

OLD CONDUCTS NEW CRIMES

SOME BRIEF REFLECTIONS PERTAINING THE UPCOMING  
INTRODUCTION OF STALKING AS A CRIMINAL OFFENCE  
IN THE PORTUGUESE JURISDICTION

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## INTRODUCTION

This paper addresses stalking, a social phenomenon “as old as the hills” (we can trace references back to Hippocrates) that has been reborn in recent years in the European context, now from a criminal point of view, thanks not only to the Istanbul Convention, but also to an increasing interest from civil society and the media.

After a brief supranational overview, we will address the phenomenon, first from a historic and non-legal point of view, to then concentrate on stalking as a criminal conduct. We then focus on the Portuguese jurisdiction, assessing current answers and expected developments with the upcoming criminalization of stalking.

### *SUPRANATIONAL LEGAL FRAMEWORK*

Nowadays violence against women can be addressed as a violation of fundamental rights, moreover, as a violation of human rights. But it has not always been thus considered. In most EU Member States, up until recently, violence against women – domestic violence in particular – was considered a private matter in which the State merely played a limited role.

According to the World Health Organization’s official statistical data, 35% of women worldwide have experienced either physical and/or sexual intimate partner violence, or non-partner sexual violence<sup>1</sup>. It is estimated that, of all women killed in 2012, almost half were killed by intimate partners or family members<sup>2</sup>. Countless more cases of violence against women remain unreported. For instance, a EU-wide survey, based on interviews with 42.000 women across the 28 Member States of the European Union, revealed that only 14% of women reported their most serious incidents of intimate partner violence to the police<sup>3</sup>, and only 13% reported their most serious incident of non-partner violence to the police<sup>4</sup>. Furthermore, we must take into account that most women do not report such abuse to the police or other public authorities.

### *United Nations*

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<sup>1</sup> World Health Organization, Global and Regional Estimates of Violence against Women, [http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf)

<sup>2</sup> UNODC Global Study on Homicide: 2013

<sup>3</sup> Violence against women: an EU-wide survey, European Union, 2014

<sup>4</sup> Violence against women: an EU-wide survey, European Union, 2014

In 1979, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) was adopted, entering into force in 1981, along with its Optional Protocol, in 2000. It is a legally binding instrument that defines discrimination against women, identifies several forms of such discrimination, and establishes an agenda for national action to end all forms of discrimination against women. In 1992, the CEDAW Committee adopted its General Recommendation No 19, thereby establishing that gender-based violence was a form of discrimination against women and linking the achievement of gender equality to the eradication of violence against women. In 1993, at the Vienna Conference<sup>5</sup>, the international community officially recognized violence against women as a human rights violation, and in the same year the General Assembly adopted the Resolution 48/104 entitled the “*Declaration on the Elimination of Violence against Women*”<sup>6</sup> which defined “*violence against women*” as “*any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life*”. Influenced by these principles, several other regional legal instruments came to set up a minimum standard and to cover new types of violent behaviour or discrimination against women.

### ***The Istanbul Convention and the criminalization of stalking***

At a regional level, since the 1990s, the Council of Europe has undertaken a series of initiatives to promote the protection of women against violence. In 1993, the 3<sup>rd</sup> European Ministerial Conference on Equality between Women and Men was devoted to “Strategies for the elimination of violence against women in society: the media and other means”. These initiatives have resulted in the adoption, in 2002, of the Council of Europe Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence.

In December 2008, the Committee of Ministers set up an expert group mandated to prepare a draft convention concerning this matter. Over the course of two years, this group, called CAHVIO (*Ad Hoc Committee for preventing and combating violence against women and domestic violence*), worked out a draft text that was finalized in

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<sup>5</sup> The Vienna Declaration stands that “*the human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights*”

<sup>6</sup> <http://www.un-documents.net/a48r104.htm>

December 2010<sup>7</sup>. The Convention on Preventing and Combating Violence against Women and Domestic Violence, a.k.a. the Istanbul Convention, was adopted by the Council of Europe Committee of Ministers on 7 April 2011, and opened for signature on 11 May 2011, on the occasion of the 121st Session of the Committee of Ministers in Istanbul. The Convention entered into force on 1 August 2014, after the 10<sup>th</sup> ratification of Andorra on 22 April 2014. So far, in 2015, 21 States have signed and 16 States have ratified the Convention (Albania, Andorra, Austria, Bosnia and Herzegovina, Denmark, France, Italy, Malta, Monaco, Montenegro, Portugal, Serbia, Slovenia, Spain, Sweden, and Turkey).<sup>5</sup>

The Istanbul Convention is a legally-binding regional instrument dedicated to ending violence against women. Ensuing a definition of violence against woman as “*a violation of human rights and a form of discrimination against women and shall mean all acts of gender- based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life*”, the Convention’s main purposes are to “*protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence*” by promoting international co-operation and “*design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women*”.

This Convention specifically focuses on two main goals: the prevention of all types of violence against women, and the protection of victims and prosecution of the perpetrators. The Instrument compiles States’ authorities, officials, agents, institutions and other entities to always act on behalf of the State in conformity with such obligations, with due diligence standards, in order to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention are perpetrated by non- State actors<sup>8</sup>.

By accepting the Istanbul Convention, governments are thus obliged to change their laws, introduce measures and allocate resources to effectively prevent and combat violence against women, including domestic violence. The Convention compiles its

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<sup>7</sup> [http://www.coe.int/t/dghl/standardsetting/convention-violence/background\\_en.asp](http://www.coe.int/t/dghl/standardsetting/convention-violence/background_en.asp)

<sup>8</sup> Under international law a state is responsible for the commission of an internationally wrongful act which is attributable to it, through the conduct of their agents such as the police, immigration officials and prison officers. This principle is set out in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (2001), which are widely accepted as customary international law.

Parties to criminalize, *inter alia*, psychological violence, stalking, physical violence, sexual violence, including rape, and sexual harassment. Article 34 specifically imposes that “Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalized.” This article explicitly establishes stalking as a criminal offence, defining it as the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety. This comprises any repeated behaviour of a threatening nature against an identified person which has the consequence of instilling in this person a sense of fear. Notice that the Istanbul Convention allows for the possibility to make reservations to this provision (Article 78 par 3.), since some parties prefer to respond to stalking by means of non-criminal sanctions, “as long as they are effective, proportionate and dissuasive”.<sup>9</sup>

### ***European Union***

Although there is no specific comprehensive legislation addressing violence against women at EU level (neither has the EU adopted its own definition of violence against women), generic legislation has been enacted concerning female crime victims<sup>10</sup>. In particular, the Resolution of the European Parliament of 26 November 2009 on the elimination of violence against women calls on Member States to improve their national laws and policies to combat all forms of violence against women, and to act in order to tackle the causes of violence against women, at least by enacting preventive measures, and calls on the EU to guarantee the right to assistance and support for all victims of violence.

In its resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women, the European Parliament proposed a strategy to combat violence against women, domestic violence and female genital mutilation, as a basis for future legislative criminal law frameworks against gender-based violence (including legislation aimed at combatting violence against women) to be followed up by a EU action plan. Also, the Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection

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<sup>9</sup> Explanatory report on the Council of Europe Convention on preventing and combating violence against women and domestic violence: [http://www.coe.int/t/dghl/standardsetting/convention-violence/convention/Explanatory\\_Report\\_EN\\_210.pdf](http://www.coe.int/t/dghl/standardsetting/convention-violence/convention/Explanatory_Report_EN_210.pdf)

<sup>10</sup> See Violence against women: an EU-wide survey in: [http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results-apr14_en.pdf)

order, establishes a mechanism for the mutual recognition of protective measures in criminal matters between Member States. This directive “*does not create obligations to modify national systems for adopting protection measures nor does it create obligations to introduce or amend a criminal law system for executing a European protection order*”, but rather it applies to protective measures which aim specifically to protect a person against a criminal act of another person which may, in any way, endanger that person’s life or physical, psychological and sexual integrity. Finally, the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 came to establish minimum standards on the rights, support and protection of victims of crime.

#### A BEHAVIOUR “AS OLD AS THE HILLS”: STALKING’S HISTORICAL BACKGROUND

*Stalking, an age-old phenomenon, was discussed in the ancient writings of Hippocrates, researched extensively in the early 20th century by French psychiatrist G.G. de Clerambault, given notoriety with the tragic death of former Beatle John Lennon, and as Fatal Attraction in local theaters across the nation. (Davis&Chipman, 2001: 3).*

The term “stalking” dates back on the late 1980s, originating in California. Indeed, anti-stalking legislation was first introduced in 1990 in California and rapidly spread to all US. The European developments started about a decade later. Currently, the following European countries currently have specific anti-stalking legislation: Austria, Belgium, Denmark, Germany, Ireland, Italy, Luxemburg, Malta, the Netherlands, Poland and the United Kingdom. Bosnia and Herzegovina has an anti-stalking provision which applies only to family members and In Turkey, victims of stalking are listed among the targets of the Law 6284 on the Protection of Family and Prevention of Violence against Women which entered into force in 2012.

*Stalking is a crime that is only recently being taken seriously by legislatures, courts, and law enforcement. **Both law enforcement and the courts have, unfortunately and incorrectly, viewed stalking as a potential crime rather than as a completed crime.** (2001: 293, our highlights)*

Stalking legislation is generally framed in terms of three elements – conduct, intent and effect on the victim. In short: (1) The **conduct element** defines a course of conduct or number of acts that constitute stalking. Most legislation requires a minimum of two acts, although in some countries one is sufficient; (2) The **intent element** generally concerns the intent to cause fear and/or recklessness as to whether

fear is caused, based on a reasonable person test<sup>11</sup>; (3) The *effect on the victim* is caused by a threat that in some jurisdictions needs to be a “credible threat”<sup>12</sup>.

Just to have an idea of the depth of social damage we are talking about, according to the official hard data retrieved by a 2014 EU-wide survey about violence against women, in relation to stalking, in the EU-28, 18% of women have experienced stalking since the age of 15, and 5% of women have experienced it in the 12 months before the survey interview. This corresponds to about 9 million women in the EU-28 experiencing stalking within a period of 12 months. About 14% of women have received offensive or threatening messages or phone calls repeatedly from the same person, and 8% have been followed around or experienced somebody loitering outside their home or workplace. Out of all respondent women, 3% stated they have experienced stalking that involved the same person repeatedly damaging her property.<sup>13</sup>

#### *RESPONSES FROM THE EUROPEAN COURT OF HUMAN RIGHTS*

When called upon to decide on matters specifically concerning stalking – either directly connected to domestic violence/intimate partner violence or not –, the European Court of Human Rights (ECtHR) addressed such cases mostly under the light of articles 2 (Right to life), 6 (Right to a fair trial), 8 (Right to respect for private and family life) and 13 (Right to an effective remedy), of the European Convention on Human Rights (ECHR). We have selected a few examples of such ECtHR rulings to illustrate the Court’s positions on the matters of stalking and State obligations.

In *A. v. Croatia*, the applicant complained that a national court refused to issue a restraining order against her former spouse. The underlying case concerned a severe domestic violence situation in which the aggressor spouse suffered from severe mental illness, with the national authorities failing to provide evidence on whether several of the national courts’ protective measures/decisions (such as detention, fines, psycho-social treatment, imprisonment) had or had not been actually been enforced. The applicant argued that national authorities did not issue the requested court order on the grounds that she had failed to prove an immediate risk to her

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<sup>11</sup> Report of the Committee on Equality and Non-Discrimination Stalking in the Parliament Assembly of Council of Europe [http://www.assembly.coe.int/Communication/24062013\\_Stalking\\_E.pdf](http://www.assembly.coe.int/Communication/24062013_Stalking_E.pdf)

<sup>12</sup> Flint, 2007: 681.

<sup>13</sup> For more information see: [http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-oct14_en.pdf)

life. In this case, the ECtHR ruled that there had been a violation of Article 8 of the ECHR (right to respect for private and family life), noting that

*[t]he national authorities failed to implement measures ordered by the national courts, aimed on the one hand at addressing B's psychiatric condition, which appear to have been at the root of his violent behaviour, and on the other hand at providing the applicant with protection against further violence by B. They thus left the applicant for a prolonged period in a position in which they failed to satisfy their positive obligations to ensure her right to respect for her private life.*

In the 1998 ECtHR leading case *Osman v the United Kingdom*, the underlying situation concerned the murder of the applicant's husband and severe bodily injury of the applicant's son by the latter's former teacher, who had been stalking the boy and his family. The applicant complained that British police authorities had failed to protect the right to life of her husband from the threat posed by the stalker, arguing that, in spite of plentiful information being given to the authorities concerning the individual's behaviour and threats, no special investigative or protective measures had been put in place. Here, the ECtHR ruled that there had been no violation of Article 2 of the ECHR (right to life), considering that, in spite of Article 2 imposing a positive obligation to take protective measures, the applicant failed to prove that the police had to know or had actual knowledge of the threat posed by the stalker. Nonetheless, the ECtHR did find there had been a violation of Article 6 of the ECHR (right to a fair trial), considering there had been no right to a hearing by an independent and impartial law, under the "blanket immunity" of police actions, provided by the House of Lords, as well as The High Court and the Court of Appeal, in accordance to national case law, in case, *Hill v CC Yorkshire*.

Similarly, in *Van Colle v United Kingdom* (from 2012), the ECtHR yet again ruled on the positive obligation to protect life under Article 2 of the ECHR. The underlying case concerned actions perceivable as stalking, with the applicants complaining that police forces failed to protect their son from a man against whom he was due to give evidence in a criminal trial and who had previously threatened him.

The ECHR, using the same reasoning behind the *Osman v United Kingdom* decision, considered there had been no breach of the positive obligation to take protective measures, which would only happen if the police authorities had had actual knowledge of a real and immediate risk to the victim's life, in spite of them knowing



that several witnesses, this specific victim included, were being subjected to intimidation in an escalating manner.

The situation underlying the *Kontrovà v. Slovakia* case concerned a domestic violence situation that ended up in the defendant murdering his son and daughter<sup>14</sup>. The applicant (mother of the victims and wife of the aggressor) argued that the police, in spite of being aware of the husband's abusive and threatening behaviour, did not take sufficient measures to protect the children. This applicant also complained that she had not been granted compensation. In this case, the ECtHR ruled that there had been a violation of Article 2 (right to life) and Article 13 (right to an effective measure) of the ECHR, holding that

*as established by the domestic courts, the police failed to ensure that these obligations were complied with. On the contrary, one of the officers involved assisted the applicant and her husband in modifying her criminal complaint of 2 November 2002 so that it could be treated as a minor offence calling for no further action. As found by the Supreme Court in its judgment of 29 September 2004, the direct consequence of these failures was the death of the applicant's children (see paragraphs 18, 21 and 25 above. (...) In the light of the above considerations and the admission by the Government, the Court concludes that there ha[d] been a violation of Article 2 of the Convention in this case. (...)*

*In this case, the Court conclude[d] that the applicant should have been able to apply for compensation for the non-pecuniary damage suffered by herself and her children in connection with their death. From the above finding as regards the Government's preliminary objection, it follow[ed] that the action for protection of personal integrity provided her with no such remedy.*

Finally, in the case *Branko Tomašić and Others v. Croatia*, a mother and infant child were murdered by the aggressor (husband and father of the victims), who had previously been sentenced to a custodial sentence and compulsory psychiatric treatments, due to making death threats against them. The applicants, who were relatives of the victims, argued that, since the compulsory psychiatric treatments had stopped after his release, under a court order, and the killings took place one month after the individual's release, there had been a violation of Article 2 (right to life). The ECtHR found that Article 2 had indeed been put at stake by the Croatian authorities,

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<sup>14</sup> For another domestic violence case, see also *Hajduová v. Slovakia*, where the aggressor, who had mental illness, threatened the spouse and her lawyer after being convicted and sentenced to undergo psychiatric treatment by a court of law, which however did not order the hospital to retain him, thus resulting in his release still untreated.

since no compelling evidence was presented that the individual had actually undergone psychiatric treatment while incarcerated, and that there had been a psychiatric assessment before his release was ordered, thus considering the Court that there had been insufficient risk assessment and re-socialization of this aggressor, resulting in the victims' death.

*STALKING AT CLOSE RANGE: AN OVERVIEW OF THE PHENOMENON FROM THE INDIVIDUALS' PERSPECTIVE*

Psychology experts classify the stalker in various types, according to their behavior and/or causes<sup>15</sup>. In a glimpse, stalkers can be:

**Simple Obsession Stalkers** include those who have previously been involved in an intimate relationship with their victim and refuse to accept it is all over. These stalkers are emotionally immature, extremely jealous, insecure and with low self-esteem. Even though reconciliation is the goal, when denied, they can easily snap and kill the victim, committing suicide afterwards, since for them *“death is better than having to face humiliation of the stalking victim leaving them for someone else, and the humiliation of having to face their own powerlessness”* (Spitzberg&Cupatch, 2001:105-106).

**Love Obsession Stalkers:** these individuals become obsessive with a person with whom they never had an intimate relationship. They often (mis)read encouraging meanings in neutral responses from the victim and believe that a special relationship exists between them. They are often loners living in an emotional void that is filled even with negative responses from the victim. Such stalkers believe that the victim loves them dearly and that their affection merely appears not to be reciprocated due to external influence. When threats and intimidation do not accomplish what they expected, they can become very violent.

**Casual Acquaintance Stalker:** this kind of stalkers often see any acts of kindness as a sign of true love, which means that being polite to a potential stalker can be very dangerous. Therefore, very little interaction is needed in order to trigger a long-term stalking episode.

**Stranger Stalking/Delusional Stalkers:** often a stranger stalker suffers from *erotomania*: a mental disorder that causes the stalker to believe another person is in

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<sup>15</sup> For comprehensive studies on the matter, see, v.g., Spitzberg&Cupatch (2001) and Marlene Matos, Helena Granjeia, Célia Ferreira, Vanessa Azevedo (2011).

love with him or her. Due to this disorder, a stranger stalker may fantasize either that they have had an intimate relationship with their victim or that their victim truly loves them and wants to have an intimate relationship with them.

**Serial Stalkers:** this kind of stalker follows a behavioural pattern they have been practicing for years, and no matter what the reason or cause was, they can stalk someone for no apparent reason and even stalk more than one person at a time.

**False Stalking / False Victims:** some stalkers take the place of the victim and use a variety of situations to attract attention to themselves. Even though it is all false, this kind of stalker believes that he/she is the real victim.

**As for the victims, the main premise is that anyone and everyone can be a victim when stalking is concerned.** They can have any gender identity, sexual orientation, race, age, or social background. As Flint puts it, “[v]ictims of stalking are likely to be at least acquainted with their stalkers. The most common stalker is someone who has had an intimate relationship with the victim. Stalking victims, however, can be chosen because of their prominence in the community, country, or entertainment industry and have never even met their stalkers” (Flint, 2007: 685). There are also cases of victims on work context, involving employers, co-workers, subordinates or clients.

In what specifically concerns the **impact on the victim**, the so-called physical effects can range from mere annoyance to fear and terror, or severe physical injuries and even death. Very often, victims complain about headaches, digestive disorders, weakness and fatigue, as well as the consequences of injuries caused by the stalkers’ attack (bruises, burns, cuttings, etc). Mental health is the area where more information has been gathered over the last years. Typically, victims report states of fear, hyper vigilance, distrust and feelings of abandonment, and discouragement or lack of control.

However, the major consequence on the victim’s life can be observed on social interaction, with extreme lifestyle changes, routine shifts, diminishing of social interactions, change of residence or employment. All these changes can originate the impoverishment of the backup system, thus furthering the difficulties felt by victim whilst fighting to exit the stalking situation.

The course of conduct “*means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose*” (Davis, 2001:

429). According to Matos, Granjeia, Ferreira and Azevedo (2011: 23), 3 periods can be identified: (1) crisis, when the stalker approaches the victim; (2) recovery, when the stalker diminishes his offences and the victim feels there is a calmness on the conduct of the stalker; (3) anticipation, when the victim realizes it has not ended and observes with anxiety and expectation the future attacks, returning to phase one. The same authors also explain how, whilst facing stalking, victims tend to cope with the harassment in 5 different ways: (1) they deny or minimize the problem; (2) they try to avoid the stalker; (3) they confront the stalker; (4) they try to negotiate their freedom; and (5) they ask for help (*idem*, 26).

Finally, **conducts** that can be identified with stalking, such as harassment, mean a “*knowing and willful course of conduct directed at a specific that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.*” (Wells, 2001: 428). The media have also created a new form of stalking, as **cyberstalking** is taking form as a behavior that is becoming more common and has the potential to cause significant consequences. As Flint summarizes, “[t]he internet provides a medium for stalkers to send unwanted messages and can also aid stalkers by giving them the information about their victims, such as addresses, phone numbers, e-mail addresses, employers, birth dates, and other types of personal and professional information” (Flint, 2007: 685).

#### *LEGAL OPTIONS FROM THE PORTUGUESE JURISDICTION: THE STATE OF THE ART*

On 12 December 2012, the Portuguese Parliament approved (published on the Official Journal on 21 January 2013,) Resolution No. 4/2013, which approved the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, a.k.a the Istanbul Convention. Since 1 August 2014, this International Instrument is in force in the Portuguese jurisdiction insofar as the Portuguese Republic remains a Party of the Convention, according to article 8, par. 2, of the Portuguese Constitution.

Therefore, according to article 5, par. 2, of the Convention, all Member States should adopt all the legislative measures necessary in order to prevent, investigate and punish all acts of violence covered by it, and adopt all legislative measures to provide the victims of such acts for their rightful reparation (*rectius*, “compensation”). On the

other hand, as seen above, article 33 (Psychological violence) and article 34 (Stalking), prescribe that all parties must take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats, and all the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, should be criminalised.

There is not yet specific legal framework to respond to the phenomenon of stalking in the Portuguese jurisdiction; it is only possible to prosecute stalking when individual behaviours that are elements of it amount to crimes prosecutable under other norms, thus leaving out of the criminal justice system's scope of action various potentially harmful conducts. Still, several conducts can be prosecuted, v.g., as "simple bodily harm" (article 143, Criminal Code), "threat" (article 153, Criminal Code), "domestic violence" (article 152, Criminal Code), "coercion" (article 154, Criminal Code), "violation of home and disturbance of privacy" (article 190, Criminal), "inquest of the private life" (article 192, Criminal Code) and "illicit records and photographs" (article 199, Criminal Code) (Modena Group on Stalking, 2007: 14).

As Suzan van der Aa and Renée Römken (2013: 235-236) explain, the lack of specific regulation is bound to cause to different sets of problems:

*The generic criminal and civil law provisions are not efficient in combatting stalking. The lack of a specific provision, for example, causes the police to wait for escalation and remain inactive in the early stages of the harassment, even if other provisions are applicable; The generic provisions do not cover stalking in its entirety, they do not cover certain forms of stalking, and/or they do not cover certain victims of stalking. (2013: 235-236)*

In short, generic legal provisions are inefficient in combating stalking and do not cover stalking behavior in its entirety, making the criminalization of stalking conducts imperative.

The phenomenon of stalking has recently (re-)entered public attention through the media. The matter has recently entered into academic discourse as well, but there is still some crucial questionings concerning which conducts should or should not be criminalized as stalking. Academics diverge in the use of specific (national) terms or a generic term (v.g., 'harassment') to designate the behavior which varies from "obsessive stalking (*perseguição obsessiva*)", to "criminal stalking (*perseguição*

*criminosa*)”, “unhealthy fixation (*fixação doentia*)”, or “close surveillance (*marcação cerrada*)”. As seen above, currently, it is only possible to prosecute stalking when the underlying behaviours amount to crimes prosecutable under other norms; furthermore, specific restraining or protection orders are not foreseen (Modena Group on Stalking, 2007: 34-35).

***How to cope in the absence of specific norms: a few examples from Portuguese case law***

Up until now, judicial officers sought to achieve the criminal punishment of stalking indirectly, by means of other offences where this type of behaviour could be integrated; nonetheless, in some cases, the lack of a specific offence hinders the prosecution of the act of stalking *per se*.

In four selected rulings from the Portuguese Courts of Appeal, we find expressive examples of the judges’ attempts to subsume stalking behaviour to pre-existing offences, or to specifically use the concept of stalking to aggravate a domestic violence offence.

In a case found in a ruling from the Évora Court of Appeal (date: 18-03-2010, case file No. 741/06.9TAABF.E1), the bench found the defendant guilty of violation of privacy and defamation. At stake was an ongoing harassing behaviour that took place from march 2006 until the summer of 2007, with the defendant making constant visits to the victim’s shop and places she frequented, dozens of daily telephone calls to her shop and home (both at night and during the day), and frequently shouting expressions of the likes of “your tits and arse are so fine I’d give it to you 3 times in a row” (sic) during their frequent encounters in public places. The panel specifically considered the reiteration of the defendant’s behaviour to be consistent with stalking, but in the absence of a specific offence ended up “settling for” the aforementioned offences.

Differently, in a 2013 ruling from the same Court of Appeal (date: 08-01-2013; case file No. 113/10.0TAVVC.E1), the Appeal Court Judges incorporated the defendant’s stalking behaviour (that consisted *v.g.* on controlling the victim’s mobile phone, following the victim by car on a casi-daily basis, questioning the victim’s closest relatives and friends in order to know her everyday life in close detail) in the crime of

domestic violence, using said behaviours, among others, to assert the defendant's psychological violence towards his spouse.

The underlying facts and the judge's reasoning are similar to the ones from another recent ruling from the Oporto Court of Appeal (date: 08-10-2014, case file No. 956/10.5PJPRT.P1). In this specific case, "intense psychological abuse" was exerted towards the victim by a former spouse by means of numerous text messages and written messages left daily in her car.

In both cases, the stalking behaviour was part of a domestic violence situation, with the latter consuming the former. The judges from both cases considered the defendants' stalking behaviour as an especially grievous form of domestic violence, in consonance with most doctrine, which refers stalking as a means to achieve one of the most severe forms of intimate partner violence: coercive control<sup>16</sup>.

In yet another ruling from the Oporto Court of Appeal (date: 07-11-2012; case file No. 765/08.1PRPRT.P2), the stalking behaviour was directed towards a work colleague of the primary victim. In this case, the Appeal Court Judges found the defendant guilty of an offence of disturbance of peace and quiet (mostly used in cases of violation of domicile, but since 2007 including a specific mention to telephone calls and text messages able to disturb the victim's private life and wellbeing). At stake were 3.060 text messages containing insults and threats sent by the defendant to one of his spouse's work colleague for a whole year.

### ***Bills introducing new anti-stalking legislation***

Three Bills introducing a new provision in the Portuguese Criminal Code are now under discussion at the Portuguese Parliament. These were submitted by the three political parties with major expression in the country: PS (*Partido Socialista* – "Socialist Party"), PSD (*Partido Social Democrata* – "Social-Democrat Party") and BE (*Bloco de Esquerda* – "Left Block"), respectively, Bills No. 647, No. 663 and No. 659.

In the opinion of the High Council of Public Prosecutors, all three proposals, even though originated by parties with a diametrically opposed positioning, have in

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<sup>16</sup> For a comprehensive study of this form of domestic violence, see *Stalking as coercive control* (2012) Eve S. Buzawa, Carl G. Buzawa, Evan Stark, in "Responding to domestic violence - integration of criminal justice and human services", Sage, p. 31-34.

common not only the purpose of implementing criminal measures concerning stalking, in respect to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, but they also reveal some kind of agreement in some fundamental aspects: the systematic insertion of the new type of crime in crimes against self-determination, the existence of complementary community penalties, and the subsidiary nature of the punishment, with a foreseen semi-public nature of the offence (i.e. it is dependent of a formal complaint in order to be investigated).

Nonetheless, such similarities do not extend to the definition of the typical conducts, nor to the punishment of the attempt of stalking. Regarding the definition of the conducts at stake, in abstract, Portuguese criminal law requires a further detailed concretization on the conducts in order to prevent excesses that can occur due to the novelty of the crime and the necessity felt to set apart all the conducts without criminal significance. Therefore, the criminalization must predict the prohibition of “unwanted conducts”, as well as those conducts must be repeated over time to justify criminalization, noticeable on the legal definition “those who persist on an unwanted conduct”, making single accidents not punishable. On the other hand, even though the norm needs to have a certain degree of certainty, since some conducts can be socially accepted by its apparent neutrality, the norm must somehow predict a wide range of stalking behaviors, to help interpretation from police and judicial officers. This may fall upon all the conducts that constrain or cause unrest to the victim, but which are not enough to cause fear, restlessness, nor are able to jeopardize the victim’s freedom, as giving flowers, sending romantic messages, or keeping the victim under close surveillance.

The severity and the nature of conducts, considering the possible consequences they may have on the life and freedom of the victims, impose the prevision of accessory penalties. Specifically concerning domestic violence, the Portuguese legal framework already prescribes additional protection to the victims, that consist on prohibition of contacts, barrage of the offender from the victim’s house, or the obligation to attend specific programmes or treatment in order to prevent relapses, that are also being taking into account concerning the crime of stalking on the three aforementioned Bills. In short, to merely foresee stalking as a criminal offence is clearly not enough. Accordingly, it is of no avail if the offender can continue to harass the victim with



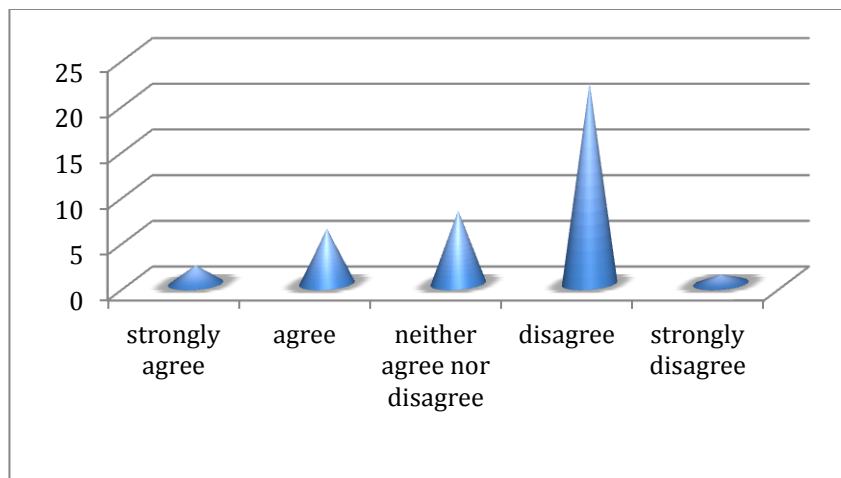
impunity, and therefore must attend programmes that facilitate reintegration and/or treatment.

***A quick glimpse at the perceptions of future judges and public prosecutors at the dawn of an old-new offence: the survey***

The main purpose of applying a survey<sup>17</sup> to future judges and public prosecutors was to gather information on the perceptions of young judicial officers who are to be applying the new law when getting to the criminal courts. This way, we tried to assess their awareness and sensitivity to stalking behaviour on its own, in order to perceive whether they would or not be prosecuting/judging such conducts. A few of the results from such survey are now presented and briefly discussed below.

First of all, when questioned if they considered that our criminal justice system already gave a sufficient response to stalking, with no need for an autonomous criminalization, our respondents were mostly negative, as seen in the chart below.

**CHART 1**



Accordingly, almost all respondents (32) considered that such kind of conducts should be criminalized on their own, with stalking as an autonomous offence in the Criminal Code.

**CHART 2**

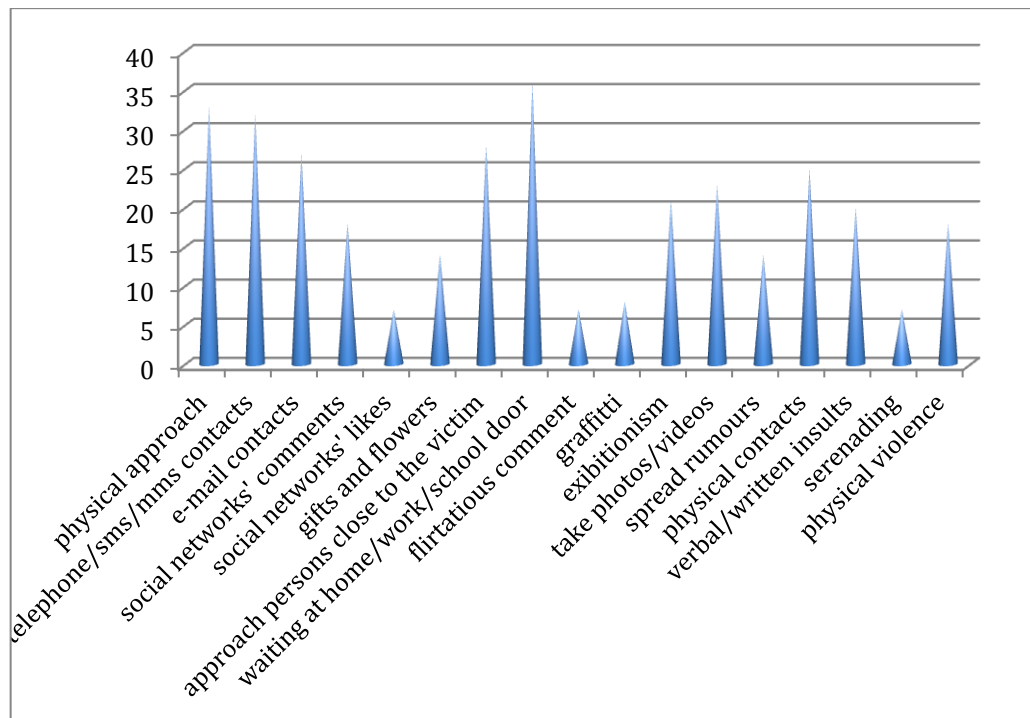
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<sup>17</sup> A short survey was applied to all future judges and public prosecutors currently in training at CEJ (with the exception of the 3 authors), as well as two Public Prosecutors from São Tomé e Príncipe, also in training at the CEJ, who kindly agreed to participate in our study, in a total of 39 respondents.



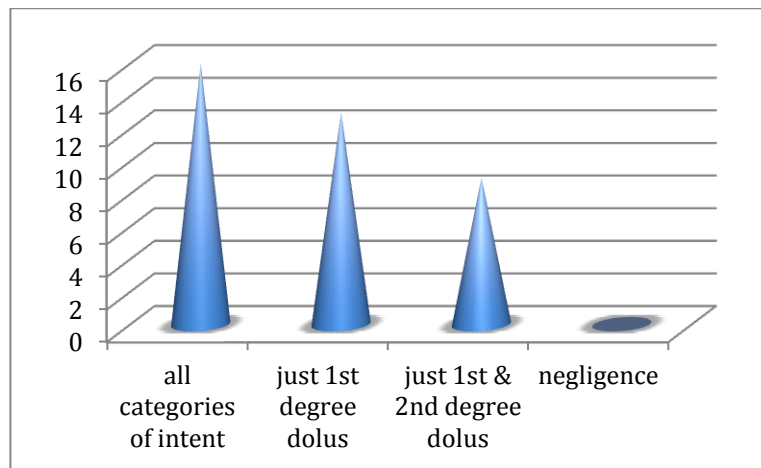
As seen in the Chart below, to our respondents, the conducts underlying stalking are multiple, ranging from the classic surveillance, physical approach, gifts, serenading and graffiti, to the more modern comments and “likes” in social networks.

**CHART 3**



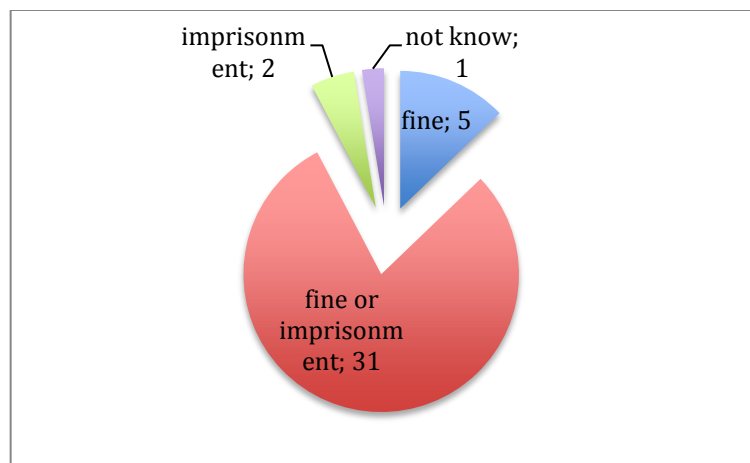
All respondents consider stalking as an intent crime, with 16 perceiving as possible all categories of intent, 13 only direct intent of 1st degree *dolus directus*, and 6 only direct intent/1st degree *dolus directus* and oblique intent/2nd degree *dolus directus*. The possibility of negligent stalking is excluded by all respondents, both conscious and unconscious categories.

**CHART 4**



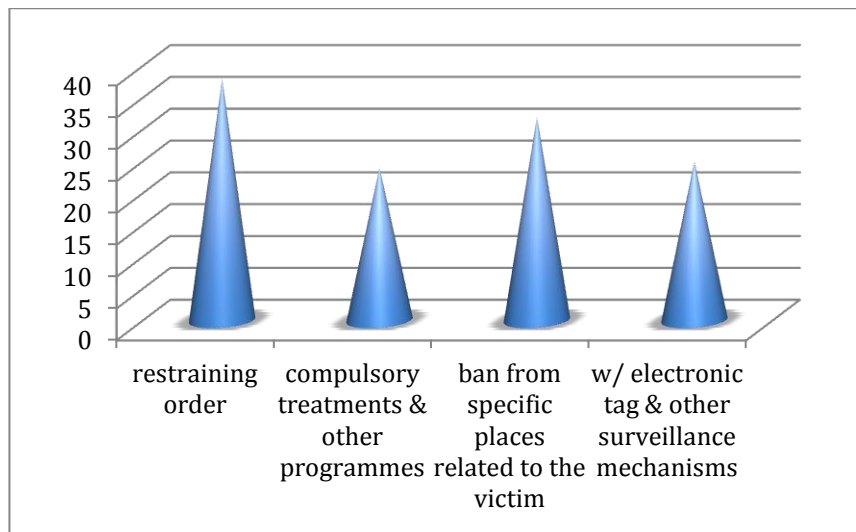
As for the penalty to be applied, the alternative between a fine and a prison sentence gathered the vast majority of answers. This way, respondents considered the judge had the possibility of selecting the most appropriate penalty to any given case.

**CHART 5**



As for supplementary community penalties to be added to the main (prison/fine) sentence, our respondents gravitated especially towards the restraining order, but banning the defendant from places related to the victim, such as residence, workplace or school and their vicinities, and the compulsory frequency of treatments and programmes designed to reduce violent or behaviours were relevant to many as well. The use of surveillance mechanisms to ensure compliance was also considered to be important by the majority of future judges and public prosecutors.

**CHART 6**



All in all, as we can ascertain from the results of this short survey, young judicial officers currently in training are in general very aware of the dangers of such conducts, displaying both knowledge on the matter and an interest in a strong judicial response to this phenomenon. A specific care for the victims' wellbeing and safety is to be noticed, with the vast majority addressing the need for supplementary community penalties, and the specific use of electronic surveillance mechanisms to ensure compliance.

## CONCLUSIONS

As seen throughout this paper, due to the complex nature of stalking, taking into account not only the multiple underlying conducts, but also the difficult to gather solid evidence of them and the dangers within them, and the effects on victims, a solid response from legislators, judicial offices and police forces face difficulties that are, many times, insurmountable. However, learning from previous experiences of different jurisdictions, and always bearing in mind the need for a multidisciplinary approach and integrated responses from different entities and agents, as far as we are concerned, the Portuguese jurisdiction can only win with the criminalization of stalking.

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