



**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**APP. NO. 45305/16**

**BETWEEN**

**ANDREA GIULIANO**

**Applicant**

**- and -**

**HUNGARY**

**Respondent Government**

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**THIRD-PARTY INTERVENTION SUBMISSION BY**  
**ARTICLE 19: GLOBAL CAMPAIGN FOR FREE EXPRESSION**  
**AND**  
**ILGA EUROPE**

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1. This third-party intervention is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19) and ILGA-Europe (jointly the Interveners). The Interveners welcome the opportunity to intervene in the case, by leave of the President of the Court, granted on 31 January 2020 pursuant to Rule 44 (3) of the Rules of Court. As directed, the submission does not address the facts or merits of the Applicant's case.

## **SUMMARY**

2. In the Interveners' view, the core issue raised in the present case is an alleged failure of the State to conduct an effective investigation into the online harassment and abuse, including continuous death threats, suffered by the Applicant. Together with recent cases which included an aspect of online harassment and abuse,<sup>1</sup> this case provides the opportunity for the European Court of Human Rights (the Court) to elaborate on an appropriate standard of effective investigation into online harassment and abuse, including whether this includes an obligation on the side of law enforcement authorities to attempt the pursuit of international mutual assistance with the authorities of the USA. In the submission, the Interveners address:
  - i) wider contextual information on the situation of LGBTQI activists in Hungary, providing a background against which the Court will determine this application;
  - ii) international and comparative standards on effective investigation, including into online harassment and abuse;
  - iii) comparative standards on the extent to which law enforcement authorities rely on mutual legal assistance treaties in the investigation of online harassment and abuse;
  - iv) the appropriate approach to cases involving online harassment and abuse, consistent with the right to freedom of expression and other human rights standards.

### ***Note on terminology***

3. At the outset, the Interveners observe that there is a broad range of terminology used to describe the phenomenon of discriminatory expression and other forms of complex abusive behaviour, that is committed, abetted or aggravated, in part or fully, by the use of information and communication technologies, such as mobile phones, the Internet, social media platforms, and email.<sup>2</sup> These range from *inter alia* "online violence," "cyber-violence," "cyber-bullying," "cyber-violence and harassment using new technologies," "technology related violence" or "online hate speech."<sup>3</sup> Further, this terminology is used to collectively describe different types of problematic conduct; from sending direct or indirect threats of physical or sexual violence, sending offensive messages, targeted harassment (often in the form of 'pile-ons', with multiple perpetrators), to privacy violations (such as "doxing, stalking, sharing intimate sexual images"). Each of these might be defined differently in domestic legislation or in recommendations of regional and international human rights bodies; many of which were developed specifically to provide gender-based protection to women and girls.<sup>4</sup> Other institutions, such as social media companies and academics, have also produced their own lexicon to conceptualise this phenomenon.
4. While there is no universally agreed terminology to capture this phenomenon and its different forms, in this submission, the Interveners have employed the term "online harassment and abuse" as a generic term to capture the type of conduct described above.

## **SUBMISSION**

### **i) Situation of LGBTQI activists in Hungary – context**

5. The Interveners, as well as other international governmental and nongovernmental organisations, have long-documented the deteriorating situation for LGBTQI people and LGBTQI activists in Hungary.
6. For example, according to a 2019 Eurobarometer survey, a majority of Hungarians are hostile towards

LGBTQI people, this number has greatly increased over the last few years, and this attitude is consistent across most issues connected with LGBTQI rights.<sup>5</sup> Studies show that ‘hate speech’ and various forms of discriminatory language on the grounds of sexual orientation and gender identity have been on the rise in Hungary in recent years. While leading public officials and representatives of governing parties have spoken out against similar forms of speech concerning Roma and Jewish people, homophobic and transphobic speech remains largely unaddressed. This is a clear shift from the earlier period, up until 2010, where the public discourse was more balanced and homophobic and transphobic statements were more likely to be condemned by public officials.<sup>6</sup>

7. Equally concerning is the fact that anti-LGBTQI statements are often made by high-ranking government officials. For example, in 2015, Prime Minister Viktor Orbán publicly declared that the very topic of LGBTQI people’s rights “lures one to joke” and that “homosexuals should not behave in a provocative way like one can see in Western countries.”<sup>7</sup> Special advisor to Prime Minister, Imre Kerényi called for “stopping the faggot lobby”; Mayor of Budapest, István Tarlós talked about homosexuality as “unnatural and repulsive”; Vice Prime Minister Zsolt Semjén called homosexuality “a deviance” and “an aberration”<sup>8</sup>; State Secretary for denominational, national minority and civil society affairs Miklós Soltész spoke about “unnatural advocates of gender theory” and LGBTQI “pseudo-science” and “senseless craziness.”<sup>9</sup> No government officials have distanced themselves from these statements.
8. Reports also show that for LGBTQI people in Hungary, harassment, threats and various forms of violence are not isolated incidents. The following examples are illustrative, but not exhaustive:
  - The annual Budapest Gay Pride Parade, a peaceful and successful event previously, has since 2007 been the target of homophobic attacks. For example, on 18 June 2011, two Pride participants were beaten up by a group of 10-20 extremist protestors. The attack was video-recorded and uploaded to an extreme-right wing website with the title *Patriots beat up a faggot*. From the circumstances of the video, it was clear that it was prepared by one of the perpetrators.<sup>10</sup> On 6 July 2013, three Pride participants were physically assaulted by a group of extremists. After the victims gave an interview to the media, the extreme right wing news portal published an article *Thirty members of the guard dressed in black beat up gypsies – they lied again*, with the names, email addresses and mobile phone numbers of two of the victims.<sup>11</sup> In July 2013, 20-30 protestors verbally and physically assaulted three human rights activists returning from Pride, the assault ended only after the arrival of the police. Police did not apprehend any of the perpetrators; but the prosecution later charged six men. Only two of them will serve a prison sentence.<sup>12</sup>
  - In June 2012, prior to Budapest hosting the Eurogames, a European level LGBTQI sport event, several news portals affiliated with extreme right-wing political groups started publishing articles calling for the banning of the event. On June 24, 2012, the extreme right-wing news portal *deres.tv* carried an article with title *The Hunting Season Starts! List of the organizers of the faggot Olympics in one place, hotels where the queers stay soon to come*. The article contained the name and photo of 31 persons, whom the authors claimed were the organisers of the event. It called for “using whatever means necessary” and “the highest form of resistance”; and also claimed that they would publish the list of organisers to help “faggot hunters.” The following day a list of hotels where the participants would stay was published referring to the participants as “game to hunt down” (game referring to wild animals). The authorities found that publishing the list amounted to preparation to commit violence against a member of a community, but when the police found out that the server hosting the website was operated from abroad, they refrained from prosecution.<sup>13</sup>
  - In 2013, a same-sex couple was threatened with a baseball bat as they were kissing outside a shop. The police arrived with significant delay and discouraged the victims from initiating proceedings against the harasser, explaining that they could be apprehended for “immoral public behaviour.” After the story was reported to the media by one of the victims, the ORFK (the civil law enforcement agency) issued a press release claiming the victim was lying. The Independent Police Complaints

Board found that the police procedure violated the complainant's right to a fair trial, right to information and the right to equal treatment; however, the ORFK did not recognise the latter. The victim also approached the Equal Treatment Authority, which rejected the complaint on the ground that the ORFK had already taken a decision on the matter.<sup>14</sup>

- In September 2019, a neo-Nazi group disrupted an LGBTQI movie screening, repeatedly threatened participants with “beating them up” and demanding “banning faggots.”<sup>15</sup> The organisers called the police, who arrived after 20 minutes but left the house after a brief look and told the organisers that they would not take action against the perpetrators. They made it clear they would intervene only “if blood is spilled.” The police claimed they had no right to intervene, although several offences were being committed before them.<sup>16</sup>

9. NGO reports have also shown that law enforcement agencies often continue to disregard the homophobic or transphobic motivation in certain crimes which results in less efficient investigation and lower sanctions.<sup>17</sup> Data collection on homophobic/transphobic hate crimes is not adequate: recording them is optional, while for those motivated by nationality, ethnicity, race, and religion, it is mandatory.<sup>18</sup> There are no measures to encourage reporting or prevention. For these reasons, the European Commission against Racism and Intolerance recommended that Hungary revises the National Crime Prevention Strategy to better combat crime motivated by racial, homophobic, and transphobic violence.<sup>19</sup> Despite a revised Investigative Protocol, issued by the National Police Chief in 2019, which includes a list of bias indicators that could be applied in LGBTQI cases,<sup>20</sup> the police and the prosecutor's office have nonetheless insisted on treating the cases as mere violence.<sup>21</sup>

10. Although the UN Human Rights Council (HRC) as part of the Universal Periodic Review (UPR) of Hungary also called for the adoption of an action plan to promote tolerance towards LGBTQI persons and to combat homophobia and transphobia in the country,<sup>22</sup> there is no strategy or action plan on LGBTQI equality, and similarly no other plan to address discrimination on other grounds (e.g. Roma or disability). There is no government sponsored campaign or concentrated efforts to tackle discrimination against the LGBTQI community.<sup>23</sup>

11. The Interveners recommend that the Court evaluate the facts of the present case against this background. In particular, it should assess it in light of the systemic failure of the Hungarian Government to adopt a comprehensive legal and policy framework to ensure equality of LGBTQI people in Hungary, and the public authorities' failure to act when LGBTQI individuals and activists come under attack.

## **ii) Standards on effective investigation into online harassment and abuse**

12. Online harassment and abuse, including on the basis of sexual orientation and gender identity, has been an issue of growing concern in recent years in Hungary<sup>24</sup> and beyond; making it clear that state-led measures are needed to combat it.<sup>25</sup> International and regional human rights bodies as well as civil society organisations have repeatedly called on law enforcement to take action against it, develop tools to better identify whether this kind of conduct falls under the purview of criminal or other offences, and provide real protection for victims.<sup>26</sup>

13. Numerous studies also highlight the risks that online harassment and abuse pose to the protection of human rights, in particular the right to private and family life, but also the right to freedom of expression and the democratic exchange of ideas. They show that online harassment and abuse can result in a range of psychological and emotional harms, as well as negative impacts on mental health, certain negative behavioural effects, such as victims changing their lifestyles and routines, or the exclusion from engagement in online space.<sup>27</sup>

14. In light of the foregoing, the Interveners submit that the right to private and family life under Article 8

is rendered ineffective in an environment in which there is impunity for harassment, intimidation or threats of violence – online and offline – directed against those who exercise their right to freedom of expression. This is particularly the case when minorities, members of the media and human rights activists and defenders are targeted. The right is rendered similarly ineffective if there is a failure on the part of the state to carry out an effective investigation into the breaches, or threatened breaches, of the Convention rights of these individuals.

15. It is well established that the “effective” exercise of the rights protected by the Convention does not depend only on the state’s duty not to interfere, but may also require positive measures.<sup>28</sup> Importantly, while the Grand Chamber has held that the choice of means to secure protection of the right to privacy under Article 8 in the sphere of relations between individuals falls within a state’s margin of appreciation, it has added that “where a particularly important facet of an individual’s existence or identity is at stake, or where the activities at stake involve a most intimate aspect of private life, the margin allowed to the State is correspondingly narrowed.”<sup>29</sup> Hence, the steps which a state must take to protect these individuals include measures to protect interference with their private life.<sup>30</sup> Additionally, this Court has previously stated *inter alia* that, under certain circumstances, states must undertake “effective steps” to “identify and prosecute” perpetrators; and that confidentiality of communications “must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others.”<sup>31</sup>
16. The Interveners therefore urge the Court to consider Hungary’s positive obligations as part of its assessment of the compliance with Article 8 in this case. As shown in this submission (see above), the systemic failure by Hungary to investigate or prevent infringement of the rights of LGBTQI people and LGBTQI activists in Hungary contributes to a culture of impunity for attacks and limits their engagement in civic space. In order for the rights of LGBTQI people and activists to be protected, the state must provide appropriate protection against intimidation, threats, and all other forms of harassment. This protection must, as shown in the Interveners’ submission, include their protection from interferences with their private life, where these interferences result from their exercise of freedom expression.

#### ***Comparative international standards on effective investigation***

17. First, international standards recommend that States must adopt a comprehensive public policy approach to tackling forms of intolerance and prejudice, of which manifestations of online harassment and abuse are symptomatic. They must take action to counter discriminatory attitudes and norms, and create an enabling environment where all individuals, in particular, women and LGBTQI people can fully participate in society. In this respect, State officials should publically, unequivocally and systematically, condemn attacks against those who exercise their right to freedom of expression and should refrain from making statements that are likely to increase the vulnerability of those who are targeted for exercising their right to freedom of expression, such as women and LGBTQI people.<sup>32</sup>
18. Second, international human rights standards and jurisprudence demonstrate that in order to comply with their positive obligation to carry out an effective investigation, States must have a system of investigation which incorporates a number of safeguards. The Interveners note that the most developed body of standards and jurisprudence dealing with the duty to investigate has been produced in relation to violence against journalists (including under Articles 2, 3 and 10 of the European Convention) and the obligations of States to prevent such attacks, protect journalists and prosecuted perpetrators. Although these standards do not address the investigation into online harassment and abuse, the Interveners submit that the following recommendations can illustrate types of action that States should put in place to address online harassment and abuse, in particular when based on sexual orientation or gender/gender identity.
19. The 2012 Joint Declaration on “Crimes Against Freedom of Expression” issued by international

intergovernmental experts, recommends that States should *inter alia* ensure that crimes against freedom of expression are subject to independent, speedy and effective investigations and prosecutions. Among the principles related to the effectiveness of the investigations, the Joint Declaration recommends that:

- Sufficient resources and training should be allocated to ensure that investigations into crimes against freedom of expression are thorough, rigorous and effective and that all aspects of such crimes are explored properly;
- Law enforcement bodies should take all reasonable steps to secure relevant evidence and all witnesses should be questioned with a view to ascertaining the truth;
- The victims should be involved in the procedure to the extent necessary to safeguard their legitimate interests; this includes giving access to certain parts of the proceedings and also to the relevant documents to ensure participation is effective;
- Investigations should be conducted in a transparent manner, subject to the need to avoid prejudicing the investigation.

20. The HRC Resolution 33/2 on the Safety of Journalists sets out the steps States should take to prevent violence against journalists, protect them from such attacks, and prosecute the perpetrators. These include undertaking protective measures to ensure accountability for threats and attacks against journalists through impartial, prompt, thorough, independent and effective investigations. In particular, States should create special investigative units on crimes against journalists and adopt specific investigation protocols, recognising and taking seriously gender-specific attacks on women journalists. The Resolution also recommends that States dedicate necessary resources to investigate, prosecute, punish, and remedy attacks of all kinds, including gender-specific attacks, and ensure that enforcement mechanisms have the capacity to systematically pay attention to the issue.

21. In its jurisprudence, this Court has refrained from specifying the types of procedures that should be adopted, or concluding that one unified procedure which combines fact-finding, criminal investigation and prosecution is necessary. However, it has held that certain crucial features are indispensable for maintaining public confidence in the rule of law and helping prevent suggestions of official collusion in or tolerance of unlawful acts. The Court's jurisprudence demonstrates that States are obliged to *inter alia* undertake a prompt, expeditious, thorough, diligent and comprehensive investigation in a manner guaranteeing sufficient public scrutiny.<sup>33</sup> Additionally States must take all reasonable steps to unmask the possible discriminatory – including homophobic – motives of crimes under investigation.<sup>34</sup>

### ***Comparative standards on investigation into online harassment and abuse***

22. As noted earlier, numerous international and regional human rights bodies, as well as civil society organisations, have called on States to put in place measures to combat online harassment and abuse on the basis of certain protected characteristics, and in particular based on gender/gender identity, sexual orientation and race/ethnicity. From a comparative perspective, recommendations in this area could inform actions that States should undertake to combat online harassment on the basis of sexual orientation and gender identity. For example:

- The Special Rapporteur on Freedom of Expression and Opinion and the Special Rapporteur on violence against women have urged States to address online gender-based abuse, whilst warning against censorship.<sup>35</sup> They recommended that human rights-based responses which could be implemented by governments and others could include education, preventative measures, and steps to tackle the abuse-enabling environments often faced by women online.
- The OSCE Representative on Freedom of Media (RFoM) in their 2016 report recommended *inter alia* that States recognise 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. The RFoM called on States to strengthen the capacity of law enforcement agencies to understand international standards on human rights so that they can identify real threats to safety and protect

individuals in danger, including providing tools and training on technical and legal issues. Other recommendations included commissioning and supporting the collection and analysis of data related to online abuse and its effects and creating a database of specific occurrences and follow-up from law enforcement.<sup>36</sup>

- In their 2019 report on online harassment or abuse of journalists, the RFOM recommended that in cases when online harassment and abuse “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).”<sup>37</sup>

23. At the same time, there does not appear to be a comprehensive standard and specific guidelines at a national level on what specific steps law enforcement should undertake when investigating gender-based online harassment and abuse. Hence, this case is an opportunity for the Court to provide more specific guidance on the steps law enforcement should take to meet the standards of effective investigation of online harassment and abuse, especially when directed at groups at risk of discrimination – due to their belonging to what the Court identifies as “vulnerable groups”, such as the LGBTQI community.<sup>38</sup>

24. The Interveners note that the Convention on Cybercrime of the Council of Europe, also known as the Budapest Convention (Cybercrime Convention), sets out a number of procedural requirements for the investigation and prosecution of cybercrimes as defined by the Convention, including preservation orders, production orders and the search and seizure of computer data.<sup>39</sup> However, the Cybercrime Convention (with the exception of the Additional Protocol that deals with “racist and xenophobic nature committed through computer systems”) does not deal with speech related offences, but rather offences against the computer systems and infrastructure. The Interveners do not advocate for the inclusion of content-based offences under the Cyber-Crime Convention; however, we note that a recent report from the Cyber-Crime Committee points at possible synergies between different standards and treaties when it comes to prevention of, protection from and prosecution of gender-based online violence and abuse. The report recommends that countries should consider implementing the procedural powers of Articles 16 to 21 of the Cybercrime Convention to facilitate international cooperation on electronic evidence in relation to gender-based online violence and abuse.<sup>40</sup>

25. At the state level, research shows that state measures to address and target online harassment and abuse range from the adoption of a new criminal offence that can be applied to online harassment and abuse, to preventive and educational measures to increase social media literacy in school curricula. The reports also show that “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.”<sup>41</sup>

26. In the same way that there is no uniform definition to collectively describe the phenomenon of online harassment and abuse, there is no universal definition of crimes of online threats of physical or sexual violence, sending offensive messages or targeted online harassment. Overall, States take very different positions on whether different forms of online harassment and abuse should be a criminal offence, and even where there is general agreement, they may disagree on precisely how these offences should be defined and where the threshold for criminal liability might arise. Even when the legislation sets a certain severity threshold (such as “substantive harm”<sup>42</sup> or “true threat”), there is a lack of comprehensive guidelines on when such a threshold is reached. Studies also show that if the conduct is prohibited under criminal law, prosecutions under respective criminal provisions are more complex

than “offline” crime. This is sometimes due to the necessity of balancing freedom of expression versus the harm caused to the victims; or other issues.<sup>43</sup>

27. Although States take divergent approaches to the problem of online harassment and abuse, the following positive examples provide useful guidance to law enforcement on the investigation of online harassment and abuse against those who exercise their right to freedom of expression.
  28. In the United Kingdom (UK), the HM Inspectorate for Policing acknowledged that “the police response to digital crime should be capable of being provided by every police officer and member of police staff who deal directly with the public,” due to “the prevalence of digital crime and that this requires police staff to have the relevant training to give them the necessary understanding of the technology.”<sup>44</sup> The College of Policing provides a number of courses to law enforcement, covering topics including cybercrime and policing and digital communication and social media. Further, the reports show that introducing national tasking process and regional co-ordinators has provided some consistency in, when, how, and to what level, online harassment and abuse are investigated. In 2017, the UK created a “national police online hate crime hub”<sup>45</sup> which acts as a single point through which all reports of online hate crime are channelled. The hub employs specially trained officers to liaise with the victim and collect relevant evidence that will be needed to bring a prosecution. According to available information, the Hub can, *inter alia*, a) assess whether the circumstances relate to a crime or non-crime incident; b) combine duplicate reports and seek to identify the perpetrator; c) produce an evidence package for local recording and response where there is a positive line of enquiry; d) update the complainant with progress and explain where there is no enforcement action possible; and e) advise local police colleagues on effective responses.
  29. In Canada, in 2017, the Department of Justice published a Handbook for Police and Crown Prosecutors on Criminal Harassment, which is intended to provide the police and Crown Prosecutors with guidelines for the investigation and prosecution of criminal harassment cases.<sup>46</sup> The Handbook also specifically deals with “online harassment” and explains to law enforcement which sections of the criminal code apply to online situations.<sup>47</sup> Although not legally binding, it details the Department of Justice's guidelines for best practice. The Handbook specifically advises the law enforcement on collecting technological evidence. In the USA, Katherine Clark, the representative for Massachusetts, proposed the Cybercrime Enforcement Training Assistance Act which would “make grants to States and units of local government for the prevention, enforcement, and prosecution of cybercrimes against individuals, and for other purposes.”<sup>48</sup> The proposed grants would be used to train law enforcement at all levels to “identify and protect victims of cybercrimes against individuals,” “utilize Federal, State, local, and other resources to assist victims of cybercrimes against individuals,” “identify and investigate cybercrimes against individuals,” and “enforce and utilize the laws that prohibit cybercrimes against individuals.” The Bill also proposes to earmark additional funds for “laws that prohibit cybercrimes against individuals,” for public education, the establishment of cybercrime task forces, the establishment or enlargement of digital forensics laboratories, the expenses involved in extraditing offenders from one state to another, and the transfer of “expertise and information” from federal to state law enforcement agencies.
- iii. Reliance on mutual legal assistance treaties in investigation of online harassment and abuse**
30. The Interveners are aware that there is limited evidence on the extent to which Hungarian law enforcement authorities rely on mutual legal assistance treaties (MLATs) in the prosecution of crimes, including crimes applicable to online harassment and abuse.<sup>49</sup> According to the information provided by the Prosecutor General in 2016, the number of requests to the USA in general is very low (on average 3 per year), not all requests were rejected, some requests concerning abuse of personal data were completed; however the law enforcement has not requested any access to data concerning the crime of incitement to violence against members of a community based on a protected ground.<sup>50</sup>



31. As for other Council of Europe States, in general, the available studies demonstrate that although MLATs are “the most resilient way of obtaining data,” the reliance on them by law enforcement on them is low. Studies show that law enforcement officials have little confidence in successfully obtaining information through MLAT requests; MLAT processes are long (they can take months), require complex administrative legal processes in both countries and specially trained law enforcement personnel, and the costs and efforts required through this process might be prohibitive for law enforcement to pursue in the context of online harassment and abuse.<sup>51</sup> Importantly, some MLATs condition that mutual legal assistance requests are subject to dual criminality and requests may be refused where execution is considered “contrary to national legislation,” and establish seriousness thresholds for international cooperation requests.<sup>52</sup> Civil society organisations have raised concerns about possible privacy concerns that MLATs and similar agreements pose and the lack of transparency over their application. There is no comprehensive assessment in the Council of Europe countries on the extent to which States rely on MLATs to identify perpetrators of online harassment and abuse, and the effectiveness of MLATs requests to the USA; in particular in the light of the possible First Amendment arguments.
32. At the same time, the Interveners point out that the reasons why MLATs are to a certain extent cumbersome is because they provide privacy and other safeguards; and these are also the reasons why law enforcement are asking for lower thresholds in terms of the sharing of information. For instance, the recent US-UK Data Sharing Agreement under the USA CLOUD Act allows the UK to demand data directly from intermediaries holding data in the US;<sup>53</sup> while previously, the UK law enforcement had to meet the higher standards in the US to acquire user data. The new UK-US agreement is extremely problematic from a human rights perspective, and might be incompatible with State obligations under the Convention.<sup>54</sup>
33. While recognising the problems with the usage of MLATs, States are not exempt from discharging their obligations on the basis that the wrong is difficult to investigate or prosecute due to extraterritoriality. The Interveners recall that the UN Human Rights Committee, in General Comment No 36, states that States must “respond urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures such as the assignment of around-the-clock police protection, the issuance of protection and restraining orders against potential aggressors and, in exceptional cases, and only with the free and informed consent of the threatened individual, protective custody.”<sup>55</sup> The Committee also stated that States must “enact a protective legal framework which includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in a deprivation of life,” including violent hate crimes.<sup>56</sup>
34. Accordingly, the Court’s task is to examine to what extent the law enforcement authorities tried to identify the perpetrators of online harassment and death threats, and whether they initiated any legal process to do so at all; such as whether they made any requests to the service providers over the identity of the perpetrators based on the national legislation. The Interveners also question the extent of genuineness of the claims by the law enforcement authorities, such as in the case at hand, on the impossibility to identify perpetrators, where some of the authors of the communication that included a death threat can be easily identified.

**iii) Appropriate approach to cases involving online harassment and abuse**

35. Although the discrepancies in national approaches to online harassment and abuse makes it difficult to formulate detailed recommendations on how to effectively investigate different online harassment and abuse cases, the previous sections demonstrate that at least the following measures should be undertaken by States:
- States should recognise that online harassment and abuse, in particular based on gender and sexual orientation and gender identity, is a serious problem, and adopt integrated prevention, monitoring, and response mechanisms, including in public policy.

- Although there are concerns that the approach to online harassment and abuse in legal measures is piecemeal, there is a growing consensus that different regulatory measures should be adopted to tackle online harassment; while criminal law should be used in exceptional circumstances when online harassment and abuse reaches a certain level of severity, such as causing serious harm.
- In cases where online harassment and abuse based on gender, gender identity and sexual orientation reaches the level of severity prohibited under criminal law, States are obliged to *inter alia* undertake prompt, expeditious, thorough, diligent and comprehensive investigations in a manner guaranteeing sufficient public scrutiny.
- States should adopt practical measures such as dedicated institutional resources, capacity and training to enable the legal system to deal with online harassment and abuse based on gender, gender identity and sexual orientation, and adequately resource them. Law enforcement authorities should be trained not only to respond to threats of physical harm, but also to recognise that online harassment and abuse can have an impact on individual's private and family life, freedom of expression and other human rights. Training materials on online harassment and abuse should be developed. States should also improve reporting and monitoring of harassment and abuse based on a protected ground and include them in national statistics and measures to address equality and discrimination.
- States should also adopt holistic and well-resourced prevention and response mechanisms together with private sector and civil society.

## CONCLUSION

36. The Interveners hope that the Court will reflect on these standards in its deliberations on the present case. Clear guidance from the Court that recognises that the European Convention requires strong, substantive, and procedural protections from online violence and abuse will encourage countries to take more concentrated efforts to deal with online harassment and abuse based on gender, gender identity and sexual orientation. This is an issue that courts and law enforcement authorities in the Council of Europe and around the world have been struggling with in recent years. Hence, the manner in which the Court deals with this issue is likely to have far-reaching and significant consequences for the exercise of the right to private and family life, the right to freedom of expression, and other human rights online, both now and in the future.



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<sup>1</sup> *Buturugă v. Romania*, App. no. 56867/15, 10 February 2020; and *Beizaras and Levickaas v. Lithuania*, App. No. 41288/15, 14 January 2020.

<sup>2</sup> *C.f.* APC, Technology-related violence against women – a briefing paper, 2015.

<sup>3</sup> *Ibid.*, *c.f. also*, Council of Europe (CoE), CoE Factsheet Hate Speech, 2017; European Commission, What is gender-based violence?, 2018; European Union Agency for Fundamental Rights (FRA), Violence against women: an EU-wide survey, 2014; UN General Assembly, Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: Protecting women rights defenders, A/RES/68/181, 2014; Human Rights Council (HRC), Report of the Special Rapporteur on violence against women (Special Rapporteur on VAW), its causes and consequences on online

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violence against women and girls from a human rights perspective, July 2018; OSCE Representative on Freedom of the Media (OSCE RFoM), *New Challenges to Freedom of Expression: Countering Online Abuse of Female Journalists*, 2016; OSCE RFoM, *Legal Responses to Online Harassment and Abuse of Journalists: Perspectives from Finland, France and Ireland*, 2019.

<sup>4</sup> *Ibid.*

<sup>5</sup> European Data Journalism Network, *Homophobia is on the rise in Hungary*, 30 October 2019.

<sup>6</sup> Report about the Implementation of the Council of Europe Recommendation to member States on measures to combat discrimination on grounds of sexual orientation or gender identity (CM/Rec(2010)5) in Hungary, 2018, p. 19.

<sup>7</sup> Joint submission by the Hungarian LGBT Alliance, Transvanilla Transgender Association, Háttér Society, and Labrisz Lesbian Association for the review of Hungary by the UN Human Rights Committee at its 122<sup>nd</sup> session, February 2018.

<sup>8</sup> *Ibid.*

<sup>9</sup> European network of legal experts in gender equality and non-discrimination, *Hungary: Country report Non-discrimination Transposition and implementation at national level of Council Directives 2000/43 and 2000/78 Hungary, Reporting period 1 January 2018 – 31 December 2018*.

<sup>10</sup> Case no. 01000-7580/2011.bü.; B. VI-VII. 5303/2011.

<sup>11</sup> Case no. 01000-2563/2013.bü., B. 7150/2013.

<sup>12</sup> Case no. 01000-2563/2013.bü., B. 7150/2013. One of the perpetrators was acquitted during the court procedure and five perpetrators were found guilty of violence against a member of a community committed in a group and of causing bodily harm. Two perpetrators received a prison sentence and three a suspended sentence.

<sup>13</sup> Case no. 01160-1459/2012.bü.; B. XVI. 8027/2012.

<sup>14</sup> Gyololetellen, *Baseball bat*, 14 August 2013 (in Hungarian).

<sup>15</sup> Budapest Pride, *Orban-friendly ne-Nazi groups make Budapest dangerous*, 30 September 2019.

<sup>16</sup> Hungarian Helsinki Committee, *The police, with their inaction, encouraged homophobic thugs*, 27 September 2019 (in Hungarian).

<sup>17</sup> Joint submission by the Hungarian NGOs, *op.cit.*

<sup>18</sup> *Ibid.*

<sup>19</sup> ECRI Report on Hungary, *Fifth monitoring cycle (CRI(2015)19)*, March 2015.

<sup>20</sup> National Chief of Police order no. 30/2019. (VII. 18.) on the tasks of the police in relation to responding to hate crimes. The new bias indicators include “the victims’ belongingness to a vulnerable group or whether the violence was committed at an event organised by a protected group.”

<sup>21</sup> Gyololetellen, *Police do not take hate crimes seriously, even though their own protocol*, 18 December 2019 (in Hungarian).

<sup>22</sup> Report of the Working Group on the Universal Periodic Review. Hungary, A/HRC/DEC/33/106, July 2016.

<sup>23</sup> Joint submission to the UN Human Rights Committee, *op.cit.*

<sup>24</sup> See, e.g. Háttér Society, *UNI-FORM: Online interface and smartphone application for reporting homophobic and transphobic hate crimes*, 2017 (in Hungarian).

<sup>25</sup> RFoM, *Legal Responses to Online Harassment and Abuse of Journalists*, *op.cit.*

<sup>26</sup> See, e.g. OSCE RFoM, *op.cit.*; Special Rapporteur on VAW, *op.cit.*; European Commission, *Cyber violence and hate speech online against women Study for FEMM Committee*, September 2018.

<sup>27</sup> Special Rapporteur on VAW, *op.cit.*, UK Law Commission, *Abusive and offensive communications*, 2018; Chakraborti, Garland & Hardy, *The Hate Crime Project - Findings and conclusions*, University of Leicester, 2014.

<sup>28</sup> See, e.g. *Vgt Verein Gegen Tierfabriken v Switzerland*, App. No. 32772/02, para 79 (Grand Chamber); *Marckx v Belgium*, App. No. 6833/75, para 31; *Young, James and Webster v the UK*, App. Nos. 7601/76 and 7806/77, para 49.

<sup>29</sup> See, e.g. *Söderman v Sweden*, App. No. 5786/08, para 78; or *Bédat v Switzerland*, App. No 56925/08, para 7.

<sup>30</sup> *C.f. Fuentes Bobo v Spain*, App. No. 39293/98, para 38.

<sup>31</sup> See, *mutatis mutandis*, *K.U. v. Finland*, App. No. 2872/02, para 49.

<sup>32</sup> See, e.g. Joint declaration by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, June 2012; UN HR Council Resolution 33/2, A/HRC/33/L.6, 26 September 2016.

<sup>33</sup> See, e.g. *Palomo Sanchez v Spain*, App. Nos. 28955/06, 28957/06, 28959/06, 28964/06; *Özgür Gündem v Turkey*, App. No. 23144/93; *Dink v Turkey*, App. Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09.

<sup>34</sup> See, *mutatis mutandis*, *R.B. v. Hungary*, App. No. 64602/12, para 84; *Identoba v. Georgia*, App. No. 73235/12; or *M.C. and A.C. v. Romania*, App. No. 12060/12.

<sup>35</sup> The Joint Press Release of the UN Special Rapporteurs on FOE and on VAW, 08 March 2017.

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<sup>36</sup> OSCE RFoM, 2016, *op.cit.*

<sup>37</sup> OSCE RFoM, 2019, *op.cit.*, p. 39.

<sup>38</sup> *C.f. O.M. v. Hungary*, App. no. 9912/15, para 53 (the case concerned an Article 5 violation).

<sup>39</sup> Council of Europe, Convention on Cybercrime, 23 November 2001.

<sup>40</sup> Cybercrime Convention Committee, Working Group on cyberbullying and other forms of online violence, especially against women and children, Mapping study on cyberviolence (Draft), 2018.

<sup>41</sup> OSCE RFoM, 2019, *op.cit.*, p.2.

<sup>42</sup> *C.f.* for example *Elonis v. United States*, 135 S. Ct. 2001 (2015); in which the defendant was indicted by a grand jury for a crime of transmitting “in interstate commerce ‘any communication containing any threat... to injure the person of another’ (under 18 U.S.C. § 875(c)). Elonis made multiple threats on his Facebook page in the form of rap lyrics (such as threats to murder his wife, to shoot up a kindergarten, and to kill the FBI agents who came to his house to investigate the kindergarten threat). The jury was asked to determine whether these were “true threats,” meaning whether they were made intentionally, “in a context or under such circumstance wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.” Elonis argued that he was simply exercising his First Amendment rights, but he was convicted under the negligence standard. The Supreme Court overturned the conviction, though not on the First Amendment grounds. The Supreme Court held that “negligence is not sufficient to support a conviction,” because “[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state.” In a partially dissenting opinion, Justice Alito stated that the “Court’s disposition of this case is certain to cause confusion and serious problems” because of its refusal to address the applicable standard; 135 S. Ct. 2001 (2015), 2013; Alito concurring in part and dissenting in part.

<sup>43</sup> For example, the case of Jessikka Aro, an award-winning Finish journalist, demonstrates this issue. Mrs Aro sustained a four-year long online harassment campaign which included the publication of her phone number, numerous death threats and allegations that she was an agent of NATO and USA intelligence services. The Finish Criminal Code, Chapter 25, section 9(1) 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.” The case showed that the public prosecutor in Finland would bring criminal charges only if the injured party reports the offence, a lethal instrument has been used, or “where a very important public interest requires the case to be brought.” This means that the public prosecutor is not proactively pursuing cases of online abuse as they are not treated as falling within their purview. In OSCE RFoM, 2019, *op.cit.*

<sup>44</sup> The HM Inspectorate for Policing, Digital Crime and Policing, Chapter 5.

<sup>45</sup> Home Secretary announces new national online hate crime hub, 8 October 2017.

<sup>46</sup> Canada: Department of Justice, Canada, A Handbook for Police and Crown Prosecutors on Criminal Harassment, January 2017.

<sup>47</sup> *Ibid.*, Section 1.6.159.

<sup>48</sup> The Cybercrime Enforcement Training Assistance Act, H.R. 4740, 114th Cong. (Mar. 15, 2016).

<sup>49</sup> For instance, the response of the Prosecutor General to freedom of information request to the HCLU about all international legal assistance requests to the United States of America, shows that the number of requests in general is very low (on average 3 per year), not all requests were rejected, some requests concerning abuse of personal data were completed, but not a single case of incitement to violence or violence against a member of a community were among those where international legal assistance was requested; see Letter no. NF.8107/2016/1-I. The response to request for information from Háttér Society about the number of international legal assistance requests to the USA concerning extremist websites shows that that in 2006-2007 and 2010 the police requested information from the US authorities in other cases, but the requests were rejected; see letter no. 29000/44342-10/2014.Ált.

<sup>50</sup> The Letter of the Prosecutor General to the HCLU, Letter no. NF.8107/2016/1-I

<sup>51</sup> See, *mutatis mutandis*, e.g. UN, Comprehensive Study on Cybercrime Draft, February 2013; UK Parliament, Jurisdictional Issues – Requests addressed to overseas CPSs, December 2012; or The Center for Internet and Society, Stanford Law School, The mutual legal assistance problem explained, February 2015.

<sup>52</sup> *C.f.* also the Cybercrime Convention.

<sup>53</sup> US-UK Data Sharing Agreement, USA No. 6 (2019), Washington, 3 October 2019, presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty October 2019.

<sup>54</sup> Clarifying Lawful Overseas Use of Data Act or CLOUD Act (H.R. 4943).

<sup>55</sup> Human Rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018, para 23.

<sup>56</sup> *Ibid.*, para 20.