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# Legal Responses to Online Harassment and Abuse of Journalists: Perspectives from Finland, France and Ireland

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## Editor's Foreword

The online harassment of journalists is a phenomenon that has prompted growing concern in recent years. Journalists who report on contested social and political issues increasingly find themselves the target of abuse through social media, online comment fora and other online means, in some cases including violent threats of death and rape. While retaliation for the content of professional output is common to all journalists, female journalists face an additional burden in that they are also attacked purely on the basis of their gender. In some cases, this abuse is seen to form part of an organized campaign led by political or other interest groups to silence critical discussion.

Research by various press rights groups, including the Vienna-based International Press Institute (IPI), have revealed the extent of the problem across the OSCE region, not merely in those participating States where press freedom is traditionally seen as challenged. This research has shown that journalists targeted with online harassment face severe personal and professional consequences. Worse still, journalists may decide to avoid covering certain topics, which in turn denies audiences' ability to receive information of public interest.

The risks that online harassment pose to the free flow of information and the democratic exchange of ideas demand an urgent response. A multi-pronged approach is essential, given the numerous factors that prompt online attacks on journalists. For one, media organizations in the OSCE region are working to develop internal protocols to better prevent online harassment and protect their journalists from its impact. These protocols look at, among other things, internal psychological and legal support for journalists; proper reporting of online harassment to management; community management and content forum moderation; and relations with social media and other third-party companies to address and remove online abuse. Research into best practices in this area is ongoing.

For another, it is clear that state-led measures are needed to combat online harassment as a societal phenomenon. While these measures range from increased social media literacy in school curricula, to an overall commitment by political actors to reduce the polarization that feeds online vitriol, there is a clear need for proper legal remedies, to ensure that online aggressors are held accountable for their actions in the virtual world and to deter would-be attackers. In many cases, however, there is a lack of clarity about how best to pursue legal accountability for online harassment, which in some cases may lead to the adoption of new, overly broad laws that harm freedom of expression.

This report specifically examines legal remedies for online attacks against journalists. It looks at three case studies, in Finland, France and Ireland, of female journalists who were viciously attacked online for their work and the ensuing attempts to hold the perpetrators accountable. From an analysis of the case studies, it offers best practices and recommendations for OSCE participating States in implementing and interpreting laws so as to effectively respond to the diverse and growing forms of online harassment and protect the rights of journalists to do their work safely online without compromising freedom of expression as guaranteed by international human rights law.

## Introduction

Online harassment and abuse have become widespread, with social media platforms and other digital spaces being inundated with targeted, hostile and threatening invective.[1] A target group for this harassment and abuse is journalists, and female journalists in particular.[2] A recent study from Amnesty International, which used machine learning and data science to analyse millions of tweets received by 778 journalists and politicians from the UK and US in 2017, found that one in every 14 tweets received by female journalists was either abusive, hurtful or hostile.[3]

This kind of online environment can have a profound "chilling effect" on journalism and can ultimately negatively impact one of the tenets of a democratic society, press freedom. Journalists may avoid reporting on certain topics that they know, or suspect, will be met with online harassment and abuse. Online harassment of journalists interferes not only with the media's right to impart information of public interest, but also with the public's right to receive such information. This report critically analyses the legislative framework adopted or proposed in three jurisdictions that may be used to penalize, curtail or remedy online harassment and abuse of journalists.

There are many ways in which a journalist can be harassed or abused online, and some of these methods are not dissimilar to the harassment or abuse that people can experience in the offline world (e.g., repeated and unwanted contact). Nonetheless, the unique nature of the Internet, which allows individuals to communicate instantaneously across the globe, and with the potential to do so anonymously, can often increase the harm sustained by those who are harassed or abused. Furthermore, the disconnection that is felt by users on the Internet can often lead these individuals to act in ways that they would not otherwise act in the non-digital world.[4]

For the purpose of this research, this report will only place focus on the following types of online harassment or abuse:

- **"Cyberstalking"**: This is how most people understand harassment through online communications. It is when an individual sends numerous unsolicited messages to another person (i.e., "direct communications") that cause the other person distress, anxiety or other forms of harm. This activity can arise out of malice, obsession or

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1 Pew Research Center, *Online Harassment 2017*, available at: http://www.pewinternet.org/2017/07/11/online-harassment-2017/.

2 Reuters, *'I will rape you': female journalists face 'relentless' abuse*, available at: https://www.reuters.com/article/us-global-women-media/i-will-rape-you-female-journalists-face-relentless-abuse-idUSKCN1LT39G; International Women's Media Foundation, *Attacks and Harassment: The Impact on Female Journalists and Their Reporting*, available at: https://www.iwmf.org/wp-content/uploads/2018/09/Attacks-and-Harassment.pdf.

3 Amnesty International, *Troll Patrol Findings: Using Crowdsourcing, Data Science & Machine Learning to Measure Violence and Abuse against Women on Twitter*, available at: https://decoders.amnesty.org/projects/troll-patrol/findings.

4 See Suler, *The Online Disinhibition Effect* (2004) 7(3) Cyber Psychology & Behaviour 321. According to Suler, anonymity is one of the principal factors which creates the online disinhibition effect because it allows people to separate their online selves from their offline selves creating a sense that behaviour which occurs online is not as "real" as that which takes place offline.

fixation on the part of the perpetrator.[5] As well as e-mailing or directly messaging a victim online, the practice of "tagging"[6] or "@-mentioning"[7] someone on social media can be another means of "cyberstalking" them. This practice is where, by using the "@" symbol followed by the victim's username, a user can notify the victim that she has been mentioned in the user's otherwise publicly available post. Accordingly, the practice of repeatedly "tagging" or "@-mentioning" an individual can instil the same feelings of distress, anxiety or fear as can be caused by repeated direct contact through private communication channels. Furthermore, the victim will usually be notified each time the original post "tagging" or "@-mentioning" her is "liked" by another user of the social media platform, which can intensify and aggravate the impact of the communication or even turn a once-off message into a repeated one. In July 2018, an Oklahoma man, Jordan Richison, was arrested following allegations that he had been stalking a number of female reporters online.[8] He would create Facebook accounts of non-existent journalists and real members of the public to communicate with these reporters. One of his victims, Stephanie Pagliaro, a radio journalist from Pennsylvania, had received messages from him on Facebook Messenger and he had used publicly available information about her to strike up conversations. Since this incident, Ms. Pagliaro has reported being more cautious of engaging with viewers and listeners who were well-meaning.[9]

- **Sending intimidating, threatening or offensive messages**: Online abuse can also take the form of grossly offensive, aggressive and threatening messages that put an individual in fear of her personal safety or security. In July 2018, Italian journalist Marilù Mastrogiovanni received around 7,000 death threats to her professional email account after her newspaper had published a story linking organized crime to the tourist business in Sicily.[10] It is believed that these threats were coming from the mafia, and Ms. Mastrogiovanni is one of ten Italian journalists receiving full-time police protection.[11]

- **Online impersonation and trolling:** This often involves harmful messages and communications about a person sent to a third party rather than directly to the victim (i.e. "indirect communications"). These communications can subsequently come to the knowledge of the victim and cause anxiety, stress or fear. For example,

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5 BBC, *What's the difference between a stalker and a super-fan?*, available at: https://www.bbc.co.uk/news/magazine-36095672.

6 Social Media Today, *Understanding and Using # Tags and @ Tags*, available at: https://www.socialmediatoday.com/social-networks/courtney-hunt/2015-07-06/understanding-and-using-tags-and-tags.

7 MashableUK, *How the @-Mention Took Over Social Networks*, available at: https://mashable.com/2014/01/14/social-web-language/?europe=true#Iq7gU4_DlPqw.

8 KJRH, *Oklahoma man accused of stalking reporters in US*, available at: https://www.kjrh.com/news/local-news/oklahoma-man-accused-of-stalking-reporters-in-us.

9 Committee to Protect Journalists, *For local female journalists in US, rape threats, stalkers, harassment can come with the beat*, available at: https://cpj.org/blog/2019/01/for-local-female-journalists-in-us-rape-threats-st.php.

10 European Federation of Journalists, *Italy: Several journalists facing threats related to their stories*, available at: https://europeanjournalists.org/blog/2018/07/17/italy-escalation-of-attacks-against-the-press/.

11 Reporters Without Borders, *Italian woman reporter defies mafia death threats*, available at: https://rsf.org/en/news/italian-woman-reporter-defies-mafia-death-threats.

there have been examples of cases where individuals have set up websites dedicated to monitoring and criticizing a female journalist.[12] Other forms of harassment through "indirect communications" include the posting of (real or doctored) intimate images of the victim without the victim's consent (i.e. "revenge porn"), and the publication of fake profiles, photoshopped headlines, and doctored social media posts aimed at destroying the credibility of the victim and subjecting her to abuse. In February 2018, when trying to cover the Marjory Stoneman Douglas High School shooting in Parkland, Florida, reporters noticed doctored tweets being circulated that tried to make them look as though they were acting inappropriately in how they carried out their newsgathering activities. Alex Harris, a breaking news reporter from the Miami Herald, had a fake tweet that showed her asking someone for photos or videos of dead bodies following the shooting.[13] Numerous Twitter followers responded to these fake tweets and harassed Ms. Harris.[14] When she tried to explain that the tweets were doctored, many users did not believe her and accused her of having deleted the tweet.[15] The fake tweet was shared on Reddit and a white nationalist message board. Users of these sites accused her of being racist and questioned her gender.[16] After this fake tweet, she decided to start reporting on the story of the victims of the shooting rather than the survivors.[17]

- **Online harassment campaigns (including "pile on" harassment)**: This is where a person experiences a sustained campaign of harassment from a number of different individuals. This campaign may be co-ordinated, or it could occur without prior organization.[18] For example, it can start with one message from one user that then provokes many other users to send offensive, violent, intimidating, hostile or targeted messages to the victim (i.e. "pile on"). This kind of activity often falls short of the legal definition of "harassment" in many jurisdictions, since each actor will only be sending one message that is not necessarily, on its own, particularly serious or unlawful. However, when seen in context, it contributes to a sustained harassment campaign that can have a profound impact on a journalist and her ability to carry out her work. In November 2018, a BBC presenter, Andrew Neill, tweeted (in response to a question) "[n]othing compared to having to deal with mad cat woman from Simpson's, Karol Kodswallop". This tweet was referring to Guardian journalist Carole Cadwalladr and was sent at 3.15am in a conversation unrelated to the

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12 Taylor Lorenz, a staff writer at The Atlantic, who covers technology and culture, found a website critiquing and making fun of her after she had reported on alt-right troll Pamela Geller. The website stated that "Taylor Lorenz is not associated with this website in any way, but we hope she notices all the hard work we put into this parody website." At the time the website was established, people also posted the address of Ms. Lorenz's parents and harassed her relatives. Poynter, *Women in public-facing journalism jobs are exhausted by harassment*, available at: https://www.poynter.org/business-work/2018/women-in-public-facing-journalism-jobs-are-exhausted-by-harassment/.

13 Poynter, *Imposter tweets made it even harder for a reporter to cover Florida school shooting*, available at: https://www.poynter.org/fact-checking/2018/imposter-tweets-made-it-even-harder-for-a-reporter-to-cover-florida-school-shooting/.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 See UK Law Commission, *Reform of the criminal law needed to protect victims from online abuse says Law Commission*, available at: https://www.lawcom.gov.uk/reform-of-the-criminal-law-needed-to-protect-victims-from-online-abuse-says-law-commission/.

journalist. This tweet had "unleashed a whole new torrent of hate and abuse" against Ms. Cadwalladr.[19] Writing about the incident, she noted that the imagery behind the tweet (i.e. "mad cat woman") did not originate with Mr. Neill. Instead, it formed a "key piece" of the arsenal used by a businessman, Aaron Banks, in his "targeted harassment" against her.[20] This harassment campaign was aimed at silencing her work exposing Mr. Banks' alleged misconduct in the context of the Brexit referendum.

- **"Doxing"**: This is the online practice of researching and broadcasting private or personally identifiable information about an individual – such as her telephone number or email and home address – in an environment that implies or encourages intimidation or threat. This can then lead to or encourage the phenomenon of online harassment campaigns/"pile on" (described above), as a large group of individuals now have the information needed to directly contact the victim. This occurred to a Finnish journalist, Linda Pelkonen, after she reported a story about the rape of a 14-year-old girl. In her article, she highlighted the unusual fact that the police report on the crime had identified the suspect's ethnicity. Following this story, the anti-immigrant news website MV Lehti led a smear campaign against Ms. Pelkonen. In the comment section of an article on the MV Lehti site, a reader published Ms. Pelkonen's mobile number and encouraged others to contact the journalist.[21] She subsequently received threatening and abusive text messages from 18 different phone numbers.[22]

As can be demonstrated from some of the examples above, the different forms of harassment and abuse that journalists experience online can have a serious "chilling effect" on their journalism. Widespread harassment and abuse can turn some social media platforms, which many journalists are expected to engage with in their work, into hostile environments. As Scottish journalist, Vonny Moyes, told Amnesty in its study;

> "[t]he majority of the abuse I receive is Twitter-based because I have a very active Twitter profile and following – part of which is necessary for the job I do. You can't really be a journalist without being on Twitter these days because it's where news breaks. Its where a lot of my work comes from... I guess I would say I have come to expect everything I post online, whether it's a tweet or a piece of writing to have some type of pushback. It's become as if I have had to develop combat navigation skills, not just to do my job but to be a woman occupying space on the internet."[23]

In 2018, the International Women's Media Foundation and Troll-Busters.com held a survey of 597 female journalists and found that approximately 40 percent of those who were

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19 *Id.*

20 *Id.*

21 Union of Journalists in Finland, *Journalist subject to hate speech glad of union's support for legal struggle*, available at: https://journalistiliitto.fi/en/journalist-subject-to-hate-speech-glad-of-unions-support-for-legal-struggle/.

22 International Press Institute, *Journalists in Finland face 'unprecedented' levels of online abuse*, available at: https://ipi.media/journalists-in-finland-face-unprecedented-levels-of-online-abuse/.

23 Amnesty International, *#TOXICTWITTER: Violence and Abuse Against Women Online*, available at: https://www.amnesty.org/download/Documents/ACT3080702018ENGLISH.PDF, p. 16.

threatened and harassed online avoided certain stories as a result of this.[24] As with other forms of harassment experienced by journalists, such as frivolous and vexatious legal claims that may be brought against them,[25] online harassment and abuse can often result in a journalist's energies being directed towards dealing with this problem rather than carrying out her work.[26]

Journalists may also be impeded from exercising their right to freedom of expression even when they are not a direct victim of the online abuse or harassment. In 2017, the Pew Research Center found that almost three in every ten Americans (27 percent) say that witnessing online harassment of others has caused them to refrain from posting something online.[27] Similarly, the harassment, intimidation or abuse that a journalist experiences online can negatively impact a source's willingness to work with her on certain stories.[28] This will inevitably impact a journalist's ability to carry out newsgathering activities, a protected aspect of the right to freedom of expression.

## Online Harassment and International Obligations

Under international human rights law, the right of journalists to express themselves freely is recognized by Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR), which provides that "[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." This provision protects all forms and means of expression, including "electronic and internet-based modes of expression."[29]

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[24] International Women's Media Foundation, *Attacks and Harassment: The Impact on Female Journalists and Their Reporting*, available at: https://www.iwmf.org/wp-content/uploads/2018/09/Attacks-and-Harassment.pdf, p. 7.

[25] See The Guardian, *MEPs call for power to tackle 'vexatious lawsuits' targeting journalists*, available at: https://www.theguardian.com/world/2018/feb/22/meps-call-for-power-to-tackle-vexatious-lawsuits-targeting-journalists.

[26] For example, in January 2018, UK Channel 4 news presenter Cathy Newman had to bring on specialist security experts to verify online threats made against her. The Guardian, *C4 calls in security experts after presenter suffers online abuse*, available at https://www.theguardian.com/society/2018/jan/19/channel-4-calls-in-security-experts-after-cathy-newman-suffers-online-abuse.

[27] Pew Research Center, *Online Harassment 2017*, available at: http://www.pewinternet.org/2017/07/11/online-harassment-2017/.

[28] Sorcha Pollak, an Irish Times journalist who writes a column about people who have moved to Ireland from other countries, has spoken about the impact of online abuse on her ability to interview people for that column. She said "[w]e noticed straight away that the pieces do attract some online abuse. It emerged early on, on Facebook mostly. I'm very uncomfortable with it. We can shut down comments on The Irish Times site if we want, but there's very little we can do on Facebook. It started last summer, there was a guy badly abused online and it made me question whether to continue with the column. Now, when I sit down to interview someone, I have to tell them I'll be posting this on Facebook and there will be comments; mostly they're fine but there is a chance of abuse. I have to give them a chance to back out." As an Nua, *As an Nua Interviews: Sorcha Pollak*, available at: http://www.asannua.com/nua-interviews-sorcha-pollak/.

[29] UN Human Rights Committee, *General Comment No. 34, Article 19, Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, par. 12.

Article 19(2) ICCPR places an obligation on States Parties to refrain from interfering with an individual's right to freedom of expression. It also requires States Parties to "ensure that persons are protected from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression."[30] In its authoritative interpretation of Article 19 ICCPR, the U.N. Human Rights Committee has stated that States Parties should put in place "effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression."[31] In light of the above, governments must adopt measures that protect victims from attacks from both state and non-state actors that are aimed at interfering with their right to freedom of expression.

The Human Rights Committee has recognized the fundamental role that a free, uncensored and unhindered media performs in a democratic society.[32] It has also recognized that attacks aimed at silencing journalists are not confined to those that are of a physical nature; they can also include threats and intimidation.[33] The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Special Rapporteur) recently observed that online abuse against journalists, activists, human rights defenders, artists and other public figures and private persons can "chill and disrupt" their right to freedom of expression.[34]

The U.N. Human Rights Committee has stated that threats and intimidation aimed at journalists, as well as other attacks against journalists, should be vigorously investigated in a timely fashion, the perpetrators should be prosecuted, and the victims be in receipt of appropriate forms of redress.[35]

The U.N. Special Rapporteur has recognized the fact that online harassment and abuse is often targeted at female journalists, and that female journalists often face different forms of online abuse that present a special challenge to them.[36] He stated that "[t]he internet should be a platform for everyone to exercise their rights to freedom of opinion and expression, but online gender-based abuse and violence assaults basic principles of equality under international law and freedom of expression. Such abuses must be addressed urgently, but with careful attention to human rights law."[37] The Committee of Ministers of the Council of Europe has similarly stated that "harassment, threats, abuse and violations of

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30 *Id.*, par. 7.

31 *Id.*, par. 23.

32 *Id.*, par. 13.

33 *Id.*, par. 23.

34 UN Office of the High Commissioner, *UN experts urge States and companies to address online gender-based abuse but warn against censorship*, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21317&LangID=E.

35 UN Human Rights Committee, *General Comment No. 34, Article 19, Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, par. 23.

36 The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, for Security and Co-operation in Europe (OSCE) Representative on Freedom of theMedia, the Organization of American States (OAS) Special Rapporteur on Freedom of Expressionand the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur onFreedom of Expression and Access to Information, *Joint Declaration on Media Independence and Diversity in the Digital Age*, available at: https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration2May2018_EN.pdf.

37 UN OHCHR, *UN experts urge States and companies to address online gender-based abuse but warn against censorship*, available at: https://shar.es/aaOs3w.

digital security tend to target female journalists and other female media actors in particular, which calls for gender-specific responses."[38]

These observations have been echoed by the OSCE Representative on Freedom of the Media, who has observed that female journalists carry the double burden of being attacked as journalists and attacked as women.[39] The current Representative has emphasized the impact this has on both the journalist and the public at large, "[i]t affects the kinds of voices we hear, the stories we read, and ultimately the freedom and quality of the societies we live in. There is no such thing as freedom of expression if it is the privilege of some, with the exclusion of others. Freedom can only be inclusive. For all".[40] In 2015, the previous OSCE Representative on Freedom of the Media recommended that participating States "[r]ecognize that threats and other forms of online abuse of female journalists and media actors is a direct attack on freedom of expression and freedom of the media."[41]

Measures that are adopted to remedy online abuse and harassment necessarily interfere with the perpetrator's right to freedom of expression, since Article 19(1) ICCPR extends its protection to expression that may be regarded as deeply offensive.[42] Nonetheless, Article 19(1) is not an absolute right and may be limited in accordance with Article 19(3) ICCPR. When developing responses to online harassment and abuse, State Parties must therefore ensure they meet the criteria set out under Article 19(3) ICCPR. These criteria are (i) that the measure be provided by law, (ii) that the measure be adopted for the purpose of respecting the rights or reputations of others, or protecting national security, public order, public health or public morals, and (iii) that the measure is necessary and proportionate.

## Scope of Research

This report focuses on the legal framework that applies to online harassment and abuse in three jurisdictions, namely Finland, France and Ireland. These three jurisdictions have been selected because they are some of the few jurisdictions that have seen high-profile and successful prosecutions in 2018 of individuals who had been harassing or threatening journalists online.

This report will use these three cases as the starting point to study how the laws in these three jurisdictions protect journalists from this kind of harassment and abuse. The report will look at what best practices can be distilled from the legislative framework in each jurisdiction, and will also comment on the gaps or limitations in these approaches. The report will then conclude with a number of recommendations from this analysis.

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38 Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2016)4[1] on the protection of journalism and safety of journalists and other media actors, available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415d9#_ftn1, par. 18.

39 OSCE, *OSCE media freedom representative calls on governments to step up efforts to effectively combat harassment of women journalists*, available at: https://www.osce.org/representative-on-freedom-of-media/375382.

40 *Id*.

41 OSCE, *Recommendations following the Expert MeetingNew Challenges to Freedom of Expression: Countering Online Abuse of Female Journalists*, available at: https://www.osce.org/fom/193556?download=true.

42 UN Human Rights Committee, *General Comment No. 34, Article 19, Freedoms of opinion and expression*, UN Doc. CCPR/C/GC/34, par. 11.

This report will be limited to looking at legislative responses to direct and indirect communications that are of a threatening nature or constitute harassment. It is recognized that, when responding to online abuse or harassment, a number of legal provisions may be applicable and can be relied upon by a journalist to obtain a remedy for the harm caused by such harassment. For example, online abuse that damages a journalist's reputation could infringe defamation or insult law and phenomena like "doxing" could be remedied through legal provisions dealing with a breach of privacy or confidentiality, data protection or the hacking of computer systems. Some of these laws may be referred to in order to give context to some of the case studies, but they fall outside the scope of this report.

## Finland

### *Case Study: Jessikka Aro*

On 18 October 2018, three individuals were convicted of "aggravated defamation", "incitement to commit aggravated defamation" and "stalking" for their involvement in a harassment campaign against Finnish journalist Jessikka Aro.

Ms. Aro is an award-winning reporter for the Finnish national broadcaster *Yleisradio Oy* (YLE).[43] In 2014, she investigated the existence of pro-Russian troll factories. When investigating a pattern of fake profiles spreading propaganda on social network sites to which Finnish users had access, she began to uncover evidence of a state-sanctioned "troll farm" that pushed a pro-Kremlin agenda through Twitter bots and bot networks.[44]

As she was starting this investigation, a four-year harassment campaign was waged against her. This included publication of her phone number online, the sending of numerous death threats, and allegations made online that she was an agent of NATO and U.S. intelligence. Much of this campaign was led and orchestrated by Johan Bäckman, a Finnish academic, and a right-wing website, MV-Lehti, which published a number of disparaging stories about the journalist, including a false story that she had been convicted of drug dealing.[45] Both Mr. Bäckman and MV-Lehti were pro-Russian mouthpieces and were known for attacking Kremlin critics online.[46] They were targeting Ms. Aro because of her research and reporting on Russia's online information war.

Many other trolls and Internet users were mobilized to join the campaign against Ms. Aro. She would frequently be tagged in messages and memes spread through social media sites, many of which were also shared by Mr. Bäckman. At the time, Ms. Aro said that she "was blamed for the bloodshed in Ukraine, [her] looks and mental health were questioned, [she] was sexually harassed and called a russophobe. [Her] story was falsified and people wished [her] death of a uranium poisoning."[47] She was also accused of engaging in information warfare, spreading propaganda, and destroying freedom of speech in Finland.[48] The most egregious communication happened in spring 2014, when she received a text message from someone pretending to be her father who had died 20 years prior.[49] This message said that Ms. Aro's father was "watching" her.

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43 Helsingin Sanomat, *Award-winning journalist Jessikka Aro: Facebook must fix its Finnish hate speech problem*, available at: https://www.hs.fi/kotimaa/art-2000002917452.html.

44 See Jessikka Aro, *The cyberspace war: propaganda and trolling as warfare tools*, 15(1) *European View*, available at: https://journals.sagepub.com/doi/10.1007/s12290-016-0395-5, p. 121 - 132.

45 BBC News, Jessikka Aro: How pro-Russian trolls tried to destroy me, available at: https://www.bbc.co.uk/news/blogs-trending-41499789.

46 Independent, *Pro-Russian Internet trolls jailed for defamatory comments about Finnish journalist*, available at: https://www.independent.co.uk/news/world/europe/russian-trolls-jailed-defamatory-comments-finnish-journalist-jessika-aro-a8593631.html.

47 Kioski, *My Year as a Pro-Russia Troll Magnet: International Shaming Campaign and an SMS from Dead Father*, available at: https://kioski.yle.fi/omat/my-year-as-a-pro-russia-troll-magnet?fbclid=IwAR3EV6ARyTAxFpT4zWnrWrMOYz-aKX7PZa0sUuhTFMaOzRTj3KkdEIFX7Pk.

48 New York Times, *Effort to Expose Russia's 'Troll Army' Draws Vicious Retaliation*, available at: https://www.nytimes.com/2016/05/31/world/europe/russia-finland-nato-trolls.html.

49 *Id*.

Ms. Aro filed a complaint with the police in Helsinki in 2016 and prosecutions were brought against three individuals pursuant to provisions of the criminal law, including those related to "aggravated defamation" (chapter 24, sections 9 and 10 of the Criminal Code), "incitement to commit aggravated defamation" (chapter 5, section 5 and chapter 24, sections 9 and 10 of the Criminal Code) and "stalking" (chapter 25, section 7(a) of the Criminal Code). Only the stalking offence is relevant to the scope of this report, but aspects of the defamation charges will be discussed to provide further context to Ms. Aro's case.

Prosecutions were brought against four defendants, including Johan Bäckman and two individuals involved in the operation of MV-Lehti, Ilja Janitskin and Asta Tuominen. Ilja Janitskin was the founder and editor-in-chief of MV-Lehti, while Asta Tuominen was a stand in editor-in-chief at the media outlet. The charges that were brought against these defendants did not solely concern the harassment sustained by Ms. Aro. Some of the charges also related to "breach of confidentiality", "copyright infringement" and "hate speech" and were unrelated to the harassment of Ms. Aro. There were a total of nine claimants in the case, including a student activist (Henna Huumonen) and an individual who worked with immigrants (Sari Nuuttila) who had also been subjected to harassment campaigns.[50]

The Helsinki District Court convicted three of the defendants:

- Johan Bäckman was convicted of "aggravated defamation", "incitement to aggravated defamation" and "stalking". He received a one-year suspended sentence. A number of his articles were found to be false and defamatory about Ms. Aro, and he was found to have encouraged Mr. Janitskin and others to publish defamatory statements about her. He was also found to have repeatedly contacted Ms. Aro, including through "tagging" her in social media posts, in a way that corresponded to the crime of "stalking".

- Ilja Janitskin was convicted of 16 charges, including "aggravated defamation", "breach of confidentiality", "copyright infringement" and "aggravated incitement against ethnic groups". He was given a prison sentence of one year and ten months. The Helsinki District Court ruled that Janitskin's website had displayed a noxious propensity for sexist abuse and racial slurs, and that he was responsible as editor-in-chief for articles published on the website.

- Asta Tuominen was convicted of "aggravated defamation", "incitement against ethnic groups" and "copyright infringement". She was handed a three-month suspended sentence.

[50] Helsinki District Court, *Jessikka Aro and Others v. Johan Bäckman and Others*, Judgment No. 18/144694.

**Chapter 25, Section 7(a) of the Criminal Code – Stalking**

A person who repeatedly threatens, observes, contacts or in another comparable manner unjustifiably stalks another so that this is conducive towards instilling fear or anxiety in the person being stalked, shall, unless an equally or a more severe penalty is provided elsewhere in law for the act, be sentenced for stalking to a fine or to imprisonment for at most two years.

**Chapter 24, Section 9 of the Criminal Code – Defamation**

(1) A person who

(i) spreads false information or a false insinuation of another person so that the act is conducive to causing damage or suffering to that person, or subjecting that person to contempt, or

(ii) disparages another in a manner other than referred to in paragraph (1) shall be sentenced for defamation to a fine.

(2) Also a person who spreads false information or a false insinuation about a de-ceased person, so that the act is conducive to causing suffering to a person to whom the deceased was particularly close, shall be sentenced for defamation.

(3) Criticism that is directed at a person's activities in politics, business, public office, public position, science, art or in comparable public activity and that does not obviously exceed the limits of propriety does not constitute defamation referred to in subsection 1(2).

(4) Presentation of an expression in the consideration of a matter of general importance shall also not be considered defamation if its presentation, taking into consideration its contents, the rights of others and the other circumstances, does not clearly exceed what can be deemed acceptable.

**Chapter 24, Section 10 of the Criminal Code – Aggravated Defamation**

If, in the defamation referred to in section 9(1), considerable suffering or particularly significant damage is caused and the defamation is aggravated also when assessed as a whole, the offender shall be sentenced for aggravated defamation to a fine or to imprisonment for at most two years.

**Chapter 5, Section 5 of the Criminal Code – Instigation**

A person who intentionally persuades another person to commit an intentional offence or to make a punishable attempt of such an act is punishable for incitement to the offence as if he or she was the perpetrator.

The District Court ordered Bäckman, Janitskin and Tuominen to pay a total of 238,625 euros in damages, costs and legal fees in relation to all the claimants.[51] The District Court awarded over 94,000 euros in damages to Ms. Aro, which covered damages for suffering and temporary impairment as well as compensation for medical fees, loss of earnings and security.

The District Court, towards the end of the judgment, noted that the crimes against Ms. Aro were particularly aggravated because their primary motive was to undermine her work investigating 'Russian information threats' (*informaatiovaikuttamista*) by destroying her "professional credibility and reputation as a journalist specializing in Russian affairs."[52] The District Court made numerous references to the right to freedom of expression, but only in relation to whether the statements that formed the harassment campaign against Ms. Aro were protected by the right. It did not explicitly discuss the "chilling effect" caused to Ms. Aro's right by the online abuse and harassment.

Nonetheless, free speech organizations saw the case as an important step in combatting the threat to journalistic freedom caused by online harassment and abuse. Reporters Without Borders were quoted as saying that the trial was "all the more emblematic because many reporters continue to be the target of troll armies seeking to discourage or even silence the journalists who cover them".[53] They welcomed the decision of the District Court, which they viewed as sending "a clear message to those who harass journalists online."[54]

The president of the Union of Journalists in Finland (UJF), Hanne Aho, commented that "[t]he sentences are tough but just. This is a strong message from the District Court concerning how you can and cannot talk about people on a public platform. The judgment makes it gratifyingly clear that it [defamation] is simply not allowed. Many people who go in for hate speech do so by appealing to freedom of expression. But this ruling says unambiguously that such activity has nothing whatsoever to do with freedom of expression".[55]

***Current State of Affairs: Finnish Criminal Code***

The Finnish Criminal Code includes two provisions that deal with abusive or threatening communications and these provisions can be applied in the online context. The first of these provisions formed part of Johan Bäckman's conviction in Ms. Aro's case and is referred to as the offence of "stalking". According to chapter 25, section 7(a) of the Criminal Code, an offence will have been committed when a person "*repeatedly* threatens, observes, contacts or in another comparable manner unjustifiably stalks another so that this is conducive

[51] Centre for Eastern Studies, *Finland: the fight against disinformation*, available at: https://www.osw.waw.pl/en/publikacje/analyses/2018-10-24/finland-fight-against-disinformation.

[52] Helsinki District Court, *Jessikka Aro and Others v. Johan Bäckman and Others*, Judgment No. 18/144694, p. 163.

[53] Deutsche Welle, *Pro-Kremlin online harassment on trial in Finland*, available at: https://www.dw.com/en/pro-kremlin-online-harassment-on-trial-in-finland/a-45911827.

[54] Reporters Without Borders, *Pro-Kremlin activists on trial in Finland for harassing reporter*, available at: https://rsf.org/en/news/pro-kremlin-activists-trial-finland-harassing-reporter.

[55] European Federation of Journalists, *Finland takes harsh action against Internet trolls*, available at: https://europeanjournalists.org/blog/2018/10/31/finland-takes-harsh-action-against-internet-trolls/.

towards instilling fear or anxiety in the person".[56] When determining whether the repeated acts conducted by the accused were likely to have caused fear or anxiety in the victim, the courts must take into account the position of the victim (e.g., if they suffer from a particular vulnerability or if they are a child).[57] Furthermore, the offence also requires intent. The accused must perceive that his or her contact or other actions are likely to cause fear or anxiety.

In terms of the type of online communications that would be covered by the offence, the use of the term "contact" under chapter 25, section 7a of the Criminal Code seems to imply that the offence will only concern "direct communications" with the victim and not messages sent to third parties or made publicly available online. However, as noted below in relation to Ms. Aro's case, the courts may still decide to apply the provision to some online communications that are brought to the attention of the victim through "tagging" or "@-mentioning".

The offence also only applies to "repeated" communications and would not seem to cover once-off harmful communications (such as threatening messages or messages that result in harassment campaigns/"pile on" harassment). When dealing with once-off abusive communications, the crime of "menace" under chapter 25, section 7 of the Criminal Code may be applicable. This provision states that an offence will have been committed where a person "threatens another with an offence under such circumstances that the person so threatened has justified reason to believe that his or her personal safety or property or that of someone else is in serious danger".[58] This offence seems to only cover clear threats that are objectively understood as likely to cause another person harm. Given the nature of online communications, it is conceivable that many threats would not be punishable under this provision because they would not meet this threshold (despite the distress or anxiety such communications might otherwise cause).

***Jessikka Aro's Case & Interpreting the Offence of Stalking***

In Ms. Aro's case, the Helsinki District Court applied the "stalking" offence in such a way that it could be used to tackle two varieties of abuse and harassment that are novel to the online context, "tagging" and "pile on" harassment through "targeting" the victim. When applying Chapter 25, section 7a of the Criminal Code, the District Court interpreted the term "contact" as including calling, approaching or sending a message to a person, including sending messages to the victim in a public discussion forum.

The District Court noted that Mr. Bäckman sent several messages a day mentioning or "tagging" Ms. Aro. It held that

> "individually the messages were not especially intimidating or disturbing, but their content and tone were demeaning and derisive of Aro, they were brought to the attention of several people and Aro was notified of all of them by tagging her Twitter username in the message… Regardless of the minor

[56] Chapter 25, section 7(a) of the Finnish Criminal Code [emphasis added].

[57] Helsinki District Court, *Jessikka Aro and Others v. Johan Bäckman and Others*, Judgment No. 18/144694, p. 74.

[58] Chapter 25, section 7 of the Finnish Criminal Code.

> significance of the individual messages, considered as a whole and taken in context, the messages can be regarded as likely to at least cause distress to Aro. Although Bäckman's actions have involved messaging and writing that are of minor significance taken individually… the elements of the conduct of the defendant towards the plaintiff must be considered as constituting a coherent whole with a unified motivational basis [i.e. Ms. Aro's reporting on Russian "troll farms"]… With online harassment, it is rare that a single message would cause blind distress. Rather, it's floods of messages that cause distress. Tagging can also be used to try to involve the target in an acrimonious discussion or to show that there's an online discussion taking place concerning the target of the harassment, but which the person concerned cannot influence. Both are likely to induce anxiety and a feeling of losing control."[59]

The District Court thus reasoned that the messages written by Mr. Bäckman, although not sent directly to Ms. Aro, were sufficiently comparable to direct contact that they had to be considered as part of the actions forming the offence. These messages were seen and "liked" by several people, bringing them to the attention of Ms. Aro.[60]

The District Court also made some specific findings around the practice of "targeting" (*maalittaa*), where someone incites other Internet users to attack an individual. When giving its findings on the "stalking" offence, the District Court noted that "Bäckman's conduct caused other people to persecute, harass and target (*maalittaa*) Aro." It went on to find that Mr. Bäckman clearly intended to cause third parties to act in this way.[61] This implied that a person carrying out the "targeting" of an individual is at least partially responsible for the persecution, harassment and abuse caused by others under the "stalking" offence. However, it is still unclear to what extent *maalittaa* itself is criminalized under chapter 25, section 7a of the Criminal Code when it is not accompanied by repeated communication from the accused.

***Prosecuting the Crimes of Menace and Stalking***

There is one aspect of the criminal justice system in Finland that might make it particularly difficult or less likely for prosecutions to be brought against individuals who harass or abuse journalists online. The Criminal Code regulates the circumstances under which prosecutors may bring charges, and chapter 25, section 9(1) of the Criminal Code states that "[t]he public prosecutor may not bring charges for negligent deprivation of personal liberty, menace or coercion, unless the injured party reports the offence for the bringing of charges or unless a lethal instrument has been used to commit menace or coercion, or unless a very important public interest requires that charges be brought."[62]

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59 Helsinki District Court, *Jessikka Aro and Others v. Johan Bäckman and Others*, Judgment No. 18/144694, p. 74 – 79.

60 Maria Pettersson, *MV-trial: Court showed it understands form and impact of online harassment*, available at: https://journalistiliitto.fi/en/mv-trial-court-showed-it-understands-form-and-impact-of-online-harassment/.

61 Helsinki District Court, *Jessikka Aro and Others v. Johan Bäckman and Others*, Judgment No. 18/144694, p. 79.

62 Chapter 25, section 9(1) of the Finnish Criminal Code.

This provision has been applied in cases concerning online abuse and has been interpreted as requiring a victim's request before a prosecutor may bring a case against the abuser (unless a lethal weapon has been used, or it is in the public interest to bring charges). This means that the prosecutor cannot act on complaints from third parties, such as colleagues or employers of a journalist who has been the victim of online abuse, since the demand for punishment must come from the injured party herself. Most other offences, in contrast, are subject to public prosecution, which means that the police can investigate them and a public prosecutor can bring charges even if the injured party does not demand punishment.[63] This means that police and prosecutors are not proactively pursuing cases of online abuse as they are not treated as falling within the purview of the public prosecutor.

The threshold set out under chapter 25, section 9(1) of the Criminal Code places a burden on victims of online abuse to push the case forward and demand punishment. This has proved to be an impediment to charges being brought in cases concerning journalists who, for whatever reason, do not want to take such an active role in prosecuting their cases. This is what happened in the case of Rebekka Härkönen, a journalist who had fallen victim to an online harassment campaign in August 2017 that went unpunished.

Ms. Härkönen received hundreds of threatening and offensive messages online after she wrote about a reported terrorist attack in Turku, Finland.[64] The police investigated the online harassment with a view to bringing charges under the offences of "defamation" (chapter 24, section 9 of the Criminal Code) and "menace" (chapter 25, section 7 of the Criminal Code). These charges would have gone to the prosecutor, but Ms. Härkönen withdrew her request for prosecution. She later clarified that she withdrew her request in an attempt to trigger the process where the prosecutor would have to determine whether a "very important public interest" required the charges to be brought.[65] She believed this would have been an important precedent for journalists, and freedom of expression more generally. If the prosecutor were to decide that a sustained harassment campaign against a journalist was of a "very important public interest" to prosecute then investigations and prosecutions could be brought without the involvement of the victim journalist.

In this case, the prosecutor decided that the actions did not meet the threshold and that the prosecutor's office would, therefore, not pursue the charges in the matter.[66] The prosecutor's office did not give any prominence to the impact of harassment on the right to freedom of expression and press freedom in its explanation for why it decided not to treat the pursuit of the case as being in the public interest. Instead, the prosecutor's office found that the individual statements were not offensive enough to meet the threshold.[67] Ms.

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63 Police of Finland, *Offences subject to public prosecution, and complainant offences*, available at: https://www.poliisi.fi/crimes/offences_subject_to_public_prosecution_and_complainant_offences.

64 The individual responsible was sentenced with two counts of "murder with terrorist intent" and eight counts of "attempted murder with terrorist intent". The attack is regarded as the first attack with a jihadist motive in Finland.

65 Helsingin Sanomat, *Valtakunnan-syyttäjä ei nosta syytettä Turun Sanomien toimittajaan Rebekka Härköseen kohdistuneesta viha-puheesta*, available at: https://www.hs.fi/kotimaa/art-2000005602622.html.

66 Journalisti, *Laki Jättää Toimittajan Häiriköinnissä Yksin*, available at: https://www.journalisti.fi/artikkelit/2018/4/laki-jtt-toimittajan-hirikinniss-yksin/.

67 *Id*.

Härkönen criticized this approach because "[h]arassment is not individual words, but its purpose is to silence media and make journalists afraid."[68]

Kimmo Nuotio, professor of criminal law at the University of Helsinki, has similarly criticized the approach of the prosecutor. He noted that cases where journalists are harassed are not about the personal honour of the journalist, instead such actions are aimed at influencing the journalist's work (which is a public matter). He noted that the prosecutor's office, in its decision, failed to sufficiently take into account the distinct nature of online harassment or abuse against journalists or the media. He has called for law reform in this area, asking for threats that are made to individuals in the course of their work to be placed under the purview of the public prosecutor.[69]

This would mean that a journalist would not have to report the crime before it would be investigated and prosecuted. It could also allow media outlets to push for cases to be brought on behalf of their employees. In other words, it would not leave victim journalists alone in demanding punishment of the perpetrators of online abuse and harassment against them. The president of the Union of Journalists in Finland (UJF), Hanne Aho, has lent her support to Mr. Nuotio's proposal. She has said that the interference with a journalist's work is not a private matter, and the law needs to change so society can collectively protect journalists and freedom of expression.[70]

Requiring journalists to pursue cases against those who harass or abuse them online can, in itself, interfere with their ability to carry out their "public watchdog" role. Once the prosecutor reached the decision to drop Ms. Härkönen's case, the latter explained the trade-off that she had to make when deciding whether to pick up the case again herself; "I had to weigh it up, use my energy to fight [the case] or continue my work as a journalist. I chose my job".[71] The toll on journalists to report and pursue these kinds of prosecutions could result in crimes of online abuse and harassment going underreported and under-prosecuted, which means such actions will be met with impunity in Finland.

## ***Conclusion***

The law regulating online harassment in Finland has successfully been invoked to prosecute individuals who orchestrated a harassment campaign against a journalist with a view to silencing her. The law captures a wide range of repeated activities that are likely to cause fear or anxiety in a journalist and can apply in both the online and offline context. Finland also has a provision that criminalizes threats to commit a crime where such threats cause someone to believe there is a risk to personal safety or property. Accordingly, Finnish law does contain measures that can protect journalists against online abuse or harassment. Nonetheless, these laws have a number of limitations that reduce their effectiveness at combatting online abuse and harassment aimed at journalists.

Firstly, the "stalking" offence will only apply where there has been "repeated" contact with the journalist. It will, therefore, not cover circumstances where one message sent by the

68 *Id.*
69 *Id*.
70 *Id*.
71 *Id*.

perpetrator causes many other Internet users to attack and abuse a journalist (i.e., harassment campaigns/"pile on" harassment). The Helsinki District Court, when convicting Johan Bäckman, made reference to the fact that he made others target and harass Ms. Aro. However, it was not clear to what extent this kind of activity is criminalized under the offence of "stalking", since Mr. Bäckman had also been responsible for directly contacting Ms. Aro on numerous occasions. Finnish law does include an offence of "instigation" where an individual "intentionally persuades another person to commit an intentional offence or to make a punishable attempt of such an act". However, this will only apply where it can be demonstrated that the accused explicitly persuaded others to commit the crimes of "stalking" or "menace" against a journalist.[72] Therefore, it would not cover insidious forms of "pile on" harassment. Furthermore, it would not criminalize the activity of those who post one message knowing that it forms part of a wider campaign of harassment or abuse (i.e. those who take part in "pile on" harassment, but do not necessarily orchestrate it).

Secondly, the "stalking" offence will only apply where there has been "contact" between the accused and the journalist. Therefore, it will not necessarily cover repeated "indirect communications" that can still cause fear or distress in a journalist. The Helsinki District Court did apply the provision flexibly to also cover online publications that "tag" or "@-mention" a journalist, bringing it to her attention, but this will not cover all forms of "indirect communications" that can amount to harassment (e.g. fake profiles or websites). Furthermore, the convictions in Jessikka Aro's case are currently under appeal, so it is open to the appellate courts to find that this was an incorrect interpretation of the offence of "stalking" in the Criminal Code.[73]

Thirdly, it appears that the Finnish prosecutor will not pursue cases of online harassment or abuse against journalists without a claim being filed and pursued by the journalist herself. This appears to be out of line with the international obligations set out under Article 19 ICCPR, which calls for intimidation and threats against journalists to be vigorously investigated in a timely fashion, with the perpetrators prosecuted and victims in receipt of appropriate forms of redress. This is a positive obligation that is placed on States Parties and is not dependent on any action on the part of a journalist. Furthermore, journalists often face legal threats and frivolous and vexations cases can be brought against them to deter them from carrying out their work.[74] Requiring them to also proactively pursue those responsible for online abuse and harassment, while also defending against these other forms of harassment, would have a significant and detrimental impact on press freedom.

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[72] The Finnish MP Laura Huhtasaari was criticised for publishing something critical about a school, which included the names of young pupils and the name of the school. Many considered this to be an act of "targeting", as it was clear that making the names of the pupils public would make them a target for harassment and abuse from Ms. Huhtasaari's followers. She was not prosecuted and her conduct did not seem to fall within the offence of "instigation" to "stalking" since she did not ask or tell anyone to contact the pupils or the school. See Independent, Far-right Finland MP exposes teenagers to online abuse after attacking pro-migration poster, available at: https://www.independent.co.uk/news/world/europe/laura-huhtasaari-finns-party-finland-school-poster-students-teacher-a8567036.html.

[73] YLE, *Janitskin appeals sentence over trolling, hate speech*, available at: https://yle.fi/uutiset/osasto/news/janitskin_appeals_sentence_over_trolling_hate_speech/10553592.

[74] The campaign of harassment against Jessikka Aro also included the filing of complaints to the Parliamentary Ombudsman, the Security Police and the Council for Mass Media.

Fourthly, Finnish law does not provide any gender-specific response to online harassment and abuse. Although abuse and harassment of this nature would still be criminalized under the law more generally, there is no recognition of it being an aggravating factor in such cases.[75] In this way, Finnish law fails to recognize the particularly serious nature of online abuse that is targeted at female journalists. A 2016 UJF survey found that 14 percent of female journalists in Finland experienced threats of sexual violence, while no male journalist reported receiving such threats.[76] In a 2017 Amnesty International poll, 46 percent of women surveyed who had experienced online abuse or harassment reported experiencing sexist or misogynistic comments directed at them.[77] Currently, Finnish law calls for a harsher punishment when the "commission of the offence [is] for a motive based on race, skin colour, birth status, national or ethnic origin, religion or belief, sexual orientation or disability or another corresponding ground" (see chapter 6, section 5, paragraph 4 of the Criminal Code). This should be amended to include offences motivated by gender, so harsher penalties can be imposed where abuse or harassment is of a sexist or misogynistic nature.

The convictions in Jessikka Aro's case are a positive development in the fight against the online abuse and harassment of journalists in Finland, one that undoubtedly sends a strong signal that the courts will treat this kind of online activity very seriously. However, some question whether it will make those responsible for online abuse and harassment think twice about harassing journalists. Matilda Merenmies, a PhD researcher from Finland, noted that "[in Ms. Aro's] case the hundreds of people who sent threatening messages and otherwise participated in the harassment have not faced charges. The judgement does assign responsibility for targeting of individuals, but it remains to be seen if this will in truth have any effect on online behaviour."[78]

Here, it is essential to note that various European and international human rights bodies, including international and regional courts and IGOs that have a mandate in the area of human rights protection, have criticized the imposition of criminal sanctions specifically in the case of defamation. This criticism highlights that criminal penalties for harm to reputation have a greater potential to exert a chilling effect on free expression and notes that criminal defamation laws at a global level are frequently abused to silence opponents and critics. The European Court of Human Rights (ECtHR) has repeatedly criticized the use of criminal defamation laws, on occasion suggesting that the imposition of a criminal sanction alone may be sufficient for the finding of a disproportionate remedy. The OSCE Representative on Freedom of the Media said in 2002: "[c]riminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."[79]

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75 International Press Institute, *Finland's journalists warn against normalization of online violence*, available at: https://ipi.media/finlands-female-journalists-concerned-about-normalization-of-online-violence/.

76 International Press Institute, *Countering Online Harassment in Newsrooms*, available at: https://ipi.media/countering-online-harassment-in-newsrooms-finland/

77 Amnesty Global Insights, *Unsocial Media: The Real Toll of Online Abuse against Women*, available at: https://medium.com/amnesty-insights/unsocial-media-the-real-toll-of-online-abuse-against-women-37134ddab3f4.

78 Input from Matilda Merenmies for this report.

79 Scott Griffen, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, Report for the OSCE, March 2017, avaiable at https://www.osce.org/fom/303181?download=true.

From this perspective, this study cannot recommend the use of criminal laws to sanction harm done to reputation or honour ("criminal defamationa laws") through online harassment or other types of online attacks. Instead, violations of the right to reputation should be resolved exclusively through civil means, in line with the recommendations of international human rights bodies and international press freedom organizations.

## France

### *Case Study: Nadia Daam*

In July 2018, a Parisian court sentenced two men for their involvement in an online harassment campaign against Nadia Daam, a French journalist and broadcaster. The harassment began in November 2017, after Ms. Daam had broadcast her show on Europe 1 radio in which she denounced the actions of members of an online forum.[80] The members of the forum had harassed two feminist activists, Clara Gonzales and Elliot Lepers, following the creation of the "anti-relou" telephone line.[81] This telephone line was opened to help female victims of street harassment. It was a number that women could hand over to individuals they feared might try to stalk or harass them. During her broadcast in November 2017, Ms. Daam described the online forum, Blabla 18-25 ans, as "a non-recyclable rubbish bin".[82]

Since that date, the journalist became the victim of online attacks and abuse herself. These postings were of a pornographic nature, and contained death threats, threats of rape, and hate speech. One post included an image of a Daesh follower beheading a victim with Ms. Daam's face superimposed on the victim. Another post said "[t]he brunette Milf, I fill her mouth with my cum".[83] The cyber-harassment on the online forum lasted for eight months.

This harassment had a profound impact on Ms. Daam, who withdrew her child from school for a few days and stopped taking public transport.[84] It was reported that she also decided to move house.[85] Europe 1 subsequently filed a complaint with a police station in the 8th arrondissement of Paris. Seven individuals were later identified as the perpetrators of the online abuse,[86] and two were brought before the Paris Tribunal de Grande Instance.

**Article 222-17 of the French Penal Code – Threat**

A threat to commit a felony or a misdemeanour against persons, the attempt to commit which is punishable, is punished by six months imprisonment and a fine of €7,500, if it is repeated, or evidenced by a written document, picture or any other object.

The penalty is increased to three years imprisonment and to a fine of €45,000 where the threat is one of death.

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80 Huffington Post, *Harcèlement en ligne sur Nadia Daam: le procès de deux hommes jugés à Paris reporté*, available at: https://www.huffingtonpost.fr/2018/06/04/harcelement-en-ligne-sur-nadia-daam-deux-hommes-juges-a-paris_a_23450323/.

81 20minutes, *Jeuxvideo.com: Pourquoi cette haine du féminisme sur le forum 18-25 ans?*, available at: https://www.20minutes.fr/high-tech/2162327-20171102-jeuxvideocom-pourquoi-haine-feminisme-forum-18-25-ans.

82 Huffington Post, *Harcèlement en ligne sur Nadia Daam: le procès de deux hommes jugés à Paris reporté*, available at: https://www.huffingtonpost.fr/2018/06/04/harcelement-en-ligne-sur-nadia-daam-deux-hommes-juges-a-paris_a_23450323/.

83 NewsBeezer, *Cyberbullying: From the Screen to the Bar*, available at: https://newsbeezer.com/franceeng/cyberbullying-from-the-screen-to-the-bar/.

84 *Id*.

85 *Id*.

86 20minutes, Cyberharcèlement: Nadia Daam veut «voir physiquement» ses harceleurs à leur procès, available at: https://www.20minutes.fr/arts-stars/medias/2300635-20180703-cyberharcelement-nadia-daam-veut-voir-physiquement-harceleurs-proces.

Mohamed A., aka "Tintindealer" on Blabla 18-25 ans, who was 21 years old, was charged with making a “death threat” for his image of Ms. Daam as a Daesh victim. Before the Paris Tribunal de Grande Instance, he stated that he “wanted to be smart” by publishing the image and he did not take into account the threatening nature of the photograph. Virak P., aka “Quatrecentrois” on Blabla 18-25 ans, who was 34 years old, was charged with threatening to commit rape against Ms. Daam for his comment. He said he posted the message in two seconds and that “it was just for trolling”.[87] He also said that he did not mean for it to be a threat.[88] Both men were given six-month suspended prison sentences and fined 2,000 euros.[89]

This case was deemed an important moment for the French courts in demonstrating that those responsible for cyber-harassment of journalists can be held accountable to the law. On the day of the sentencing, Ms. Daam noted that "[c]yberbullying will not stop overnight. But what this trial says is that we have the means to find the perpetrators”.[90]

***Law on Online Threats***

The law that applies to online threats was relied on in Ms. Daam’s case, despite the existence of the criminal offence of moral harassment (see below). Article 222-17 of the Penal Code provides that a threat to commit a crime is punishable with six months’ imprisonment or a fine (7,500 euros). This provision would, therefore, cover threats to murder, assault, or rape the victim. Where the threat is one of death, the penalty increases further to three years in prison and a fine of 45,000 euros.

The offence will have been committed where the threat is made by written document, picture or any object. As was seen in Ms. Daam’s case, it can apply to written or visual threats made online. Furthermore, it will apply to once-off threats and does not require repeated contact to be made before a prosecution can be brought.

For a successful prosecution to be brought, it must be shown that the individual who made the threat intended to threaten the individual with the relevant crime, and that the perpetrator knew and had as their objective the creation of fear and mental disturbance in the victim. This can be a difficult evidential burden to meet in cases of online harassment where, as was seen in Ms. Daam’s case, individuals do not put much thought into the impact that their statements might have on the person they are directed towards.

There are two further provisions that may be relied on to prosecute online threats. The first of these is Article 222-16 of the Penal Code, which criminalizes malicious calls or messages, which would include WhatsApp messages and emails. Here, a minimum of two texts or calls

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87 L'Obs, *Six mois avec sursis pour les cyberharceleurs de Nadia Daam: "C'était juste pour troller"*, available at: https://www.nouvelobs.com/justice/20180703.OBS9116/six-mois-avec-sursis-pour-les-cyberharceleurs-de-nadia-daam-c-etait-juste-pour-troller.html.

88 *Id*.

89 Reporters Without Borders, *RSF publishes report on online harassment of journalists*, available at: https://rsf.org/en/news/rsf-publishes-report-online-harassment-journalists.

90 Libération, *Menaces sur Nadia Daam : «Troll, ça n’existe pas dans le code pénal !»*, available at: https://www.liberation.fr/france/2018/07/03/menaces-sur-nadia-daam-troll-ca-n-existe-pas-dans-le-code-penal_1663820.

are required to constitute the crime since the actions need to occur "repeatedly", and judges take into account the timeframe in which they occur. This is of limited utility to deal with the online harassment of journalists since the threats must be sent by direct and private messages. It would, therefore, not cover harassment through public social media sites and other similar Internet activity.

The second offence can be found in the Press Law. Article 23 of the Press Law provides for an offence where there has been a direct provocation, by any means of electronic communication, to commit a crime or an offence. Where the crime or offence has been carried out following the provocation, or an attempt has been made to commit the crime or offence, then the individual who made the provocation is to be treated as an accomplice to the crime. Article 24 of the Penal Code provides for a penalty of five years' imprisonment and a 45,000 euros fine where there has been a direct provocation to commit certain crimes, including rape, voluntary attempts to life, sexual assaults, theft, and destruction, which will be applied where no crime or offence has actually followed the provocation. Journalists may be reluctant to rely or press on charges being brought under a press offence, since this can be abused by the authorities against them in the context of their work.

***Law on Cyber-Harassment***

The French Penal Code also criminalizes "moral harassment" (*harcèlement moral*), which is a general term that captures a wide range of actions. Article 222-33-2-2 of the Penal Code defines harassment as "repeated speech or behaviour" that has "as its purpose or effect" a deterioration in the victim's way of life resulting in an impairment of their rights and dignity, an impairment of their physical or mental health, or to put her professional future in jeopardy. The offence is punishable by one year's imprisonment and a fine of 15,000 euros.

On 4 August 2014, the offence of "moral harassment" was modified to give explicit recognition to the fact that it covers online harassment. In 2016, a judge ordered the removal of 34 blogs based on this provision.[91] Not only does the provision apply to online harassment, but it was also modified so that some forms of online harassment would be treated as an aggravating factor in sentencing. Since the amendment in 2014, "moral harassment" committed "through the use of an online communication service to the public" carries a penalty of two years' imprisonment and a fine of 30,000 euros.[92] This amendment implies that only harassment conducted through publicly accessible online platforms would be treated as an aggravating factor. However, in 2018, the provision was extended further so harassment conducted through any "digital or electronic medium" would also be treated as an aggravating factor. Therefore, the provision now treats any form of harassment online, including harassment conducted through direct private messaging, as an aggravating factor in sentencing.

Prior to 2018, the law on "moral harassment" only applied to "repeated speech or behaviour". This meant that the provision could not be relied on to tackle "pile on" harassment (*raids numériques*) and it was this limitation to Article 222-33-2-2 of the Penal

[91] Paris Tribunal de Grande Instance, Judgment of 1 April 2016, available at: https://www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-paris-ordonnance-de-refere-du-29-mars-2016/.

[92] Article 222-33-2-2-4 of the French Penal Code.

Code that led Ms. Daam's lawyer to pursuing an action on the basis of "a threat to commit a criminal offence" rather than "moral harassment".[93] In Ms. Daam's case, most of the messages she received were one-off and from different people, which all together constituted a harassment campaign against her.

In 2018, a bill was passed to fill this gap in the law. Marlene Schiappa, the French gender equality minister who proposed the bill, explained "[w]e want to put an end to this group cyber-harassment by making clear that every single person that is taking part will have to answer for it, even if they just sent a few tweets."[94] Since August 2018, the offence of "moral harassment" now includes the following:

1) "Statements or behaviours imposed to the same victim by several persons, in a concerted manner or by encouragement of one of them, even though they do not present a repetitive character", and

2) "Statements or behaviours imposed to the same victim by several persons to a same victim, when in the absence of co-ordination, these persons are aware that the victim is subject to repetitive behaviours or statements".[95]

***Law on Sexual and Sexist Harassment***

Article 222-33 of the Penal Code provides for the offence of "sexual harassment". Up until 2002, the scope of the offence was confined to "sexual harassment" that took place in a work or relationship context. However, as of 2002, the provision can be applied regardless of where the harassment takes place. Prior to 2018, the term "sexual harassment" was defined as "repeated sexual statements or behaviours directed towards a person that harm the person's dignity through their degrading, humiliating character, or by creating an intimidating, hostile or offensive situation."[96] As of 2018, the provision has been extended to also include "sexist" statements or behaviours that harm the person's dignity in this way.[97] The offence carries a penalty of two years' imprisonment and a 30,000 euro fine.

In 2018, Article 222-33 was also modified to provide that where "sexual harassment" takes place "through the use of an online communication service to the public or through a digital or electronic medium" then this will be treated as an aggravating factor. Online "sexual harassment" will, therefore, carry a higher penalty of three years' imprisonment and a fine of 45,000 euros. As with Article 222-33-2-2, the offence of "sexual harassment" will be found where there has been "pile on" harassment of a sexual or sexist nature.[98]

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93 Ouest France, *Menaces sur Nadia Daam. Les « raids numériques », nouveau visage du harcèlement sur Internet*, available at: https://www.ouest-france.fr/societe/justice/menaces-sur-nadia-daam-les-raids-numeriques-nouveau-visage-du-harcelement-sur-internet-5803632.

94 Deutsche Welle, *France passes new law on child rape, sexual harassment*, available at: https://www.dw.com/en/france-passes-new-law-on-child-rape-sexual-harassment/a-44919914

95 Article 11(b) of the *Law No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and gender-based violence*.

96 Article 222-33 of the French Penal Code.

97 Article 11(a) of the *Law No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and gender-based violence*.

98 Article 11(b) of the *Law No. 2018-703 of 3 August 2018 reinforcing the fight against sexual and gender-based violence* extends the offence of sexual and sexist harassment to (a) "[s]tatements or behaviours

***Conclusion***

The prosecution of two individuals for their involvement in the online harassment campaign against Nadia Daam was a welcome development, and hopefully it will help deter Internet users from conducting similar campaigns against journalists in the future. Nonetheless, the case exposed some loopholes in French law on moral and sexual harassment. In fact, the abuse against Ms. Daam may have gone unpunished if it were not for the fact that some of the abuse took the form of threats against the journalist. This was because the campaign involved a large group of individuals who individually only sent one message targeting her. As a result, this activity did not fall within the definition of "harassment" which required "repeated speech or behaviour".

As of 2018, the French law on moral and sexual harassment has undergone significant reform. This has provided some incredibly robust protections for journalists who experience online harassment and abuse in their different forms.

First, the laws on moral and sexual harassment have been extended so that they apply to (repetitive or non-repetitive) messages about the victim published by one person with several others in a co-ordinated effort or on the encouragement of one other person. They will also apply where a person sends a message with knowledge that the victim is already subject to repetitive statements or behaviours constituting moral or sexual harassment. This is a notable development as it explicitly makes users liable for one-off messages when they contribute to a campaign of harassment.

Secondly, the laws on moral and sexual harassment will carry heavier penalties when such conduct takes place over the Internet. This seems to take into account the uniquely harmful impact online harassment and abuse can have on the victim. As the European Court of Human Rights has noted, "[t]he risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press."[99]

Finally, France is the only jurisdiction considered in this report that has adopted a gender-specific response to online harassment and abuse. The French law on "sexual harassment" now criminalizes the repeated targeting of an individual with both sexual and *sexist* statements that harm the victim's dignity through their degrading, humiliating, intimidating, hostile or offensive nature. This would, therefore, protect journalists against intimidation that is of a sexual nature, as well as other forms of gender-based abuse.

Despite these positive developments above, there is still room for improvement in how French law responds to the online harassment or abuse of journalists. Firstly, the law still requires engagement with a judicial process. As has been noted above, this can be costly and time consuming for a journalist. This can lead to online harassment and abuse going

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imposed to the same victim by several persons, in a concerted manner or by encouragement of one of them, even though they do not present a repetitive character", and (b) "[s]tatements or behaviours imposed to the same victim by several persons, when in the absence of co-ordination, these persons are aware that the victim is subject to repetitive behaviours or statements"

[99] European Court of Human Rights, *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, Application No. 33014/05, par. 63 – 64.

unreported and unpunished. Nadia Daam has noted that if it were not for the fact that her employers took care of her case, she might not have gone through with it.[100] Secondly, there are still examples of the French authorities failing to take up cases of online harassment and abuse of journalists. Julie Hainaut, a Lyon-based freelancer who writes for Le Petit Bulletin, experienced exceptionally violent online harassment in September 2017 after reporting about the owners of a local bar. She received numerous insults, serious threats, and her home address was published online. She lodged four separate complaints to the police but received no feedback of follow-up from the authorities.[101]

[100] NewsBeezer, *Cyberbullying: From the Screen to the Bar*, available at: https://newsbeezer.com/franceeng/cyberbullying-from-the-screen-to-the-bar/.

[101] Reporters Without Borders, *Trial spotlights need to prosecute trolls who threaten journalists*, available at: https://rsf.org/en/news/trial-spotlights-need-prosecute-trolls-who-threaten-journalists.

## Ireland

### *Case Study: Sharon Ní Bheoláin*

On 17 May 2018, a 41-year-old Dublin man, Conor O'Hora, was sentenced to four and a half years in prison (the last eighteen months of which were suspended) for harassing Sharon Ní Bheoláin, an Irish journalist, newsreader and presenter. At the time of the offence, Ms. Ní Bheoláin was a newsreader with the national broadcaster Raidió Teilifís Éireann (RTÉ).

On 27 March 2013, Mr. O'Hora uploaded 32 images to the website imagefap.com using the account name "*whoresluttramp*".[102] These images were modified to show Ms. Ní Bheoláin's head superimposed onto pornographic images, and these modified images could be found on Google after a search of Ms. Ní Bheoláin's name.[103] The account was closed at the request of Gardaí (Irish police) on 17 January 2014. Mr. O'Hora also had 39 online conversations with another man via Yahoo private messenger.[104] These discussions included talk of rape, gang rape, sexual assault, torture, threat of extreme sexual violence and murder. Some of these conversations referred to Ms. Ní Bheoláin.[105] Following a search of Mr. O'Hora's home, his computer and mobile phone were seized. These devices included over 90 images of child pornography in the most serious category.[106] Many of the pictures were of three identified children and had been taken from Facebook accounts and doctored to form pornographic images. Mr. O'Hora's conversations over Yahoo messenger also referred to these three identified children.

In November 2017, Mr. O'Hora was charged under section 10 of the Non-Fatal Offences Against the Person Act and the Child Trafficking and Pornography Act.[107] The former is the most relevant for the purposes of this report.

**Section 10 Non-Fatal Offences Against the Person Act**
(1) Any person who, without lawful authority or reasonable excuse, by any means including by use of the telephone, harasses another by persistently following, watching, pestering, besetting or communicating with him or her, shall be guilty of an offence.

(2) For the purposes of this section a person harasses another where—

(a) he or she, by his or her acts intentionally or recklessly, seriously interferes with the other's peace and privacy or causes alarm, distress or harm to the other, and

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102 Thejournal.ie, *Man who harassed Sharon Ní Bheoláin and possessed child abuse images jailed for 3 years*, available at: https://www.thejournal.ie/ni-bheolain-harassment-4017763-May2018/.

103 *Id*.

104 *Id*.

105 *Id*.

106 *Id*.

107 Irish Independent, *Man accused of harassing RTÉ star Sharon Ní Bheoláin sent for trial*, available at: https://www.independent.ie/irish-news/courts/man-accused-of-harassing-rt-star-sharon-n-bheolin-sent-for-trial-36370147.html.

(b) his or her acts are such that a reasonable person would realise that the acts would seriously interfere with the other's peace and privacy or cause alarm, distress or harm to the other.

(3) Where a person is guilty of an offence under subsection (1), the court may, in addition to or as an alternative to any other penalty, order that the person shall not, for such period as the court may specify, communicate by any means with the other person or that the person shall not approach within such distance as the court shall specify of the place of residence or employment of the other person.

(4) A person who fails to comply with the terms of an order under subsection (3) shall be guilty of an offence.

(5) If on the evidence the court is not satisfied that the person should be convicted of an offence under subsection (1), the court may nevertheless make an order under subsection (3) upon an application to it in that behalf if, having regard to the evidence, the court is satisfied that it is in the interests of justice so to do.

(6) A person guilty of an offence under this section shall be liable—

(a) on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both, or

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 7 years or to both.

In March 2018, Mr. O'Hora pleaded guilty to recklessly harassing Ms. Ní Bheoláin and to knowingly possessing child pornography on a hard drive.[108] The police indicated that Mr. O'Hora did not hold any particular malice towards Ms. Ní Bheoláin, just a "fixation".[109] "It's not something I'm proud of, it's a fantasy thing. It's ridiculous to think she would have any interest in me," said Mr. O'Hora at his sentencing hearing.[110]

When sentencing Mr. O'Hora, Judge Martin Nolan described his actions as an "insidious form of harassment" and "debasing behaviour".[111] Judge Nolan went on to note that the "information on [Ms. Ní Bheoláin] will be out there forever" and "no doubt it caused considerable distress to [Ms. Ní Bheoláin] and her family. [Mr. O'Hora] must have known

108 Irish Independent, *Dublin man to be sentenced in May for harassing RTE's Sharon Ni Bheoláin*, available at: https://www.independent.ie/irish-news/courts/dublin-man-to-be-sentenced-in-may-for-harassing-rtes-sharon-ni-bheolin-36733190.html.

109 Irish Times, *Man who harassed RTÉ newsreader Sharon Ní Bheoláin to be sentenced*, available at: https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/man-who-harassed-rt%C3%A9-newsreader-sharon-n%C3%AD-bheol%C3%A1in-to-be-sentenced-1.3497767.

110 *Id*.

111 Thejournal.ie, *Man who harassed Sharon Ní Bheoláin and possessed child abuse images jailed for 3 years*, available at: https://www.thejournal.ie/ni-bheolain-harassment-4017763-May2018/.

that. It was reprehensible and he should be thoroughly ashamed."[112] It was not reported to what extent the judge took into account the impact on Ms. Ní Bheoláin's journalistic freedom when sentencing Mr. O'Hora.

***Non-Fatal Offences Against the Person Act and Civil Law Remedy for Breach of Constitution***

Irish law provides for the criminal offence of "harassment" under section 10 of the Non-Fatal Offences Against the Person Act. This provision captures a wide range of behaviour and was explicitly intended by the legislature to include "stalking" within its remit.[113] The provision criminalizes the persistent following, watching, pestering, besetting and/or communicating with an individual where this amounts to "harassment". "Harassment" will have taken place where two criteria are met.[114] First, the accused must intend to, or recklessly, seriously interfere with the victim's peace and privacy *or* cause alarm, distress or harm to the victim. Second, a reasonable person must also realize that the acts would seriously interfere with the victim's peace and privacy *or* cause alarm, distress or harm to the victim.

Even though this is a criminal offence carrying a financial penalty (up to 1,500 euros) or a term of imprisonment (up to seven years on indictment), section 10 of the Non-Fatal Offences Against the Person Act grants the courts the power to issue an order restraining the accused from communicating with the victim or requiring the accused to remain a certain distance from the place of residence or employment of the victim for such a period as the court may specify.[115] These orders can be made instead of a financial penalty or term of imprisonment where guilt is established, as well as in cases where the accused is not found guilty of an offence following prosecution. Therefore, it is open to the courts to adopt these lighter measures instead of imposing a fine or prison term where it is in the interests of justice to do so.

As Ms. Ní Bheoláin's case demonstrates, the provision can be used to prosecute individuals for harmful content targeted at journalists online. The provision explicitly recognizes that harassment covered by the provision could take place "by any means". Therefore, it is technology neutral and can be applied in cases where forms of communication such as email, social media messages or texting have been used.

Nevertheless, the current legal framework on harassment has a number of shortcomings that make it difficult for prosecutions to be brought in relation to the online harassment of journalists.

Firstly, the "following, watching, pestering, besetting or communicating" must be done "persistently" for there to be a conviction under the provision. The term "persistently" has been interpreted in a manner that is not dependent on a specific number of incidents or a

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112 Thejournal.ie, *Man who harassed Sharon Ní Bheoláin and possessed child abuse images jailed for 3 years*, available at: https://www.thejournal.ie/ni-bheolain-harassment-4017763-May2018/.

113 See Volume 477 Dáil Éireann Debates 15 April 1997, Second Stage debate on Non-Fatal Offences Against the Person Bill 1997; See also Volume 478 Dáil Éireann Debates 29 April 1997, Committee and Remaining Stages debate on Non-Fatal Offences Against the Person Bill 1997.

114 Section 10(2) of the Non-Fatal Offences Against the Person Act 1997.

115 Sections 10(3) and 10(5) of the Non-Fatal Offences Against the Person Act 1997.

time frame within which those incidents must have occurred.[116] Nonetheless, in one case, the Irish courts held that the core requirement of persistence is that the behaviour involved be "continuous" in nature, which means it can consist of either (a) a number of incidents that are separated by intervening lapses of time, or (b) a single, but continuous, incident such as following a person on an unbroken journey over a prolonged distance.[117] It is unlikely, therefore, that once-off postings online could be found to have met this definition of persistence.[118] This means that the provision may not protect journalists against harmful online communications that only occur once, but may have an incredibly harmful impact on the individual and their ability to carry out their work.

Secondly, the provision only provides that communications *with* the victim can constitute harassment under section 10 Non-Fatal Offences Against the Person Act. Therefore, harassment through indirect communications, i.e. communications with third parties about the victim, would seem to be excluded from the offence.[119] This has also raised questions about whether postings on social media, that are not specifically directed at the victim, would be covered by the provision.[120] Ms. Ní Bheoláin's case would suggest that some publications made online, that do not involve direct contact with the victim, would be covered by the provision. However, as Mr. O'Hora pled guilty to the offence, no general conclusions can be drawn as to how courts will interpret the provision in the future.

Section 5 of the Non-Fatal Offences Against the Person Act provides for an offence where a person, without lawful authority, "makes to another a threat, by any means intending the other to believe it will be carried out, to kill or cause serious harm to that other or a third person".[121] The provision envisages that such threats may be made "by any means" and, therefore, it can apply to threats made online. It also extends to serious threats concerning the victim that were communicated to a third party (i.e. "indirect communications"), as well as threats that are made on only one occasion. However, as the offence requires intention

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116 Law Reform Commission, *Report on Aspects of Domestic Violence* (LRC 111-2013), December 2013, available at: https://www.lawreform.ie/_fileupload/Reports/r111.pdf. This can be compared with the UK Harassment Act 1997, which requires a "course of conduct" rather than perisistence. "Course of conduct requires at least two incidents.

117 *Director of Public Prosecutions v. Lynch*, [2008] IEHC 183.

118 Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116-2016), available at: https://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf, par. 2.78.

119 See Joint Committee on Transport and Communications, *Report on Addressing the Growth of Social Media and Tackling Cyberbullying* (Government Publications, 2013), available at: https://webarchive.oireachtas.ie/parliament/media/report-on-social-media-july-2013-website.pdf, p. 34.

120 Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116-2016), available at: https://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf, par. 2.35. Two successful prosecutions brought against individuals for indirect communications concerning the victims followed guilty pleas, and so the law in this area has not been properly tested. Irish Times, *Man avoids jail for 'vile' internet messages about ex-girlfriend*, available at: https://www.irishtimes.com/news/crime-and-law/courts/man-avoids-jail-for-vile-internet-messages-about-ex-girlfriend-1.1731368; Irish Times, *Man jailed after falsely linking woman with online pornography*, available at: https://www.irishtimes.com/news/ireland/irish-news/man-jailed-after-falsely-linking-woman-with-online-pornography-1.2421444.

121 Section 5 of the Non-Fatal Offences Against the Person Act 1997.

for the other person to believe that the threat will be carried out, and the threat has to kill or cause serious harm, the scope of the offence is considerably narrow and it can be difficult to prosecute.

In terms of civil law remedies, there is one avenue that appears to be open to plaintiffs to bring claims for damages on the basis of harassment or abuse sent online.[122] In recent years, the Irish courts have recognized remedies that are available to plaintiffs based on breach of a constitutional right by another private person. In one case, for example, a debt collector was ordered to pay damages to a woman who he had harassed and intimidated through emails and texts demanding payment.[123] The court recognized that this amounted to an offence under section 10 of the Non-Fatal Offences Against the Person Act, but also found it to be a violation of the constitutional rights to the protection of the person (Article 40.3.2) and the inviolability of the dwelling (Article 40.5). Although it has not been attempted before the courts, it would be open to a journalist to bring a claim for damages based on a breach of the right to privacy, the right to the protection of the person, and/or the right to freedom of expression in cases where abuse and harassment has inhibited their ability to carry out her journalistic work. This would permit a journalist to obtain specific remedies for the free speech violations caused by the harassment and abuse.

***Law Reform Commission Report on Harmful Communications and Digital Safety***

In 2016, Ireland's Law Reform Commission published a report looking into law reform in response to the fact that some online users engage in communications that cause significant harm to others. Even though the Law Reform Commission did not make explicit reference to the problem of journalists being abused online, it recognized that law reform was necessary in light of negative developments such as "intimidating and threatening online messages directed at private persons and public figures".[124]

In the report, the Law Reform Commission highlighted the need to achieve an appropriate balance between the right to freedom of expression and the right to privacy when approaching law reform in this area.[125] In this vein, it recommended a three-level hierarchy of responses to target harmful digital communications with a view to achieving proportionality. The first level was education to create user empowerment and foster safe and positive digital citizenship. The second level was civil law and regulatory oversight, and the Law Reform Commission stated that "where education and related responses are ineffective and the law needs to be employed, civil law should be favoured as it is less onerous than the criminal law."[126] Finally, it recommended the use of criminal law where other measures are ineffective and the behaviour meets the clear threshold of "serious harm". It went on to observe that:

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122 Aside from remedies in defamation and data protection, which fall outside the scope of this report.

123 *Sullivan v. Boylan and Ors* [2013] IEHC 104, 2012 8738 P.

124 Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116-2016), available at: https://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf, par. 2

125 *Id*., par. 1.14 – 1.80.

126 *Id*., par. 1.74.

> "communications which constitute serious threats of violence and those which directly target individuals, including behaviour which amounts to harassment, that is, persistent behaviour which seriously interferes with a person's peace and privacy or causes alarm, distress or harm, should be subject to the criminal law in most cases. However, communications which do not come within these categories require a high threshold before they should be criminalized if freedom of expression is to be safeguarded. Nonetheless, activity designed to reach a large audience and carried out with the intent to cause serious distress or harm by an adult offender, would appear to meet this threshold."[127]

The Law Reform Commission made a number of recommendations for reform of Ireland's criminal law relevant to online harassment and abuse.

Firstly, it recommended that section 10 of the Non-Fatal Offences Against the Person Act be remodelled so: (a) the harassment offence would expressly apply to harassment by any means of communication, including through digital and online communications; and (b) the offence would deal with indirect forms of communication that constitute harassment. Although section 10 of the Non-Fatal Offences Against the Person Act was technology neutral, and applied to harassment "by any means", the Law Reform Commission deemed it important to give explicit recognition to the fact that the offence applied to digital and online communications. It believed this clarity in the legislation would increase the reporting of online offences and ensure that there is greater prosecution by the authorities of such offences.[128] It also noted that it would also underline society's recognition of the seriousness of such offences and the need to prevent and punish them.[129] With regard to its proposal to include indirect communications within the offence, it noted that this would close "an important gap" in the law of harassment but underlined that the "behaviour would still need to be such that it can be proven that it harasses the victim. This behaviour must thus seriously interfere with the victim's peace and privacy ***or*** cause him or her alarm, distress or harm". [130]

Secondly, the Law Reform Commission recommended introducing a separate offence of "stalking". The definition of "stalking" would follow the harassment offence but would differ to the extent that it would require "the intentional or reckless acts of the perpetrator to interfere seriously with the victim's peace and privacy ***and*** cause him or her alarm, distress or harm" rather than them being alternative requirements.[131] It explained that, although stalking would already be covered by section 10 of the Non-Fatal Offences Against the Person Act, recognizing it as a separate offence would be of particular importance for victims. It also noted that specifically naming stalking in the legislation would underline the "different and more insidious character" of the offence. It also noted that it could see the number of prosecutions for stalking increase, as happened in England and Wales when they introduced a specific offence.[132]

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127 *Id.*, par. 1.80.
128 *Id*., par. 2.29.
129 *Id*.
130 *Id*., par. 2.52.
131 *Id*., par. 2.74.
132 *Id*., par. 2.69.

Thirdly, it recommended the introduction of two offences aimed at tackling one-off harmful digital communications.[133] In this context, it noted that the "permanence of online content as well as the potential for such content to go viral and remain in the public consciousness and publicly available after the initial upload means that such interferences with privacy can have substantial long-term consequences, such as harming future employment prospects and having harmful effects on the individual's physical or mental health."[134] However, it also noted that general offences designed to target one-off activity need to be drafted with enough specificity to ensure that the right to freedom of expression is safeguarded.[135]

The first of these offences was one of distributing a threatening, false, indecent or obscene message to or about another individual by any means of communication, and with the intent to cause alarm, distress or harm or by being reckless as to this. The offence would also be made out if such communications were sent persistently and by any means. The second offence was that of distributing an "intimate image"[136] without the consent of the person depicted in the image or threatening to do so. The offence would only be committed where the perpetrator has intent to cause alarm, distress or harm or has been reckless as to this. It also recommended a strict liability offence of taking or distributing an "intimate image" of another person without the other person's consent.

***Harassment, Harmful Communications and Related Offences Bill 2017***

A bill was presented to the Dáil Éireann, the lower house of the Irish legislature, on 16 May 2017 with a view to implementing the thrust of the Irish Law Commission's Report. Section 3 of the *Harassment, Harmful Communications and Related Offences Bill 2017* expands the current definition of harassment to include circumstances where a person "persistently communicates with a third person about another person".[137] In this way it brings harassment through "indirect communications" explicitly into the scope of the offence. The provision also defines "communication" as "the communication of information by any means and, without prejudice to the generality of the foregoing, includes (a) communication by spoken words, other audible means, behaviour, writing, sign or visible representation, and (b) the communication of information that is generated, processed, transmitted, received, recorded, stored or displayed by electronic means or in electronic form".[138] Therefore, online communications are explicitly covered by the offence of harassment.

Sections 3(3) and 3(4) of the Bill provide factors that the courts can treat as aggravating circumstances when sentencing a defendant for the offence of harassment. The first factor is

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133 The Law Reform Commission noted that some other legal instruments covered once-off harmful digital communications, such as section 5 of the Non-Fatal Offences Against the Person Act, the Criminal Damage Act 1991, the Child Trafficking and Pornography Act, and the Data Protection Acts, but not one of these provided a comprehensive response to this type of behaviour.

134 Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116-2016), available at: https://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf, par. 2.80.

135 Id., par. 2.142.

136 *Id*., par. 2.204 to 2.209.

137 Section 3(1)(a)(iii) of the Harassment, Harmful Communications and Related Offences Bill 2017.

138 Section 2(1) of the Harassment, Harmful Communications and Related Offences Bill 2017.

where the defendant by his or her acts both intentionally or recklessly seriously interferes with another person's peace and privacy *and* causes alarm, distress or harm to the other person. In short, the offence of "stalking", as defined by the Law Reform Commission, has been treated as an aggravating factor when sentencing for harassment rather than a standalone offence. The second aggravating factor is where the defendant and the victim were in an intimate relationship and the defendant either used personal information about the other person or made use of an electronic device or software in order to monitor, observe, listen to or make a recording of the other person or her movements, activities and communications, without the other person's knowledge and consent.

Notably, a scenario where, by committing the offence, the defendant violated other fundamental rights of the victim, including the right to freedom of expression, is not explicitly treated as an aggravating factor under the provision. This is perhaps a missed opportunity to recognize and signal the seriousness of the offence when it is used against journalists, politicians or activists in the context of their work.

The Bill also recognizes that judicial proceedings can lead to the victim receiving further harassment or abuse online due to the public nature of a trial. In response to this, the Bill establishes a process for protecting the privacy of victims in proceedings concerning harmful communications. Section 11(1) of the Bill provides that, once an individual has been charged with a harmful communications offence, nothing can be published that is "likely to lead members of the public to identify any person as a person against whom the offence is alleged to have been committed".[139] These reporting restrictions can be lifted in limited circumstances, such as where it is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses and where the conduct of the defence is likely to be adversely affected if the restrictions are not lifted.[140]

The Bill is currently at the Third Stage (Committee Stage) before the Dáil Éireann, during which it is examined section by section and amendments can be made. There have been renewed calls in December 2018[141] and January 2019[142] for the Bill to be passed as a matter of priority.

***<u>The Office of a Digital Safety Commissioner</u>***

One aspect of the Law Reform Commission's Report that has not been included in the Harassment, Harmful Communications and Related Offences Bill 2017 is the establishment of an Office of the Digital Safety Commissioner of Ireland. This was the recommendation of the Law Reform Commission for the establishment of a statutory body tasked with promoting digital and online safety, that would also be responsible for overseeing and regulating a system of "take down" orders.[143] An individual who has been the victim of

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139 Section 11(1) of the Harassment, Harmful Communications and Related Offences Bill 2017.

140 Section 11(2) to 11(6) of the Harassment, Harmful Communications and Related Offences Bill 2017.

141 Irish Times, *Taoiseach slates 'Seanad filibuster' of judicial appointments law*, available at: https://www.irishtimes.com/news/politics/oireachtas/taoiseach-slates-seanad-filibuster-of-judicial-appointments-law-1.3713709.

142 Raidió Teilifís Éireann, *Eir to issue cyber-bullying awareness leaflets with new phones*, available at: https://www.rte.ie/news/ireland/2019/0113/1022919-cyberbullying/.

143 Law Reform Commission, *Report on Harmful Communications and Digital Safety* (LRC 116-2016), available at:

harmful online harassment or abuse could apply for such an order to be made against digital service undertakings, which would include Internet service providers and social media websites. This takedown procedure would be based on a Code of Practice that would explain the procedure and set out the relevant requirements and obligations placed on digital service undertakings.[144]

This regulatory mechanism is envisaged as being a swift and accessible remedy for those who have been subject to online harassment or abuse. Notably, the Law Reform Commission recommended that the take-down procedure be "made available to all affected individual persons by digital service undertakings free of charge".[145] Earlier in the report, the Law Reform Commission noted the cost that can accompany judicial proceedings in Ireland. For instance, an attempt to remove content from the Internet through the courts has reportedly cost one plaintiff over 1,000,000 euros.[146] As noted above, the financial and other burdens that can accompany judicial proceedings have a particularly detrimental impact on the ability of journalists to carry out their work. Therefore, this is a welcome proposal from the Law Reform Commission that would permit journalists to obtain a swift and low-cost remedy to online abuse and harassment. It is regrettable that the legislature has not picked up on this proposal and included it in its Harassment, Harmful Communications and Related Offences Bill 2017.

***Conclusion***

Ms. Ní Bheoláin's case was a rare example of a prosecution actually being brought in Ireland against an individual for harassing a journalist online. The case demonstrates the flexibility inherent in Ireland's law on harassment, which covers repeated communications regardless of the medium. The case also implies that the provision may apply to "indirect communications" online, since the accused's conduct consisted of the publication of photoshopped images of the victim online.

Nonetheless, the case also demonstrates how the provision criminalizing harassment is in need of reform and further clarification to effectively combat all types of online harassment and abuse. In this regard, the Law Reform Commission's proposals and the Harassment, Harmful Communications and Related Offences Bill 2017 are welcome developments. These reforms would clarify that the offence of harassment applies to online communications and would also cover persistent communications with third parties that constitute harassment of an individual. Nonetheless, even with these reforms, there may still be gaps in the law when it comes to dealing with multiple individuals each posting one message that does not, on its own, constitute a threatening, false, indecent or obscene message. Therefore, further reform may be necessary to deal with the phenomena of "pile on" harassment.

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https://www.lawreform.ie/_fileupload/Reports/Full%20Colour%20Cover%20Report%20on%20Harmful%20Communications%20and%20Digital%20Safety.pdf, par. 3.66.

144 *Id*., par. 3.75.

145 *Id*.

146 Irish Independent, *"Student in YouTube taxi row facing €1m legal costs"*, available at: http://www.independent.ie/irish-news/courts/student-in-youtube-taxi-row-facing-1m-legal-costs-30448556.html.

The tiered response of education, civil law and criminal law in the Law Reform Commission's recommendations is worth highlighting. This response ensures that measures adopted to combat online harassment and abuse do not disproportionately interfere with the right to freedom of expression. This is achieved by confining criminal liability to circumstances where online abuse and harassment causes serious harm. This will help ensure that any interference with the right to freedom of expression caused by the response meets the test of necessity and proportionality under Article 19 ICCPR. With regard to regulatory responses, the Law Reform Commission has proposed the establishment of a statutory body that can make "take down" orders following complaints from individuals harmed by online communications. This accessible, swift and low-cost remedy would reduce the burden of pursuing redress for online abuse and harassment. In relation to journalists, it would also help ensure minimum disruption to their journalistic work.

## Conclusion

The cases and jurisdictions surveyed above provide useful insights into some best practices for dealing with online abuse and harassment of journalists. A number of recommendations can be distilled from the approaches adopted in these three jurisdictions:

- States should consider **existing harassment laws** and utilize the flexibility inherent in some of those laws to prosecute those responsible for harassing journalists online. All three case studies in this report involved the prosecution of online harassers through the imposition of criminal laws that already applied to the offline context. In Jessikka Aro's case, the court was able to interpret the law on stalking and defamation to cover online phenomena such as "tagging" and online harassment campaigns/"pile on".

- As has already been done in France, specific measures should be adopted to **penalize and/or remedy harassment that is of a sexual and/or sexist nature**. This would highlight the serious and damaging nature of this particular form of harassment and may also increase the rate at which such conduct is reported and prosecuted in sufficiently serious cases. This would also help recognize that attacks on female journalists require harsher penalties, since they are often attacks on the journalists because of their work and because they are women.

- As has already been done in France, laws regulating online harassment should be examined and, where relevant, **amended to capture the phenomenon of online harassment campaigns/"pile on" harassment**. Where there is a co-ordinated campaign of multiple Internet users posting one or more messages targeting the individual or an individual posts one or more messages targeting an individual, when they know or should know that the victim is being targeted by repeated communications or behaviour already, this should be considered a form of online harassment under the law.

- As has been proposed in Ireland and instituted in France, measures aimed at penalising or curtailing harassment should **explicitly apply to online communications**. This will help reduce the risk of under-reporting or under-prosecution caused by uncertainty as to whether harassment is capable of being conducted through electronic means. Due to the unique nature of the Internet, with the propensity of communications to instantly reach a wide audience and the difficulty in removing all trace of such communications, it may be necessary to treat online harassment as an aggravated form of harassment.

- As has been proposed in Ireland, laws regulating online harassment should be **amended where they are limited to direct communications** between the harasser and the victim. Online harassment that is carried out through indirect communications, such as the establishment of a fake profile or publication of photoshopped images on a website, should also fall within the scope of the law.

- As was highlighted by the Law Reform Commission of Ireland, States **should adopt a tiered response** in how they deal with online harassment. With educational and civil

law measures being adopted before they resort to the criminal law. This would help ensure that any interference with the right to freedom of expression caused by online harassment laws would be proportionate to the harm caused by the relevant harassment.

In addition to those recommendations set out above, this report would recommend the following:

- Measures aimed at combatting online abuse or harassment of journalists must be **compatible with the right to freedom of expression under international law**. Article 19(2) ICCPR requires that any measure interfering with the right to freedom of expression be "provided by law", in pursuit of a "legitimate aim", and necessary and proportionate. Measures should also take into account international standards and best practices adopted by international human rights bodies, including as relates to criminal laws on defamation. Therefore, different measures (e.g. regulatory, civil law and criminal law) should be adopted to combat online abuse and harassment, with criminal law only being used in exceptional circumstances where the harassment or abuse is likely to cause serious harm.

- In cases where online harassment or abuse of journalists is likely to cause serious harm, **the police and prosecuting authorities must proactively and vigorously investigate the harassment or abuse in a timely fashion**, and perpetrators should be prosecuted accordingly. Such a response should not be wholly dependent on the victim's coming forward and calling for the punishment of the perpetrators since the online harassment interferes with the right to freedom of expression of both the journalist and the public at large (and should, therefore, be treated as a public matter).

- Other measures should also be considered that can offer **swift, low-cost and low-burden remedies** for journalists who have been harassed or abused online. All the cases considered in this report have involved costly and time-consuming judicial proceedings, which can put an additional burden on journalists who have been victims of online abuse.

- When considering cases concerning the harassment or abuse of journalists, the courts must **take into account the impact this conduct has had on the right to freedom of expression** and freedom of the press, and factor this into their sentencing/remedies. The courts in all the case studies examined above failed to explicitly recognize that online abuse of journalists is a direct attack and interference with the right to freedom of expression, and should be remedied accordingly.