were his appointees. That court awarded Menem damages that were two to three times higher than the average award by Argentine courts in similar suits alleging invasion of privacy,<sup>60</sup> indicating that the award was intended to punish the exercise of free expression.<sup>61</sup> D’Amico’s wages were garnished for 21 months to pay the

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<sup>58</sup> Thorgeir Thorgeirson v. Iceland, App. No. 13778/88, ¶ 63 (Eur. Ct. H.R. 1992), *available at* [www.echr.coe.int](http://www.echr.coe.int); *see also* Lingens v. Austria, App. No. 9815/82, ¶ 44 (Eur. Ct. H.R. 1986), *available at* [www.echr.coe.int](http://www.echr.coe.int); Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission for Human Rights, *The Inter-American Legal Framework Regarding the Freedom of Expression*, Dec. 30, 2009 [hereinafter “OAS Report”] (noting “the important watchdog role of the media and ... the importance to democracy and society as a whole of vibrant, active investigative journalism”); SHEILA CORONEL, *THE ROLES OF THE NEWS MEDIA IN THE GOVERNANCE AGENDA: WATCH-DOGS, AGENDA-SETTERS, AND GATE-KEEPERS 2* (2009).

<sup>59</sup> *See* Statement of Facts, Section A, *supra* at 5.

<sup>60</sup> Commission’s Application, *supra* note 7, ¶ 170.

<sup>61</sup> Tolstoy Miloslavsky v. The United Kingdom, App. No. 18139/91, ¶ 49 (Eur. Ct. H.R. 1995) (civil sanctions awarding a sum “three times the size of the highest . . . award previously made” in that state in a similar case unduly restrict and thus violate right to free expression).

award. In effect, D'Amico worked for Menem's benefit for nearly two years to pay an award that penalized him for doing his job.

These facts plainly illustrate how abusive civil litigation infringes press freedom. Faced with the risk of meritless legal claims, interminable and costly litigation before rigged national courts, and large damage awards, even the bravest journalists think twice before reporting on possible misconduct by a public official.<sup>62</sup> This Court has stated:

the fear of a civil penalty, [in a] claim . . . for . . . very steep civil reparation, may be . . . *equally or more intimidating and inhibiting* for the exercise of freedom of expression *than a criminal punishment*, since it has the potential to [compromise] the personal and family life of an individual who accuses a public official, with the evident and very negative result of self-censorship both in the affected party and in other potential critics of the actions taken by a public official.<sup>63</sup>

The abuse of civil litigation to intimidate journalists remains a serious problem in the Americas today.<sup>64</sup> Lawsuits by public officials against journalists for allegedly offending their honor or invading their privacy have been on the rise in recent years, inhibiting coverage of issues of public concern.<sup>65</sup> In Brazil, public officials “often file multiple suits on a single matter

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<sup>62</sup> *Civil and Political Rights*, *supra* note 14, at ¶ 83 (threat of legal action “can create a climate of fear in which writers, editors and publishers become increasingly reluctant to report matters of great public interest, not only because of the large awards granted in these cases but also because of the often ruinous costs of defending such actions”); Geoffrey Robertson, *The media and judicial corruption*, in GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN THE JUDICIAL SYSTEM 113 (2007); Ana Azurmendi, *Freedom of Expression in the Jurisprudence of the Inter-American Court of Human Rights*, 2007, at § 2.4; *see also* Kasabova v. Bulgaria, App. No. 22385/03, ¶ 7 (Eur. Ct. H.R. 2011), *available at* [www.echr.coe.int](http://www.echr.coe.int).

<sup>63</sup> *Cf. see also* Tristán Donoso v. Panama, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 120 (Jan. 27, 2009) (emphasis added); *see also* Cihan Ozturk v. Turkey, App. No. 17095/03, ¶ 33 (Eur. Court H.R. 2009), *available at* [www.echr.coe.int](http://www.echr.coe.int) (“[T]he sanction imposed on the applicant was significant. This could deter others from criticizing public officials and limit the free flow of information and ideas.”).

<sup>64</sup> Carlos Lauria, Committee to Protect Journalists, *Attacks on the Press 2010: Americas*, Feb. 15, 2011, [www.cpj.org/2011/02/attacks-on-the-press-2010-americas-analysis.php](http://www.cpj.org/2011/02/attacks-on-the-press-2010-americas-analysis.php) (“Some democratically elected leaders, at the same time, have shown marked disdain for the institutions of democracy by abusing state resources to stifle dissent and silence critics. In some instances, powerful figures have used politicized courts to countermand constitutional guarantees of free expression.”); *see also* *Attacks on the Press in 2009: A Worldwide Survey by the Committee to Protect Journalists*, <http://cpj.org/2010/02/attacks-on-the-press-2009.php> [hereinafter “*Attacks on the Press in 2009*”].

<sup>65</sup> Lauria, *supra* note 64 (“The resulting rise in censorship—whether a product of government repression, judicial interference, or intimidation from criminal groups—is undermining the ability of the Latin American press to

and seek disproportionately high damages as a way of straining the financial resources of their critics.”<sup>66</sup> This practice has become so common it is known as “the industry of compensation.”<sup>67</sup> Ecuadoran President Rafael Correa also responds to criticism by filing large suits against journalists. His suits have included an \$80 million criminal defamation claim against a newspaper and several of its employees, and a \$10 million civil defamation suit against two reporters who investigated allegations that companies belonging to Fabricio Correa, the president’s brother, had obtained \$600 million in state contracts.<sup>68</sup> Civil suits and high damages also have been used against the press in Costa Rica, Panama, and Uruguay.<sup>69</sup>

With these cases, countries in the Americas are moving down a path that is all too well-trodden by nations where press freedoms are under threat and democracy is weak or illusory.<sup>70</sup> Courts in these countries have granted large monetary damages in cases involving matters of public interest, creating a climate of fear that discourages investigative reporting and exposure of corruption.<sup>71</sup> As in Argentina under President Menem, the frequency of cases brought against news organizations “suggests systematic harassment” of the press and “the abuse of privacy laws

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report the news. As the number of critical voices and the amount of investigative reporting are diminishing, topics of international importance such as drug trafficking, corruption, and human rights abuses are going underreported or entirely uncovered.”).

<sup>66</sup> *Attacks on the Press in 2009*, *supra* note 64, at 72.

<sup>67</sup> *Id.*

<sup>68</sup> See Carlos Lauria, Committee to Protect Journalists, *Confrontation, repression in Correa’s Ecuador* (Sept. 1, 2011), available at <http://www.cpj.org/reports/2011/09/confrontation-repression-correa-ecuador.php>.

<sup>69</sup> See Committee to Protect Journalists, *Attacks on the Press 2005: Panama*, <http://cpj.org/2006/02/attacks-on-the-press-2005-panama.php>; Committee to Protect Journalists, *Attacks on the Press 2004: Uruguay*, [www.cpj.org/2005/03/attacks-on-the-press-2004-uruguay.php](http://www.cpj.org/2005/03/attacks-on-the-press-2004-uruguay.php); see Committee to Protect Journalists, *Costa Rica*, [www.cpj.org/attacks97/americas/costarica.html](http://www.cpj.org/attacks97/americas/costarica.html); Committee to Protect Journalists, *Attacks on the Press 2001: Panama*, <http://cpj.org/2002/03/attacks-on-the-press-2001-panama.php>.

<sup>70</sup> See, e.g., Aaron Leaf and Emily Schmall, *In Liberia, silencing press critics through libel lawsuits*, CPJ BLOG (July 12, 2011 12:15 PM), <http://cpj.org/blog/2011/07/in-liberia-silencing-press-critics-through-libel-l.php>; Committee to Protect Journalists, *China: CPJ troubled by libel case against journalists reporting on Apple supplier*, Aug. 30, 2006, available at [www.cpj.org/2006/08/china-cpj-troubled-by-libel-case-against-journalis.php](http://www.cpj.org/2006/08/china-cpj-troubled-by-libel-case-against-journalis.php); Committee to Protect Journalists, *Independent Belarus newspaper faces closure*, Dec. 17, 2007, <http://cpj.org/2007/12/independent-belarus-newspaper-faces-closure.php#more>.

<sup>71</sup> See also *Attacks on the Press in 2009*, *supra* note 64, at 58, 72, 168, 181, 226–27.

by some state officials.”<sup>72</sup> For example, a Moroccan court ordered journalists to pay fines and damages equaling about US\$137,700 for “injuring the dignity” of Libyan leader Qaddafi.<sup>73</sup> In response, twenty publications protested “blind judicial escalation” targeting the press.<sup>74</sup>

Journalists cannot do their job when they have to spend their time and resources defending meritless lawsuits instead. CPJ urges the Court to hold that when a public official targets journalists with abusive litigation, he infringes their right to free expression just as if the journalists had been subjected to physical attack, arrest or criminal prosecution.

## **II. Argentina Breached Petitioners’ Right to Free Expression By Penalizing Them for Reporting on Matters of Public Concern Involving Public Officials**

Argentina breached Article 13 by holding Petitioners civilly liable for accurate reporting on facts relevant to then-President Menem’s suitability for office. The judgment against Fontevecchia and D’Amico was an impermissible exercise of the State’s punitive power because the Articles were not of merely prurient interest. Rather, they addressed President Menem’s exploitation of Argentina’s international relations to benefit his former mistress and their son, discussed his alleged non-compliance with domestic law regarding child support, and raised concerns about possible corruption—all matters of significant public interest.

Article 13 of the Convention protects the right of journalists and others to “impart information and ideas of all kinds.”<sup>75</sup> That right cannot be subject to prior constraint, and a state

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<sup>72</sup> Transparency International, *Global Corruption Report 2003*, at 49 (“One example of severely repressive legislation is Kazakhstan’s libel law, which is used to financially weaken media critical of the political and commercial oligarchy. . . . The sheer volume of cases filed suggests systematic harassment of the weekly and the abuse of privacy laws by some state officials.”).

<sup>73</sup> *Attacks on the Press in 2009*, *supra* note 64, at 226.

<sup>74</sup> *Id.* at 230.

<sup>75</sup> Organization of American States, *American Convention on Human Rights*, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter “Convention”], Art. 13(1).

may only subsequently impose liability “to the extent necessary to ensure” among other things, “respect for the rights or reputations of others,” including the right to privacy.<sup>76</sup> When news reports are challenged as invasions of privacy, “the decisive factor” in balancing these rights is “the contribution made by the photos or articles in the press to a debate of general interest.”<sup>77</sup>

Any restriction on expression to protect privacy must comply with the Convention.<sup>78</sup> The judgment entered against Petitioners violated the Convention because it penalized expression of great public importance.

A public official must carry a heavier burden than a private individual to prove that the press has invaded his privacy, because “in a democratic society political and public personalities are more exposed to scrutiny and the criticism of the public.”<sup>79</sup> To “minimize restrictions on the dissemination of information,”<sup>80</sup> an individual contending that articles violated his right to privacy must prove that they constituted “arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or . . . unlawful attacks on his honor or

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<sup>76</sup> *Id.* Art. 13(2). The right to privacy is recognized and protected in Article 11 of the Convention. *See infra* Section II.B.

<sup>77</sup> *Von Hannover v. Germany*, App. No. 59320/00, ¶ 76 (Eur. Ct. H.R. 2004), *available at* [www.echr.coe.int](http://www.echr.coe.int) (holding in favor of the right to respect for private life, because the reporting made no contribution to a debate of general interest as the applicant “exercise[d] no official function and the photos and articles related exclusively to details of her private life.”); *see also* *Saaristo and Others v. Finland*, App. No. 184/06, ¶ 62 (Eur. Ct. H.R. 2010), *available at* [www.echr.coe.int](http://www.echr.coe.int); *Sentencia de Unificación 1723/00 de Corte Constitucional* [Constitutional Court of Colombia], 12 December 2000, ¶ 27 (“Como se ha visto, el criterio de relevancia pública también comprende la necesidad de un interés legítimo de la sociedad para conocer información relacionada con aspectos personales e íntimos de un individuo.”); *accord* *Amparo Directo en Revisión 2044/2008* [Supreme Court of Mexico], 17 June 2009, at 21-22; *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (“As Warren and Brandeis stated in their classic law review article: ‘The right of privacy does not prohibit any publication of matter which is of public or general interest.’ . . . One of the costs associated with participation in public affairs is an attendant loss of privacy.”); *Connick v. Myers*, 461 U.S. 138, 143 n.2 (1983).

<sup>78</sup> *Kimel v. Argentina*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 177, ¶ 54 (May 2, 2008).

<sup>79</sup> *Id.* ¶ 86; *see also* *Tristán Donoso v. Panama*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193, ¶ 115 (Jan. 27, 2009); *Herrera Ulloa v. Costa Rica*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, 129 (July 2, 2004).

<sup>80</sup> *Kimel*, No. 177, at ¶ 57.

reputation.”<sup>81</sup> Each case must be examined “in accordance with its specific characteristics and circumstances.”<sup>82</sup> The central circumstances of this case are that the privacy claim has no merit, and the case is part of a pattern of President Menem’s meritless legal harassment of the press.

The Argentine Supreme Court failed to give any weight to the fact that the Articles accurately reported on issues of significant political relevance to the Argentine public. Nor did the Supreme Court give any weight to the complainant’s extremely high public profile. Instead, acting out of allegiance to President Menem, the court displayed excessive and uncritical concern for his claims that Petitioners had invaded his privacy. This Court should condemn Argentina’s failure to recognize the right to report freely on matters of public concern.

**A. The *Noticias* Articles are especially protected because they reported on possible misconduct by Argentina’s president.**

The Articles lie at the heart of the right to free expression.<sup>83</sup> This Court, the European Court of Human Rights, and national courts around the world have recognized that speech concerning “the suitability of an individual for holding public office or regarding the acts performed by public officials in the course of their duties”<sup>84</sup> is especially protected. Such speech contributes to “the functioning of a truly democratic system”<sup>85</sup> by promoting “the transparency of the actions of the State and foster[ing] the accountability of public officials.”<sup>86</sup>

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<sup>81</sup> Convention, *supra* note 75, at art. 11(2).

<sup>82</sup> *Kimel*, No. 177, at ¶ 51.

<sup>83</sup> See European Convention on Human Rights, Art. 10; U.S. Const. amend. I.

<sup>84</sup> *Tristán Donoso*, No. 193, at ¶ 115; *Ricardo Canese v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 111, ¶ 103 (Aug. 31, 2004); *Kimel*, No. 177, at ¶ 86.

<sup>85</sup> *Ricardo Canese*, No. 111, at ¶ 98; see also OAS Report, *supra* note 58, at ¶ 33 (“[T]he adequate functioning of democracy requires the greatest possible circulation of reports, opinions and ideas on matters of public interest.”).

<sup>86</sup> *Palamara-Iribarne v. Chile*, Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 135, ¶ 83 (Nov. 22, 2005); see also *Herrera-Ulloa*, No. 107, at ¶ 127; *Kimel*, No. 177, at ¶ 87.

The Articles reported on “the manner in which a high ranking public official . . . exercise[d] his . . . statutory powers.”<sup>87</sup> They reported on extravagant gifts that Menem had given to his then-mistress Martha Meza and their child. Meza herself was a public official and a member of Menem’s political party. These gifts included expensive jewels for Meza and large sums of money, such as a US\$1 million trust fund for Nair and a US\$20,000 monthly stipend for Meza. The origin of these sums was highly questionable given that President Menem was earning a public official’s salary.<sup>88</sup> Facts such as these about a high-level government official would be relevant to the public at any time. They were especially pertinent in the context of Argentine politics in the 1990s, when official corruption was widely judged to be rampant.<sup>89</sup> Because “corruption [and] public morality . . . have vaulted into the center of political debates,”<sup>90</sup> reports about possible abuses of power or public resources and disregard of domestic law by public officials are matters of great public interest.

Further, Menem’s conduct toward Nair and Meza, and his refusal for many years to acknowledge publicly that he was Nair’s father, reflected on his public persona in a manner of significant interest to the electorate and to history. Menem is not unique among high-level elected officials in this regard. Former French president François Mitterrand, former U.S. presidential candidate John Edwards, and former California governor Arnold Schwarzenegger

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<sup>87</sup> *Tristán Donoso*, No. 193, at ¶ 121.

<sup>88</sup> As president of Argentina, Menem earned approximately 5,000 pesos (US\$5,000 in 2001) per month. *See Serrat*, *supra* note 28.

<sup>89</sup> Statement of Facts, *supra*, at 5; *see also Tristán Donoso*, No. 193, at ¶ 123 (“[T]he Judiciary must take into account the context in which the statements involving matters of public interest are made[.]”); *accord Ivcher-Bronstein v. Peru*, Merits, Reparations and Costs. Judgment, Inter-Am Ct. H.R., (ser. C) No. 74, ¶ 154, Feb. 6, 2001.

<sup>90</sup> *WAISBORD*, *supra* note 7, at 210.

each received widespread coverage by responsible news organizations because of the public concern surrounding his conduct regarding his paternity of a child.<sup>91</sup>

The public is able to “question, investigate and consider whether public duties are being performed adequately” only when it has access to the relevant information.<sup>92</sup> The press therefore plays a crucial role in uncovering possible government corruption.<sup>93</sup> During Menem’s presidency, Congress and the judiciary were unable or unwilling to curtail widespread corruption and abuse of power by government officials. Publications like *Noticias* regularly published exposés of public wrongdoing.<sup>94</sup> Because of the central role of the press in a free society, the Convention properly affords states little leeway to restrict or sanction news reports about the conduct of public officials.<sup>95</sup> This applies to sanctions awarded in private civil litigation just as it applies to criminal prosecution and other direct action against journalists by the government.<sup>96</sup>

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<sup>91</sup> See, e.g., Julie Bosman, *Edwards Admits He Fathered Girl With Mistress*, N.Y. TIMES, Jan 22, 2010, at A12; Mark Z. Barabak & Victoria Kim, *Ex-gov. fathered child with household staffer; Maria Shriver moved out of their home earlier this year after learning of paternity*, L.A. TIMES, May 17, 2011, at A1; Muriel Frat, *L’enfance cachée de Mazarine*, LE FIGARO, Jan 6, 2006, at 41.

<sup>92</sup> *Claude-Reyes et al. v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 86 (Sept. 19, 2006).

<sup>93</sup> See, e.g., Bettina Peters, *The media’s role: covering or covering up corruption?*, “Global Corruption Report 2003”, in GLOBAL CORRUPTION 44, 44 (2002) (“[T]he media can shape the climate of democratic debate and help the establishment and maintenance of good governance.”); SHEILA CORONEL, THE ROLES OF THE NEWS MEDIA IN THE GOVERNANCE AGENDA: WATCH-DOGS, AGENDA-SETTERS, AND GATE-KEEPERS 1 (2009); Joint Declaration between the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression (2004), available at <http://www.cidh.org/relatoria/showarticle.asp?artID=319&IID=1>.

<sup>94</sup> Committee to Protect Journalists, *Attacks on the Press 1997- Argentina*, Feb. 1998, <http://www.unhcr.org/refworld/docid/47c565251c.html>; Committee to Protect Journalists, *Attacks on the Press 1996 – Argentina*, Feb. 1997, <http://www.unhcr.org/refworld/docid/47c564f5c.html>; see also Amnesty International, *Argentina: Journalists: Press accreditation - The wrong credentials?: Threats, attacks and intimidation against members of the press*, 29 June 2004, AMR 13/005/2004, at 2, [www.unhcr.org/refworld/docid/42ae98400.html](http://www.unhcr.org/refworld/docid/42ae98400.html); WAISBORD, *supra* note 7, at 33-36.

<sup>95</sup> *Herrera Ulloa*, No. 107, at ¶ 127 (“debe existir un margen reducido a cualquier restricción del debate político o del debate sobre cuestiones de interés público”), *Ivcher-Bronstein*, No. 74, at ¶ 155.

<sup>96</sup> *Cf.* Convention, *supra* note 75, at art. 13(3) (“The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint . . . or by any other means tending to impede the communication and circulation of ideas and opinions.”).

**B. Petitioners should not have been sanctioned because accurate reporting on matters of public concern can never constitute arbitrary or abusive interference with the right to privacy.**

Argentina's imposition of liability on Petitioners also breaches the Convention because there was no "arbitrary or abusive interference" with Menem's privacy that could justify restricting Petitioners' freedom of expression.<sup>97</sup>

*First*, an elected official cannot conveniently assume the guise of a regular citizen when bringing a privacy claim against journalists. To the contrary, politicians like Menem have "implicitly consented to some restrictions of their rights[;] their role as public figures makes them a matter of public interest, [so] it is expected that both their public activities and private life will be meticulously observed by society."<sup>98</sup> At the time the Articles were published, Menem had just been re-elected to the highest public office in Argentina. By seeking election to that post—twice—he had "inevitably and knowingly la[id] himself open to close scrutiny of his every word and deed by both journalists and the public at large."<sup>99</sup> Menem was required to "display a greater degree of tolerance"<sup>100</sup> because "public officials must account for the

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<sup>97</sup> *Tristán Donoso*, No. 193, at ¶ 55 (In construing Article 11, "[t]he Court has held that the sphere of privacy is characterized by being exempt from and immune to abusive and arbitrary invasion or attack by third parties or by the public authorities.").

<sup>98</sup> Corte Constitucional [C.C.] [Constitutional Court], March 5, 1998, Sentencia T-066/98, *available at* <http://www.wcl.american.edu/pub/humright/red/decisiones/t066-98-semana.htm>. In this case, the court ruled in favor of the press, emphasizing that the subjects of the article were public figures, and explaining that the article was of public importance because it discussed local public officials' relationship with guerrilla activity. *See also Kimel*, No. 177, at ¶ 86 (holding that the reduced "threshold [of privacy] is not based on the nature of the individual, but on the public interest inherent in the actions he performs[.]"); *Saaristo*, App. No. 184/06, at ¶ 66 (Eur. Ct. H.R. 2010); *En contra de la resolución precisada en el resultando anterior, porcede al amparo directo*, Plen do la Suprema Corte de Justicia [SCJN] [Supreme Court], 6/2009, (Oct. 9, 2009), pagina 71 (Mex.).

<sup>99</sup> *Lingens*, App. No. 9815/82, at ¶ 42; *see also Kimel*, No. 177, at ¶ 86; *Herrera-Ulloa*, No. 107, at ¶ 129; *Ukrainian Media Group v. Ukraine*, App. No. 44647/98, (Eur. Ct. H.R. 2005) ¶ 67, *available at* [www.echr.coe.int](http://www.echr.coe.int) ("[I]n choosing their profession, they [plaintiff politicians] laid themselves open to robust criticism and scrutiny; such is the burden which must be accepted by politicians in a democratic society[.]").

<sup>100</sup> *Lingens*, App. No. 9815/82, at ¶ 42.

performance of their duties.” He could not seek to repress speech or other forms of expression merely because they “shock[ed], irritate[d] or disturb[ed]” him.<sup>101</sup>

A public figure’s “claim to respect for private life is automatically reduced to the extent that [he] brings his private life into contact with public life.”<sup>102</sup> President Menem’s disregard of the distinction between his public and private lives is central to the November 12 Article, which recounts Menem’s request to the Paraguayan president to provide asylum and protection to Congresswoman Meza and their son. President Menem had no reasonable expectation of privacy where he had used public power to benefit his former mistress and their son.

*Second*, no truly private facts were reported by the Petitioners. President Menem’s relationship with his son and Congresswoman Meza had been publicly known for several years. Meza first publicly disclosed the existence of their son, and her allegation that Menem had failed to provide for the child, during Menem’s 1988 presidential campaign. In 1993, Menem’s affair with Meza and the birth of their son were discussed in the bestselling book *El Jefe* written by a prominent Argentine journalist. And in 1994—more than a year before the Articles were published—Nair’s relationship to Menem was the subject of two interviews Congresswoman Meza gave to the media, and questions posed by the divorce attorney for President Menem’s wife. Menem’s right to privacy was not implicated because the allegedly intrusive facts in the Article were already in the public domain. Indeed, Menem’s targeting of Fontevicchia and D’Amico over publication of information that was already widely known strongly suggests that he brought suit to exact retribution, not to redress any genuine violation of his privacy.

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<sup>101</sup> *Kimel*, No. 177, at ¶ 88; *see also Herrera Ulloa*, No. 107, at ¶ 113.

<sup>102</sup> *Shabanov & Tren v. Russia*, App. No. 5433/02, ¶ 46 (Eur. Ct. H.R. 2006), *available at* [www.echr.coe.int](http://www.echr.coe.int); *see also P.G. & J.H. v. The United Kingdom*, App. No. 44787/98, ¶ 57 (Eur. Ct. H.R. 2001), *available at* [www.echr.coe.int](http://www.echr.coe.int).

*Third*, even if the facts reported in the Articles were deemed private, the Convention still fully protects *Noticias*' reporting because it addressed matters of undeniable relevance to the public's assessment of President Menem's suitability for office. Unlike cases in which courts have upheld privacy challenges, the Articles were not published "with the sole purpose" of satisfying "the curiosity of a particular readership regarding the details of a public figure's private life."<sup>103</sup> The topics discussed in the Articles extend "beyond the private sphere and belong to the realm of public debate."<sup>104</sup> The Articles did not use sensational language and were based on interviews, judicial records and other verifiable sources.<sup>105</sup> *Noticias* sought advice of counsel and confirmed the accuracy of its reporting with Congresswoman Meza. President Menem has never contended that the facts recounted in the Articles were false. The right to free expression requires judges to afford significant respect to the editorial judgment of the press on whether and how to report information about government officials.<sup>106</sup> Here, the record shows that the Articles were the product of reasonable and professional editorial judgment.

These principles apply equally to the photographs that accompanied the text of the Articles. This is not a case in which an unsuspecting public figure was ambushed by

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<sup>103</sup> *MGN Limited v. The United Kingdom*, App. No. 39401/04, ¶ 143 (Eur. Ct. H.R. 2011), available at [www.echr.coe.int](http://www.echr.coe.int); *accord Von Hannover*, App. No. 59320/00, at ¶ 65; *Standard Verlags GMBH v. Austria*, App. No. 21277/05, ¶ 52 (Eur. Ct. H.R. 2009), available at <http://www.echr.coe.int>.

<sup>104</sup> *Kimel*, No. 177, at ¶ 86; *accord Herrera Ulloa*, No. 107, at ¶ 129; *Tristán Donoso*, No. 193, at ¶ 115; *Ricardo Canese*, No. 111, at ¶ 103.

<sup>105</sup> See *Saaristo*, App. No. 184/06, at ¶ 65, *Kimel*, No. 177, at ¶ 92 (citing these factors in assessing appropriateness of sanctions on publications); see also *Ukrainian Media Group*, App. No. 44647/, at ¶ 39 ("[T]he [politician] inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance.")

<sup>106</sup> See, e.g., *Saliyev v. Russia*, App. No. 35016/03, ¶ 54 (Eur. Ct. H.R. 2010), available at [www.echr.coe.int](http://www.echr.coe.int) ("The choice of the material that goes into a newspaper, the decisions made as to limitations and the size and content of the paper and the treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment."); *MGN Limited*, App. No. 39401/04, at ¶ 141 ("[I]t is . . . not for this Court, nor for the national courts, to substitute its own views for those of the press as to what technique of reporting should be adopted . . ."); *Pittsburgh Press Co. v. Human Relations Comm'n.*, 413 U.S. 376, 391 (1973) (U.S. Supreme Court "reaffirm[ing] unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial").

paparazzi.<sup>107</sup> The photographs were taken by President Menem’s staff, in the presence of many journalists, and were distributed to the press for the express purpose of publication.<sup>108</sup> Menem suffered no legally cognizable injury from the publication of photographs that were never private and which were always intended to be printed for mass consumption.<sup>109</sup> Moreover, *Noticias* used the photographs responsibly: the child’s face was pixilated to protect his image, and inclusion of the photos was “necessary to ensure the credibility of the story.”<sup>110</sup>

Unlike Argentina’s courts in this case, other courts in the Americas have protected freedom of expression in cases where reporting involved arguably private facts of public interest. In Mexico, the magazine *Proceso* published an article revealing the previous marriage of the wife of the nation’s president. The president’s wife sued the journalists for invasion of privacy. Applying the standards elucidated by this Court, the Supreme Court of Mexico held that press freedom cannot be curtailed on the ground of privacy when private facts are of public importance, “whether due to [the person’s] public conduct or to those private aspects which are of interest to the community.”<sup>111</sup> The Supreme Court of Colombia has also protected freedom of expression against privacy claims where public figures and facts of public interest are

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<sup>107</sup> See *Von Hannover*, App. No. 59320/00, at ¶ 68 (“The Court finds another point to be of importance...the context in which these photos were taken—without the applicant’s knowledge or consent—and the harassment endured by many public figures in their daily lives cannot be fully disregarded[.]”); *MGN Limited*, App. No. 39401/04, at ¶ 151.

<sup>108</sup> D’Amico Testimony, *supra* note 21.

<sup>109</sup> Commission’s Application, *supra* note 7, at ¶ 161; D’Amico Testimony, *supra* note 21; see *Shabanov & Tren*, App. No. 5433/02, at 46 (claim to privacy weakened where complainant “knowingly . . . involve[d] [himself] in activities which are or may be recorded or reported in a public manner,” or “voluntarily supplied the information and . . . could reasonabl[y] anticipate the later use made of the material”); *accord PG & JH*, App. No. 44787/98 at ¶ 57.

<sup>110</sup> *MGN Limited*, App. No. 39401/04, ¶ 151.

<sup>111</sup> Amparo Directo en Revisión 6/2009 [Supreme Court of Mexico], 6/2009, October 9, 2009 (Mex.), at 78-79 (Mex.).

involved.<sup>112</sup> This Court should support these efforts and discourage breaches by other States by declaring that Argentina's imposition of civil liability in this case violated the Convention.

**Conclusion**

CPJ respectfully requests the Court to declare that Argentina violated Article 13; to order Argentina to render the judgment against Petitioners without effect; and to order Argentina to fully compensate Petitioners.

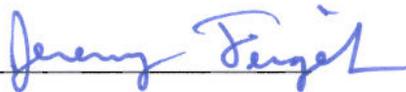
Dated: New York, New York  
September 9, 2011

Respectfully submitted,

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<sup>112</sup> Corte Constitucional [C.C.] [Constitutional Court], March 5, 1998, Sentencia T-066/98, at ¶ 19, *available at* <http://www.wcl.american.edu/pub/humright/red/decisiones/t066-98-semana.htm> (“En su jurisprudencia, esta Corporación ha manifestado que cuando se presentan conflictos entre el derecho a la información y los derechos a la honra, el buen nombre y la intimidad, en el caso de las personas y los hechos de importancia públicos, predomina *prima facie* el primero.”).