Conceptualizing Femicide as a Human Rights Violation

For all those who are affected by or fight femicide

Conceptualizing Femicide as a Human Rights Violation

State Responsibility Under International Law

Angela Hefti

LL.M. (Yale), PhD (University of Lucerne)

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Abbreviations

ACHR	American Convention on Human Rights
AP	Additional Protocol
AU	African Union
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of Discrimination Against Women
CIL	Customary International Law
CoE	Council of Europe
CSW	Commission on the Status of Women
DEDAW	Declaration on the Elimination of Discrimination Against Women
DEVAW	Declaration on the Elimination of Violence Against Women
DRC	Democratic Republic of the Congo
DyRiAs	Dynamic Risk Analysis System
ECCC	Extraordinary Chamber in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EoC	Elements of Crime
EU	European Union
FGM	Female genital mutilation
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACPPT	Inter-American Convention to Prevent and Punish Torture
IACtHR	Inter-American Court of Human Rights

ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICW	Inter-American Commission of Women
IHL	International Humanitarian Law
IHR	International Human Rights Law
ILC	International Law Commission
ILO	International Labor Organization
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East in Tokyo
ISIS	Islamic State in Iraq and Al-Sham
NAFTA	North America Free Trade Agreement
NDP	National Democratic Party
NGO	Non-Governmental Organization
OAS	Organization of American States
PKK	Kurdistan Workers' Party
PRF	Patriotic Resistance Front
SARA	Spousal Assault Risk Assessment
SC	Security Council
SCSL	Special Court for Sierra Leone
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
US	United States
VAWG	Violence Against Women and Girls

VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

1. Introduction to the concept of femicide

Being female is dangerous. Over the past several decades, the risks women and girls face—of being abducted, raped, killed, and sexually enslaved—have risen dramatically.[1] A United Nations (UN) report documented the extent of the peril women are confronted with at the hands of their partners in their own homes.[2] Other accounts detail how terrorist groups predicated on sexist ideologies, such as the Islamic State in Iraq and Al-Sham (ISIS) and Boko Haram, deliberately target women and girls as commodities to trade and exploit sexually. Yet, many States have allowed violence against women and girls (VAWG) to happen, failing to stop it in its tracks. Fighting back, women and girls have mobilized across the world, such as in the #MeToo movement and the #NiUnaMenos [Not one less] and similar campaigns to protest the indifference with which crimes directed at women and girls are treated.[3] Yazidi women and girls who escaped ISIS captivity and sexual enslavement exclusively aimed at women and girls, relentlessly seek redress—because 'justice is all Yazidi have now.'[4] Often enough, however, the law has failed to capture the sexist ideology and violence which specifically target women and girls. Consequently, human rights bodies have struggled to identify and adjudicate systemic harm inflicted on women.

I advance the concept of femicide as a female-specific international human rights violation.[5] The present book exposes the different aspects of femicide: a pattern of multiple acts targeting a female social group based on their gender,

[1] Jeremy Sarkin, 'A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World' (2018) 40(1) *Human Rights Quarterly* 1–36 at 3.

[2] UN Office of Drugs and Crime, 'Global Study on Homicide. Gender-related Killings of Women and Girls' (November 2018), www.unodc.org/documents/data-and-analysis/GSH2018/GSH18_Gender-related_killing_of_women_and_girls.pdf. All online sources were accessed 30 October 2021.

[3] #MeToo, https://metoomvmt.org/; #Ni Una Menos, http://niunamenos.org.ar/; #Nous Toutes, www.noustoutes.org/.

[4] Nadia Murad, *The Last Girl: My Story of Captivity, and My Fight Against the Islamic State* (Tim Duggan Books 2018) 304.

[5] See Consuelo Corradi et al., 'Theories of Feminicide and their Significance for Social Research' (2016) 64(7) *Current Sociology* 975–995 at 983 and 988.

with the effect of objectifying, subordinating, humiliating, or instilling fear in women, ultimately placing women and girls in a subordinate social status, where such violence remains unpunished by the State. Committed by non-state actors, VAWG has traditionally been viewed as a domestic and family matter. This work clarifies that States are responsible for femicide when they tolerate and facilitate a system in which perpetrators can harm a female social group with impunity.[6] Using the prism of 'radical feminist theory,' spearheaded by MacKinnon,[7] this book critiques elements of relevant international crimes and human rights violations, employing some of them to conceptualize femicide. Since radical feminist theory considers unequal power relations between men and women as the main cause of violence, domestic violence being the 'domination in an extreme form,' it is best suited to address femicide.[8]

No consensus exists on what acts constitute 'femicide.' In colloquial speech, the term femicide is commonly used to refer to the murder of a woman because she is a woman.[9] However, the concept of femicide should extend beyond the killings of women and girls as the reality is more complex than that. In practice, the victim[10] is often raped and abused before she is killed. Her case is not taken seriously by police officers who blame her. At the least, this causes delays in investigations of crimes against her; at worst, she is not rescued when she is still alive. I propose to conceptualize femicide in broader terms to cover the many other human rights violations, such as the right to access to justice, the prohibition of torture, and other rights, aside from killings. Moreover, the current conceptualization of the right to life is devised to cover instant killings (mostly

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[6] On State accountability for systemic violence against women, see Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *The American Journal of International Law* 613–645 at 645; see also Alice Miller, 'Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection' (2004) 7(2) *Health and Human Rights* 17–47 at 24.

[7] See discussions on other feminist theories in Nancy Levit and Robert R. M. Verchick, *Feminist Legal Theory: A Primer* (New York University Press 2006) 15–41. See also Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press 2011) 36.

[8] Levit and Verchick (n 7) 23.

[9] E.g., Alberto Nájar, 'Feminicidio en México: Mara Castilla, el asesinato de una joven de 19 años en un taxi que indigna a un país violento' *BBC* (18 September 2017), http://www.bbc.com/mundo/noticias-america-latina-41303542.

[10] The more appropriate term is 'survivor,' which awards agency to the person subjected to violence. However, as this term implies that the person remained alive, I use the term 'victim' where appropriate. See Beth Goldblatt, 'Violence Against Women and Social and Economic Rights, Deepening the Connections' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement in International Law* (Edward Elgar 2019) 363.

targeting men and boys), rather than slow-death measures usually committed against women in femicide (such as female genital mutilation [FGM] and severe psychological harm). This type of violence, while not instantly lethal, may cause untimely death years later, for instance because of (complications on account of) injuries inflicted through rape or FGM. If we were to limit femicide to killings, other acts of violence would find no recourse; feminist critique that women are required to comply with male norms, and fit into existing rights devised for men, would go unaddressed.[11] Furthermore, the aim of femicide is not the physical extermination of women and girls, as is perhaps implied by a focus on killings, but the subordination of an entire group of human beings through gender-based violence. Instead, the intersectional subordination of the female social group in patriarchal societies is at stake. Femicide, as conceptualized in this book, is composed of gender-based violence—violence directed against a woman because she is a woman, or which affects women disproportionately. Not all acts of gender-based violence can be qualified as femicide. Only extreme forms of gender-based violence would fall within the ambit of the femicide concept. I propose to measure the severity by reference to either the prohibition of torture and/or the right to life, both critiqued from a feminist perspective. That said, I conceptualize femicide in line with the architecture of the genocide framework, which may include the murder of a woman—among many other acts—as the method by which the female social group is subordinated in society. Each chapter explains one or several aspects of femicide and builds on the previous one. I differentiate femicide from other human rights violation by its composition of a multi-faceted, group-related human rights violation, including severe violence and access-to-justice issues. In line with these clear parameters, the proposed femicide concept holistically responds to its social reality.

A paradigmatic example of femicide relates to the waves of VAWG in Ciudad Juarez, Mexico, where the term has been used to denote epidemic disappearances, sexual violence, rapes, and killings of the female social group since the 1990s.[12] In a typical femicide case in Ciudad Juarez, the victim goes missing—e.g., after leaving school, the workplace, or a party. She is often held in captivity, raped, sexually mutilated (parts of her genitals and breasts are removed), and subjected to extreme pain and suffering before she is killed. [13]

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[11] Ibid.

[12] *González et al. v. Mexico (Cotton Field Case)*, Preliminary Objection, Merits, Reparations, and Costs, Inter American Court of Human Rights Series C No 205 (16 November 2009) paras 127 and 228–231; Fernando Mariño, 'Una Reflexión sobre la posible Configuración del Crimen de Feminicidio' in Fernando Mariño et al. (eds), *Feminicidio, El Fin de la Impunidad* (Tirant lo Blanche 2012) 113.

[13] See *Cotton Field Case* (n 12) para. 277.

A few days later, her dismembered and defiled body, marked with misogynist writings like 'whore,' is dumped somewhere in the public space. When her family members report their loved one's abduction or killing, the authorities typically blame the woman or girl for what happened because of the way she dressed or her lifestyle.[14] Consequently, the authorities either delay the investigation or remain inactive altogether. The case is never solved.[15] At the outset, femicide was considered endemic to Mexico, and even Ciudad Juarez more specifically, yet other iterations of femicide across the world involve similar human rights violations.[16]

As an ancient and global problem, the issue of femicide merits the attention of international law. The modern iteration of femicide echoes the historical persecution and execution of thousands of women and girls as witches in the sixteenth and seventeenth centuries.[17] In the contemporary context, the term femicide has been associated with the deaths of women and girls who perished in Ciudad Juarez, especially after the Inter-American Court of Human Rights' (IACtHR) seminal case—*González et al. v. Mexico* (also known as the *Cotton Field Case*, named after the place where assassinated women and girls' body fragments were found).[18] Widespread domestic violence in Austria, France, Italy, and Switzerland also makes femicide an issue of concern in Europe.[19]

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[14] Ibid., para. 223.

[15] Inter-American Commission on Human Rights (IACHR), Report on the Situation of the Rights of Women in Ciudad Juarez, Mexico: The Right to be Free from Violence and Discrimination (7 March 2003) Doc 44 OEA/Ser.L/V/II.117 para. 4 [hereinafter IACHR Report on Ciudad Juarez]; *Cotton Field Case* (n 12) paras 199–208; Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Pennsylvania University Press 2010) 9.

[16] Adriana Carmona López et al., 'Feminicide in Latin America and the Movement for Women's Rights' in Rosa-Linda Fregoso and Cynthia Bejarano (eds), *Terrorizing Women, Feminicide in the Americas* (Duke University Press 2010) 160 and 163.

[17] The witch craze presents similarities to modern-day femicide and its triggers. A witch was described as a woman who was responsible for evil in the community, including crop burning, death, and sterility. Accordingly, women were seen as a 'potential threat to the general well-being of the populace and in need of control.' Times of unrest, disaster, dire economic circumstances, and instability led to an outburst of violence against women in the middle ages, when the female social group outnumbered the male population. As a result, numerous unmarried and independent women (who lived on almost equal basis with men) were economically challenging men's role as providers in a context of already limited resources. Marianne Hester, 'The Witch-craze in Sixteenth- and Seventeenth- Century England as Social Control of Women' in Jill Radford and Diana Russell (eds), *Femicide: The Politics of Women Killing* (Twayne Publishers 1993) 28 and 30.

[18] *Cotton Field Case* (n 12) paras 127, 137–146 and 228–231; Mariño (n 12) 113.

[19] Daniela Bandelli, *Feminicide, Gender and Violence: Discourses and Counterdiscourses in Italy* (Palgrave Macmillan 2017); Expert Group Meeting on

Despite its prevalence and myriad forms across the world—e.g., the enslavement and rape of Yazidi women in Syria[20] the abductions of girls by Boko Haram in Nigeria,[21]—femicide has not yet been recognized as a distinct human rights violation.[22] The term femicide is missing from the international and regional human rights law framework; it is used and referenced inconsistently by international organizations and national legislators.[23]

The violence inherent in femicide is only partially recognized in human rights law. At first glance, the 'international bill of rights'—consisting primarily of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—appears to cover women and girls' human rights violations.[24] However, while these human rights instruments entail non-discrimination principles ensuring that women and girls are not being discriminated against on the basis of their gender, they do not reflect the ways women and girls are specifically harmed. Many forms of gender-based violence—which I call 'acts of femicide' to accentuate their fundamental role and function in femicide—such as forced marriage, FGM, sexual slavery, human trafficking, domestic violence, honor

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Gender-Related Killings of Women (organized by the UN Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo), 'Femicide and Feminicide in Europe, Gender-motivated Killings of Women as a result of Intimate Partner Violence (12 October 2011).

[20] Human Rights Council, Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the light of Abuses committed by the so-called Islamic State in Iraq and the Levant and Associated Groups, A/HRC/28/18 (13 March 2015) paras 35–43.

[21] Human Rights Watch, 'Those Terrible Weeks in their Camps' (27 October 2014) http://features.hrw.org/features/HRW_2014_report/Those_Terrible_Weeks_in_Their_Camp/assets/nigeria1014web.pdf; UN General Assembly, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Rashida Manjoo, A/66/215 (1 August 2011) para. 37.

[22] See Secretary General in Academic Council on the United Nations System, Feminicide, A Global Issue that Demands Action, Vol. II, Vienna (2014) https://acuns.org/wp-content/uploads/2014/07/Femicide-Publication-2014-FINAL.pdf at 5; Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences (Rashida Manjoo), A/HRC/29/27 (10 June 2015) para. 63 [hereinafter Manjoo Report 2015].

[23] Hilda Morales Trujillo/Grupo Guatemalteco de Mujeres, 'Ley contra el Femicidio y Otras Formas de Violencia contra la Mujer, Comentarios y Concordancias' (May 2010), 130 http://ggm.org.gt/wp-content/uploads/2017/04/monitoreoLeyContraElFemicidio1.pdf.

[24] See Thomas Buergenthal et al., *Human Rights in a Nutshell*, 5th edition (West Publishing 2017) 8–39; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law, a Feminist Analysis* (Juris Publishing 2000) 200 and 212.

killings, dowry-related murders, and rape—are not at all, or only regionally addressed in human rights law.

Although human rights law promises to grant universal protection, its focus has been on issues of 'public concern,' and thereby on acts directly committed by state actors. Domestic violence is the paradigmatic example of violence which does not fit the narrative of so-called 'public' violence. As a matter which is 'cultural, private and individual,' domestic violence often goes unpunished or is left to the patriarch's discretion.[25] One of the main difficulties in addressing femicide is the dichotomy between the strong legal shield of family life preventing state interference, and the need for state intervention in a unit where violence against women is likely to take place.[26] Holmes refers to this vacuum of family life as a 'prison' where women can be enslaved, as they are put to work in the fields or at home, and are subject to sexual exploitation.[27] Only when women and girls are tortured in detention or executed in public, i.e., when the mistreatment matches that suffered by men and boys, human rights law adequately protects them.[28] As a private issue, femicide has been perceived as a domestic affair best left to the discretion of States.[29] This dichotomy between the overt protection against interference in family life 'by society and the State' and the need for state intervention where violence takes place, is one of the main challenges in conceptualizing femicide.[30]

Another example where human rights law has inadequately responded to femicide concerns one of its essential ingredients: the prohibition of torture. Feminist legal scholars MacKinnon, Chinkin, and Charlesworth explain that what is perpetrated outside the home, e.g., torture of prisoners or executions, falls within the ambit of human rights law.[31] Charlesworth illustrates this with the example of torture, which is not only explicitly prohibited in various conventions but also enjoys the status of jus cogens.[32] In its strict definition,

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[25] Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2007) 17–18 and 41–43.

[26] Ibid., 192–193.

[27] Helen Bequaert Holmes, 'A Feminist Analysis of the Universal Declaration of Human Rights' in Carol Gould (ed), *Beyond Domination, New Perspectives on Women and Philosophy* (Roman & Allanhelm Publishers 1983) 255–257.

[28] MacKinnon (n 25) 181.

[29] Ibid., 4–5 and 41–42; Charlesworth, Chinkin and Wright (n 6) 180, 190 and 626; see also International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T (2 September 1998), paras 513 and 731.

[30] Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal* 87–125 at 105.

[31] MacKinnon (n 25) 181; see also Charlesworth, Chinkin and Wright (n 6) 629.

[32] Charlesworth, Chinkin and Wright, ibid.

torture presupposes the involvement of a public official and thus concerns the public sphere. Although rape can constitute torture if certain criteria are met, the Convention Against Torture (CAT) only recognizes rape as torture if committed in the presence of a public official.[33] As explained later, human rights bodies appear reluctant to recognize rape as torture when committed in the private sphere, while they do so when state officials—e.g., military personnel —rape women and girls. Committed at a woman's home, rape rarely constitutes a violation of her human rights.[34]

International criminal law (ICL) has similarly excluded crimes against women and girls from its application. Women and girls are only part of the targeted group in genocide to the extent that they belong to a persecuted ethnicity,[35] but attacks based predominantly upon gender are not covered by the definition of genocide.[36] ICL wrestles with the question of how to adequately address crimes against women because they are women. For example, widespread violence against women and girls is covered by the crime against humanity provision, and rape can now constitute a form of genocide. However, under these crimes, the group-related aspect of femicide (targeting the female social group) is neither addressed by the crimes against humanity element of 'civilian population,' nor the genocide definition's 'national, ethnic, religious, and racial group.' Finally, the crimes against humanity provision tends to require state agents to actively orchestrate or perpetuate harm through a state policy or plan.[37] Acts of femicide are however rarely planned, yet they are widespread since unpunished acts of violence may be multiplied.[38] Should crimes against humanity be interpreted to require a state policy, acts of femicide would go unpunished.

Against this backdrop, some scholars have questioned whether femicide could be framed as genocide by another name or as a crime against female humanity.[39] Others propose including gender as a protected group in genocide in addition to the currently protected national, ethnical, racial, and religious

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[33] Ibid.
[34] Ibid.
[35] MacKinnon (n 25) 181.
[36] Ibid.
[37] Charlesworth, Chinkin and Wright (n 6) 629.
[38] Mariño (n 12) 114; Charlesworth and Chinkin (n 24) 335; Andrea Dworkin, *Woman Hating* (Penguin Books 1974) 93; Ana Messuti, 'La Dimension Jurídica Internacional del Feminicidio' in Graciela Atencio (ed), *Feminicidio, el Asesinato de Mujeres por ser Mujeres* (Catarata 2015) 48–49. See also Ayaan Hirsi Ali, 'Women Go Missing by the Millions' *New York Times* (24 March 2006) www.nytimes.com/2006/03/24/opinion/women-go-missing-by-the-millions.html.
[39] See, e.g., Marcela Lagarde y de los Rios, 'Preface' in Fregoso and Bejarano (n 16) xv–xvi.

groups.[40] The literature dwells minimally on the structural implications of inequality and challenges typical to femicide, such as the interplay of many human rights violations. Most research is confined to ICL implications of sexual violence and rape as vehicles of a genocidal campaign or a crime against humanity.[41] Some of these studies examine to what extent sexual crimes fit into existing legal categories and if these categories might be enlarged to include 'gender' and 'sex crimes,' thereby relying on existing structures of international law.[42]

Feminist legal scholars, such as Charlesworth, Chinkin, and MacKinnon, have challenged these approaches and, instead, examined the structures of international criminal and human rights law as it applies to women through the lens of feminist legal theory. In an ideal world, I would like to dismantle the whole system to conceptualize new human rights to respond to femicide. However, the immediate practical implementation of the femicide concept must be kept in mind. Accordingly, I contend myself with building on feminist legal approaches to propose systemic modifications of relevant elements of existing human rights and international crimes to conceptualize femicide as a human rights violation.[43] Of equal importance is my constant reference to state responsibility for systemic violence against the female social group.[44]

This volume is organized in four parts. This chapter examines the concept of femicide in social contexts and considers current approaches to femicide, its conceptual differences to other human rights violations, and sets out reasons for why an international legal response is required. *Part I* examines femicide through the lens of ICL. I demonstrate that existing structures of ICL provide

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[40] Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present, and Future* (Brill Nijhoff 2011) 131; see also Monika Ambrus, 'Genocide and Discrimination: Lessons Learned from Discrimination Law' (2012) 25 *Leiden Journal of International Law* 935–954 at 937; *Cf.* Alex Alvarez, *Genocidal Crimes* (Routledge 2010) 26.

[41] Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005); Usta Kaitesi, *Genocidal Gender and Sexual Violence: The Legacy of the ICTR, Rwanda's Ordinary Courts and Ggacaca Courts* (Intersentia 2014); see also Awet Hailezgi Tefera, 'The Elements of Rape as a Crime of Genocide in International Criminal Law, Case Analysis' (2013) 2 *Mekelle University Law Journal* 35–65; Kelly Askin, 'Prosecuting Wartime Rape and other Gender-Related Crimes under International Law, Extraordinary Advances, Enduring Obstacles' in Sari Kouvo and Zoe Pearson (eds), *Gender and International Law* (Routledge 2014) 177–246 [hereinafter Askin, 'Prosecuting Wartime Rape'].

[42] E.g., Hagay-Frey (n 40) 111.

[43] See Charlesworth, Chinkin and Wright (n 6) 645; see also Miller (n 6) 24.

[44] On state accountability for systemic atrocities against women, Charlesworth, Chinkin and Wright (n 6) 645; see also Miller (n 6) 24.

limited flexibility to recognize and respond to the general context of the commission of femicide beyond organized state action when harm is directed against women because they are women. I contend that some harm against women is left unaddressed in statutory language and that even progressive international crimes need to be reformed to better address gender-based violence against women and girls. Chapter 2 addresses femicide and armed conflict in broad strokes. It shows that historical attempts to outlaw rape in war have created precedents to criminalize acts of femicide, such as rape, and engage state responsibility. The primary point of inquiry in seeking a concept of femicide in international law is provided in this chapter. Chapter 3 analyzes the elements of crimes against humanity to consider to what extent some potentially promising aspects of the framework of this crime, such as the contextual element and its underlying acts, may assist in conceptualizing femicide. In Chapter 4, an inquiry is made whether femicide is a form of genocide and the extent to which gender can be included as a protected group in addition to the currently protected national, ethnical, racial, and religious groups.

Part II exposes women and girls' limited protection from femicide under international human rights law, and identifies the human rights typically breached in femicide.[45] Chapter 5 conveys a broad understanding of the development of women's rights at the United Nations (UN) level and then delves into the specific focus of the lens of discrimination through which the Convention on the Elimination of Discrimination against Women (CEDAW) Committee views domestic violence, rape, and other acts of femicide. Chapter 6 considers the European Court of Human Rights' (ECtHR) stagnant approach to recognizing rape committed by non-state actors as torture or integrating a 'gender perspective' in investigating crimes against women and girls. Furthermore, it sheds light on the *Osman* test for determining state responsibility by inaction. Chapter 7 studies the Inter-American approach to femicide, which is most sympathetic to identifying and recognizing gendered harm, such as torture. Chapter 8 addresses the African human rights system's notion of human and peoples' rights in connection with the collectively targeted female social group in femicide.

Part III is the integrative and concluding part of this book. Based on the previous analysis, I argue that femicide functions as a multi-faceted human rights violation, and that impunity is a crucial aspect of femicide. Chapter 9 advances normative conclusions for the recognition of femicide as a distinct

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[45] Some of the case law examined is discussed in Maria Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (Brill 2017); Lorena Sosa, 'Inter-American Case Law on Femicide: Obscuring Intersections?' (2017) 35(2) *Netherlands Quarterly of Human Rights* 85–103.

human rights violation. A femicide concept is constructed, drawing on existing human rights violations to make it practical. Chapter 10 outlines state responsibility for femicide and proposes several avenues States can take to prevent femicide.[46] The Conclusion recapitulates the main points and spotlights the harm women and girls suffer from femicide in international law.

A FEMINIST HUMAN RIGHTS LENS

The prism through which I conceptualize femicide is a feminist human rights one. I use a feminist methodology to critique the structure of international core crimes and relevant human rights violations applicable to femicide. First and foremost, feminist legal scholars 'emphasize the rather obvious (but unspoken) point that nearly all public laws in the history of existing civilization were written by men. […] [T]hat women and men should have political, social, and economic equality.'[47] Accordingly, research methods are feminist when they 'are combined in struggle to eradicate women's subordinate status.'[48] However, feminist approaches disagree whether it is best to advance women's rights via the inclusion of women in existing legal structures or to overhaul the current system and replace it with adequate structures.[49] I embrace both approaches. I propose systemic modifications in relevant elements of human rights and ICL to conceptualize femicide. Considering the limits of such an endeavor, I also rely on existing human rights violations to make the femicide concept operable in practice.[50]

Feminist legal methods scrutinize the political and social factors which underlie judicial reasoning, including historical background and social context. They recognize that the researcher's own experience influences the construction of her work.[51] Feminist methods include nuanced abstract reasoning as they try to include many different viewpoints,[52] but they do not claim to be

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[46] See also Charlesworth, Chinkin and Wright (n 6) 24.

[47] Levit and Verchick (n 7) 15–16.

[48] Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' in Kelly Weisberg (ed), *Feminist Legal Theory, Foundations* (Pennsylvania University Press 1993) 58. See also Dianne Otto, 'Feminist Approaches to International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 490.

[49] Ibid.

[50] See Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 *International Criminal Law Review* 409–423 at 423.

[51] Katharine Bartlett, 'Feminist Legal Methods' (1990) 104(4) *Harvard Law Review* 828–888 at 862.

[52] Ibid., 858.

'objective' in the conventional sense, as 'objectivity' has long been associated with 'a denial of the existence or potency of sex inequality that tacitly participates in constructing reality from the dominant point of view.'[53]

Conceptualizing femicide with feminist lenses matters to deconstruct the implicit and explicit biases in international crimes and human rights violations framed in patriarchal contexts which are contrary to the interests of women.[54] Two main methods legitimize the arguments for the construction of femicide as a human rights violation: the woman question and feminist practical legal reasoning. I also refer to a third: consciousness-raising. The woman question asks whether an ostensibly neutral or objective rule or practice excludes the experiences of women and girls. If answered in the affirmative, the next step is to seek ways to rectify this exclusion.[55] Asking the woman question in the context of femicide exposes the hidden effect of a state policy requirement which does not on the face of it discriminate women and girls, but which strictly interpreted excludes them from the purview of crimes against humanity. The woman question supports an argument for abandoning the policy requirement so that women's position in relation to international crimes would not be subordinated any longer.[56] The lack of focus on coercive circumstances in rape definitions in ICL also stems from the law's occupation with the perpetrator's view—did he think that she tacitly or explicitly consented?—and brushes aside a woman's concern—did she feel it necessary to feign consent because she feared for her life?[57] At the same time, the woman question serves to query how the *Osman* standard, discussed in Chapter 10, applies and/or excludes state responsibility for women and girls.[58] This feminist question helps identify possible avenues for human rights law to deal with women's rights violations as they occur in femicide.[59]

Feminist practical legal reasoning considers factors like the context and history of a provision, and the legal and social contexts in which a rule is implemented.[60] Specific circumstances of a new case, such as persecution based on gender, may dictate the reinterpretation of rules.[61] In this work,

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[53] Catherine MacKinnon, 'Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8(4) *Chicago Journal* 635–658 at 636. See also Otto (n 48) 490.

[54] See on structural bias critique, Karen Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting, in International Law' in Doris Buss and Ambreena Manji (eds), *Modern Feminist Approaches* (Oxford University Press 2005).

[55] Bartlett (n 51) 837 and 852.

[56] Ibid., 843.

[57] See ibid., 842.

[58] See ibid., 837–842.

[59] See ibid.

[60] Ibid., 851–853.

[61] See ibid., 853.

feminist practical legal reasoning is used to argue for the inclusion of gendered groups in the genocide framework, based on a changed socio-cultural context.[62] In doing so, light is shed on women's present interests and their historic subordination is accounted for.[63]

I cautiously engage in 'consciousness-raising,' an interactive method that exposes individual women and girls' discourse to emphasize and exemplify women's oppression through story-telling.[64] This method reveals patterns of suffering, and contributes to a theory of the practice which violated these women's rights, such as the rhythmic songs of African women, an interactive multimedia recording of the roughly 300,000 women's experience of forced sterilization by the Peruvian Alberto Fujimori regime in the 1990s.[65] While empowering for women individually and collectively, this method is subject to errors, since individual voices bear the risk of being interpreted to represent a very diverse group of women and girls.[66] Moreover, the present book is limited by its legal nature, which cannot fully incorporate all women's experiences.

I view femicide through the lens of human rights law, rather than ICL. I recognize that the most specific and oldest responses to gender-based violence stem from international humanitarian law (IHL) and have been developed in ICL. I could not therefore possibly ignore the vast research available on IHL/ICL and would like to provide a holistic view of the femicide concept. A human rights approach empowers women and girls who are at the center of the judicial process by means of which they attempt to remedy their situation. By bringing a case before an international human rights body, women and girls can seek justice previously denied at the domestic level. They are not solely seen as victims but are awarded full agency. By contrast, victims of sexual violence have little control over international criminal proceedings, as an international criminal investigation is in the hands of the prosecutor;[67] a rape victim may merely be asked to provide testimony. Moreover, ICL punishes perpetrators individually, but does not transform the underlying structures

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62 Ibid., 855.

63 Ibid., 861–862.

64 Sylvia Tamale, *Decolonialization and Afro-Feminism* (Daraja Press 2020) 273; see also Marie Ashe, 'Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law' in Kelly Weisberg (ed), *Feminist Legal Theory, Foundations* (Pennsylvania University Press 1993) 582–593; Bartlett (n 51) 864.

65 Tamale, ibid.; The Quipu Project https://interactive.quipu-project.com/#/en/quipu/intro.

66 Bartlett (n 51) 864.

67 Art. 13 Statute of the International Criminal Court (Rome Statute) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544.

which facilitate the commission of femicide.[68] With its focus on the victim and the perpetrator, there are limits to how it can surface the complex and intersectional ways women and girls are harmed.[69] As it requires States to redress a human rights violation, human rights law is well suited to rehabilitate the structures that perpetuate femicide. Of course, I must bear in mind the limits of substantive changes to the current human rights project with its structural bias.[70] For one, the case law of international courts only slowly develops and incorporates relevant changes. My focus on the State as 'the central custodian of women's rights,' cannot take account of various forms of power, which are not state-centric.[71] Despite its limitations (e.g., the definition of torture and the right to life, which are male-centered and fail to cover many forms of non-state actor violence), I consider that the human rights framework can and ought to be adapted to cover such harm. The present work, while bearing in mind these limits, considers human rights law a formidable, albeit not perfect, tool in advancing women's interests.[72]

CAVEATS TO CONCEPTUALIZING FEMICIDE

This work begins with caveats to conceptualizing femicide. The first caveat relates to the practical reality of implementation the proposed femicide concept. Further efforts are required to convince States of the utility of the femicide approach. Even if human rights bodies apply the proposed concept of femicide, domestic implementation remains a concern.[73] However, the term femicide is not simply mentioned in an international instrument to which States can pay lip service. Rather, this work explains the meaning of femicide,

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[68] See Art. 25 Rome Statute; Buss (n 50) 416.

[69] See Buss, ibid., 418, and Karen Engle, 'A Genealogy of the Centrality of Sexual Violence in Armed Conflict' in Fionnuala Ní Aoloáin et al. (eds), *The Oxford Handbook of Gender and Conflict* (Oxford University Press 2018).

[70] Ratna Kapur, 'Gender, Sovereignty and the Rise of Sexual Security Regime in International Law and Postcolonial India' (2013) 14 *Melbourne Journal of International Law* 317–345 at 325.

[71] Ibid., 320.

[72] See Kate Ogg and Louise Craker, 'Feminist Approaches to Peace and Conflict, International Human Rights Law Disappearing and Re-Emerging?' in Fionnuala Ní Aoloáin et al. (n 69) 193.

[73] E.g., the ECtHR cannot order what measures States must take to remedy a human rights violation. Mark Villiger, 'Binding Effect and Declaratory Nature of the Judgments of the European Court of Human Rights,' in Anja Seibert-Fohr and Mark Villiger (eds), *Judgments of the European Court of Human Rights – Effects and Implementation* (Nomos 2014) 33.

and provides a tool for States to combat a serious human rights violation.[74] The femicide concept appears to be most operable in the litigation context before regional human rights courts. The focus of regional human rights instruments, such as the European Convention of Human Rights (ECHR) and the American Convention on Human Rights (ACHR), is on civil and political rights, and, with the exception of the African Charter on Human and People's Rights, to a lesser extent on social and economic rights.[75] At the same time, the proposed femicide concept does not exclude social and economic rights (e.g., in the context of torture and the right to life, which may also include the right to livelihood).[76] Social and economic rights can and should be read into the concept of femicide, where it is possible to do so.

The primary object of the attack in femicide are women and girls. Of course, who belongs to the category of women and girls is subject to debate and the group's contours may evolve.[77] I treat women and girls as a single analytical category to simplify the study of femicide in international law, while navigating the tension between this potentially essentialist category and its important intersectional characteristics.[78] I consider that an identifiable female social group targeted for subordination could include gender identity and sexual orientation. As illustrated in this book, the female social group is intersectional, thus being influenced by the victim's ethnicity, migrant status, socio-economic status and other factors, which limits over-generalizations in identifying the targeted group. While it is evident that sexual violence is used against men and boys as well, these crimes are separate from femicide and, along with the complex persecution of members of the LGBTQ+ community, must be studied elsewhere.[79]

To emphasize that women and girls of all ages can be victims of femicide, I prefer the term 'female social group' or 'female group' over 'women and girls' group.' The term 'female' should be understood to cover attacks based on women and girls' gender, not only their sex. The term 'sex,' refers to biological differences between men and women; the term 'gender' relates to

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[74] *Cf.* Madeleine Rees and Christine Chinkin, 'Exposing the Gendered Myth of Post Conflict Transition: The Transformative Power of Economic and Social Rights' (2016) 48 *NYU International Law and Politics* 1211–1226 at 1218.

[75] See Ingrid Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018) 29.

[76] See for the connection between violence against women and girls and poverty, Goldblatt (n 10) 365–368.

[77] Jaya Ramji-Nogales, 'Revisiting the Category "Women"' in Harris Rimmer and Ogg (n 10) 251.

[78] See Ogg and Craker (n 72) 195.

[79] See, e.g., Brian Kritz, 'The Global Transgender Population and the International Criminal Court' (2014) 17(1) *Yale Human Rights and Development Law Journal* 1–38.

the differently constructed social roles attributed to men and women.[80] The debated scope of the terms 'sex' and 'gender,' and their possible conflation is recognized here, but not discussed in detail.[81] To show that the violence is specific to women and girls, I use the prefix 'fem,' rather than 'gender' in conceptualizing femicide. The term 'fem' must be understood to include attacks against women and girls based on their gender. No terms or concepts in this book should be understood to restrict or limit the human rights of women and girls.

I do not make a statistical point or try to explain the significance of femicide in terms of numerical necessity, I refer to select statistics to merely exemplify its scale and reality. In any case, since statistics on the prevalence of gender-based violence are rare, such an endeavor would likely underestimate the extent of violence currently committed against women and girls. With these caveats in mind, the chapter now introduces the concept of femicide in social contexts.

THE NATURE AND EXTENT OF FEMICIDE IN SOCIAL CONTEXTS

Systemic violence against female social groups manifests differently in various social contexts. This section unearths some underlying factors galvanizing widespread attacks against women and girls, which are critical in advancing the legal claims for elements of femicide—the harm at issue, its scale, the subordination of women, and state inaction. A selection of three manifestations of violence serve to illustrate the normative characteristics of femicide: (1) the femicide waves in Ciudad Juarez, Mexico; (2) the abduction and sexual enslavement of Yazidi women and girls in Sinjan, Iraq; (3) the abduction of schoolgirls in Chibok, Nigeria. Throughout this book, I refer to these examples as I develop the concept of femicide.

Sexual Exploitation, and Murder of Women and Girls in Ciudad Juarez, Mexico

The term 'femicide' is emblematic of the disappearances and brutal murders, frequently involving sexual violence, prevalent in Ciudad Juarez, Mexico.

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[80] See detailed discussion on gender, Valerie Oosterveld, 'Gender-based Crimes against Humanity' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011) 80.

[81] See Judith Butler's in depth study on the fluidity of sex/gender, and the deconstruction of these notions in Judith Butler, *Gender Trouble* (Routledge 1990) xxii and 2–34.

Since 1993, the killings of women and girls had consistently increased.[82] Many women and girls who went missing in the early 2000s were young, underprivileged, migrant or indigenous women, usually employed in the *maquila* (sewing) industry, but affluent students and government employees also fell victim.[83] In 2021, similar patterns of femicides could be observed across Mexico.[84] These killings were initially attributed to serial killers; in the bulk of these cases, the Mexican authorities failed to conduct a proper investigation; the cases remained unresolved, and perpetrators were rarely identified.[85]

In response to the Mexican authorities' inaction, both the Inter-American Commission on Human Rights (IACHR) and the CEDAW Committee investigated the disappearances and killings in Ciudad Juarez, in 2003 and 2005 respectively.[86] Besides highlighting different factors (e.g., the proximity to the US border and the presence of organized crime and drug trafficking) which contributed to the killings in the area, the reports clarified that gender played a role in the murders of women and girls.[87] Based on these reports, the *Cotton Field Case*, involving the disappearances of three young women in Mexico, also recognized the 'culture of violence and discrimination that is based on women's alleged inferiority, a situation that has resulted in impunity,' and sparked the crimes against women and girls in Ciudad Juarez.[88]

One cause of femicide identified by the literature and case law is a tension between traditional masculine norms in a patriarchal society and surging employment opportunities for women leading to their economic independence.[89] At around the same time that femicide emerged in Ciudad Juarez, the sewing industry, enabled by the North American Free Trade Agreement (NAFTA), began operating in Ciudad Juarez.[90] Since factories predominantly hired women and girls for their sewing skills, many men remained

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[82] See *Cotton Field Case* (n 12) paras 127 and 164.

[83] Lagarde y de los Rios (n 39) xviii.

[84] See for current disappearances of women and girls in Mexico, 'El Blog de Frida, '#NiUnaMás' https://fridaguerrera.blogspot.com/.

[85] William Paul Simmons and Rebecca Coplan, 'Transnational Remedies, Terrorizing Women: Feminicide in the Americas' in Fregoso and Bejarano (n 16) 199–200.

[86] Committee on the Elimination of Discrimination against Women (CEDAW), Report on Mexico under Article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, UN Doc CEDAW/C/2005/O 8/MEXICO, 27 January 2005 [hereinafter 'CEDAW Report 2005']; IACHR Report on Ciudad Juarez.

[87] *Cotton Field Case* (n 12) para. 127; See Simmons and Coplan (n 85) 199.

[88] Ibid.

[89] *Cotton Field Case* (n 12) para. 134; Angelica Cházaro et al., 'Getting Away with Murder: Guatemala's Failure to Protect Women and Rodi Alvarado's Quest for Safety' in Fregoso and Bejarano (n 16) 93.

[90] CEDAW Report 2005; López et al. (n 16) 160 and 163.

unemployed.[91] Women began to assume the new role of providers, thereby encroaching upon a traditionally male role. In a society where masculinity is associated with men's ability to provide for their families financially, this tension is said to have translated into extreme forms of violence against women (hypermasculinity) to secure and retain the power associated with men's roles as providers.[92] In the *Cotton Field Case*, the IACtHR cited the UN Special Rapporteur on Violence Against Women's report on Mexico, which explained that women's integration into the workforce 'challenge[d] the very basis of the machismo,' empowering women economically, allowing them to become independent and overcome discrimination.[93] Struggling with this development, *machista* men reacted in violent ways causing 'family abandonment, unstable relationships or alcoholism, which in turn may increase the risk of violence. Even cases of rape and murder may be understood as desperate attempts to uphold discriminatory norms that are outpaced by changing socio-economic conditions and the advance of human right.'[94] The CEDAW Committee's report on Ciudad Juarez found that the violent acts were 'not isolated, sporadic or episodic cases of violence; rather they represent[ed] a structural situation and a social and cultural phenomenon deeply rooted in customs and mind-sets.'[95] These gender dynamics thus suggest that the violence against women in Ciudad Juarez occurred simply because they are women—meeting the definition of femicide.[96]

Sexual Enslavement of Yazidi Women and Girls in Kocho, Iraq

In 2014, ISIS fighters overran and surrounded Kocho village, inhabited by the Yazidi community. The Yazidi are an ethno-religious minority group in the Sinjan district in northern Iraq. Few Yazidis managed to escape to the Sinjar Mountain, where ISIS fighters massacred around 1,300 boys and men. Approximately 7,000 women and girls were crammed into prison cells where ISIS fighters inspected their faces, registered the women and girls, assigned them numbers (to advertise them online through Telegram, an encrypted messenger), and then sent the female Yazidis to slave markets to be sold.[97] An ISIS

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91 *Cotton Field Case* (n 12) para. 121; López et al., ibid. 160 and 163.
92 CEDAW Report 2005; López et al., ibid.
93 *Cotton Field Case* (n 12) para. 134.
94 Ibid.
95 Ibid., para. 133.
96 Ibid.
97 Valeria Cetorelli and Sareta Ashraph, 'A Demographic Documentation of ISIS's Attack on the Yazidi Village of Kocho' *LSE Middle East Centre Report* (19 June 2019) 9; Murad (n 4) 136; Natia Navrouzov, 'La France doit rapatrier ses res-

pamphlet outlined the meticulous instructions on the conditions under which Yazidi women could be raped, enslaved, and sold under ISIS' law, institutionalizing and justifying the sexual slavery of Yazidi women and girls based on a misconception of *Sharia* or Islamic law.[98]

The ISIS pamphlet specifies that non-believers who are not 'people of the book' (i.e., Jewish, Christian, or Muslim believers), such as Yazidi women and girls, can be held as *sabaya* sexual slaves to ensure the continued survival of ISIS. Accordingly, a nine-year-old girl may be raped, and 'if she is not fit for intercourse, then it is enough to enjoy her without intercourse.'[99] Under this policy, thousands of Yazidi women and girls have been held as sexual slaves, sexually exploited, and traded via the ISIS 'chattel market' as they are considered mere property 'which can be disposed of.'[100] This culture of sexual abuse with impunity complexly affects Yazidi women and girls' standing in their own community, from which they risk being ostracized for being impure. As these women remain alive, their treatment is distinct from the violence committed against Yazidi men and boys

Thus far, only a few women and girls have escaped ISIS rule or were rescued by the authorities.[101] Although ISIS has been largely defeated in Iraq, over 3,000 women still remained missing in 2021.[102] Dispersed in different cities across Iraq and Afghanistan, Yazidi women and girls are either unable

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sortissants en Irak pour rendre justice aux Yézidis' *Le Monde* (21 June 2019), https://www.lemonde.fr/idees/article/2019/06/21/la-france-doit-rapatrier-ses-ressortissants-en-irak-pour-rendre-justice-aux-yezidis_5479552_3232.html?fbclid=IwAR0f0yTGYfr43wEoTy4X8xKL4F094VEV9f9ZKXM-B0uZgj9ypfvZArF_tHc; Dunya Mikhail, *The Beekeeper, Rescuing the Stolen Women of Iraq* (New Directions Paperbook 2018) 12. See also Sareta Ashraph, 'Never Again, Again: The Yazidi Genocide' *IntLawGrrls* (15 August 2017) https://ilg2.org/2017/08/15/never-again-again-the-yazidi-genocide/.

[98] Nikita Malik, 'Surviving Islamic State: The Plight of the Yazidi Community' *Forbes* (18 September 2018) www.forbes.com/sites/nikitamalik/2018/09/18/surviving-islamic-state-the-plight-of-the-yazidi-community/#4f15a452770d.

[99] ISIS' Fatwa Department published a pamphlet in 2013 outlining the conditions for sexual slavery, Question 13. Mah-Rukh Ali, 'ISIS and Propaganda: How ISIS Exploits Women' *Reuters Institute Fellowship Paper* (University of Oxford 2015) 1–25.

[100] Question 6: Is it permissible to sell a female captive? Ali, 'ISIS and Propaganda: How ISIS Exploits Women', 1–25. See also Mikhail (n 97) 18.

[101] Richard Hall, 'Yazidi Leaders call for help finding Thousands of Missing Women and Children kidnapped by Isis' *The Independent* (28 February 2019) www.independent.co.uk/news/world/middle-east/isis-syria-iraq-women-children-missing-yazidi-a8800996.html.

[102] Kate Denereaz, 'Still Going Through Hell: The Search for Yazidi Women Seven Years On' *The Guardian* (3 August 2021) https://www.theguardian.com/global-development/2021/aug/03/still-going-through-hell-the-search-for-yazidi-women-seven-years-on.

to escape, cannot contact their relatives, or feel compelled to remain with their children fathered by ISIS fighters. Iraqi armed forces have made little to no effort to rescue the captured Yazidi.[103] Freed Yazidi have been mostly liberated by smugglers, often Yazidi businessmen, who manage to buy the women and girls back or liberate them in risky rescue operations.[104] The Iraqi government's indifference to the mass sexual enslavement of thousands of women and girls exemplifies and is a key component of femicide.[105]

Abduction and Enslavement of Women and Girls by Boko Haram in Nigeria

The terrorist organization Boko Haram has tormented Nigeria since 2009. The media has drawn particular attention to their attacks against and abduction of schoolgirls. Boko Haram considers educating women a sin; women and girls' existence is solely recognized in terms of reproductive capacities.[106] Rural Nigeria, the area where Boko Haram largely operates, is an inherently unequal and poverty-stricken society where families marry off girls between the ages of 14 and 16 in exchange for a dowry, which helps alleviate dire socio-economic circumstances. Girls are sometimes sold or 'donated' to Boko Haram for 10–20 USD.[107] At the same time, some women have gained a dominant presence in Nigeria's political landscape.[108] Marginalized men, excluded from economic progress, may have turned to the terrorist organization to assert social and political power through sexual violence in a climate of political and economic insecurity.[109]

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[103] Richard Hall, 'Yazidi Leaders call for Help finding Thousands of Missing Women and Children kidnapped by Isis' *The Independent* (28 February 2019), https://www.independent.co.uk/news/world/middle-east/isis-syria-iraq-women-children-missing-yazidi-a8800996.html.

[104] Mikhail (n 97) 15–16.

[105] Yet, there are promising domestic attempts to hold perpetrators individually responsible in Germany and the US, most notably a conviction by a German court for crimes against humanity in respect of the death of a Yazidi girl left to die from heat. Annette Ramelsberger and Susi Wimmer, 'Es wäre Jennifer W. möglich und zumutbar gewesen, das Kind zu befreien' *Süddeutsche Zeitung* (25 October 2021), https://www.sueddeutsche.de/politik/jennifer-w-urteil-zehn-jahre-haft-1.5448528. Yazda, 'Yazidi Women Seek Justice in U.S. Court for Crimes Committed by ISIL' (29 April 2021), https://www.yazda.org/yazidi-women-seek-justice-in-us-court-for-crimes-committed-by-isil.

[106] Temitope Oriola, '"Unwilling Cocoons:" Boko Haram's War Against Women' (2017) 40(2) *Studies in Conflict & Terrorism* 99–121 at 103.

[107] Ibid., 105.

[108] Ibid.

[109] Ibid., 105 and 112.

Amidst this socio-political instability, Boko Haram kidnapped 300 girls from a secondary school in Chibok, Nigeria in 2014. A study suggests that women and girls were abducted (1) to 'serve as cocoons for babies' to ensure the biological survival of the group, (2) to work as domestic servants, collecting firewood and water, as well as cooking and washing for the soldiers, or (3) to act as killing machines.[110] Boko Haram appears to have singled out women and girls according to reproductive capacity and perceived caretaking capabilities.[111] Accordingly, unmarried girls and women of reproductive age often marry fighters, procreate, and serve as 'bush wives.'[112] Boko Haram perceived married women as 'damaged goods' who either serve as caretakers in the camps or as suicide bombers together with the youngest girls. Being raped and forcibly married—and having to witness their brothers, fathers, and husbands brutally killed—women and girls undergo severe physical and mental pain.[113] The severity of such physical and mental pain is a crucial element of the femicide concept.

Boko Haram continued to attack villages, capturing another 110 girls in 2018. Many of these attacks are characterized by the national authorities' unwillingness or inability to help rescue the girls or stop the attacks despite warnings of imminent attacks from the local population. Chibok villagers had informed the local police that Boko Haram attacks were imminent, in response to which local police officers fled the scene. Moreover, Nigerian authorities initially rejected international assistance to locate the missing women and girls.[114] Eventually, the Nigerian government accepted foreign help and negotiated the release of 100 girls over the years.[115] Once femicide is recognized as an issue of international concern impunity can be combatted.

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[110] Ibid., 107. Boko Haram is also thought to deliberately attack girls given the high media attention around the world sparked by, and the leverage attached to holding female hostages. In recent years, many of the freed or escaped schoolgirls pursue the higher education which Boko Haram tried to deny them. Craig Allen et al., (prods), 'Kidnapped as Schoolgirls by Boko Haram: Here They are Now' *New York Times* (11 April 2018) www.nytimes.com/interactive/2018/04/11/world/africa/nigeria-boko-haram-girls.html.

[111] Adam Nossiter, 'In Town of Missing Girls, Sorrow, but little Progress' *New York Times* (12 March 2014) www.nytimes.com/2014/05/12/world/africa/in-town-of-missing-girls-sorrow-but-little-progress.html?module=inline; Oriola (n 106) 108–109.

[112] Nossiter (n 111).

[113] Allen et al. (n 110).

[114] Doug Bandow, 'Who Can Save "Our Girls" and Nigeria? Only the Nigerian People, Not Washington' *Forbes* (12 May 2014), www.forbes.com/sites/dougbandow/2014/05/12/who-can-save-our-girls-and-nigeria-only-the-nigerian-people-not-washington/#1659ba7e522d.

[115] Dionne Searcey and Emmanuel Akinwotu, 'With Dozens of Schoolgirls Missing in Nigeria, Angry Parents Demand Answers' *New York Times* (22 March 2018), www

APPROACHES TO FEMICIDE

This section traces the origins of the term femicide as the targeted killing of women and its many ambiguous meanings. As revealed in the examples above, sexual violence, rape and kidnapping are notoriously the indicators of the social realities of femicide. Femicide should not be equated with a female homicide, an intrinsically individualistic crime, as it is more like a female genocide (with the social subordination of the group being its aim), embedded in structural inequality. A focus on killings tends to reinforce the male experience of human rights violations exclusively and are only one means of achieving the subordination of the social group in question. Moreover, the ways in which violence is inflicted on women and girls (in slow-death scenarios) may not be covered under the right to life, so they should be captured under other human rights violations. I propose a concept of femicide to capture these particular forms of violence against the female social group.

Political Science and International Policy

The term 'femicide' emerged in political science discourse on terrorizing women in Latin America. Russell, who popularized the modern concept of femicide, initially defined it as the 'misogynist killing of women by men'[116] and later as the 'the killing of females by males because they are female.'[117] Russell requires a sexist act such as rape to accompany the killing that is 'motivated by a sense of entitlement to or superiority over women, by pleasure or sadistic desires toward them, or by an assumption of ownership of women.'[118] Latin American feminist scholars have translated the term femicide into Spanish as

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.nytimes.com/2018/02/22/world/africa/schoolgirls-nigeria-boko-haram.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer; Associated Press in Washington, 'US sending experts to aid Nigeria in search for kidnapped girls' *The Guardian* (6 May 2014), www.theguardian.com/world/2014/may/06/us-sending-experts-nigeria-kidnapped-schoolgirls.

[116] Diana Russell, 'Femicidal Lynching in the United States' in Jill Radford and Diana Russell (eds), *Femicide, The Politics of Women Killing* (Twayne Publishers 1993) 53 [hereinafter Russell, 'Femicidal Lynching']. See on Russell's work on femicide, Diana Russell, 'My Years Campaigning for the Term "Femicide"' (2021) 6(5) *Dignity: A Journal of Analysis of Exploitation and Violence* 1–5.

[117] Diana Russell, 'Defining Femicide: Speech at UN Symposium on Feminicide' (26 November 2012), https://www.femicideincanada.ca/sites/default/files/2017-12/RUSSELL%20%282012%29%20DEFINING%20FEMICIDE.pdf.

[118] Ibid.; Russell, 'Femicidal Lynching (n 116) 53; See also UNGA, 'Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences' (16 May 2012) UN Doc A/HRC/20/16/Add.

femicidio or *feminicidio*. They tend to prefer the term feminicide, for several reasons. Mexican Congresswoman Marcela Lagarde worries that 'femicide' as the corollary to 'homicide' conveys the message that femicide simply entails the killings of women.[119] Lagarde conceives of femicide as a systemic problem and includes an element of impunity and the State's failure to investigate and punish acts of femicide in her definition.[120] According to Lagarde, femicide is 'the culmination of many forms of gender violence against women that represent an attack on their human rights and that lead them to various forms of violent death.'[121] Monárrez similarly considers structural inequality as a driving factor in femicide.[122] By using the term feminicidio, Fregoso and Bejarano highlight their contribution to the investigation of violence against women as feminist scholars from the Global South.[123] The present work uses the English term femicide while building on approaches to femicide primarily put forward by Latin American scholars. I consider the distinction between 'femicide' and feminicide' to be merely descriptive, as both terms essentially refer to the same human rights violation.

A plethora of approaches have been taken to define femicide at the international plane. For example, in a policy paper, the World Health Organization (WHO) noted that, 'while our understanding of femicide is limited, we know that a large proportion of femicides are women in violent relationships.'[124] The paper continues to define femicide as the 'intentional murder of women because they are women, but broader definitions include any killings of women or girls.'[125] The WHO definition seems to equate femicide with murder resulting from domestic violence, referring to the prevalence of 'intimate partner femicide,' but also mentions 'dowry-related femicide,' and 'honor femicide,' denoting the Ciudad Juarez murders as 'non-intimate femicide.'[126]

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[119] Marcela Lagarde, 'Antropología. Feminismo y Política: Violencia Feminicidio y Derechos Humanos de las Mujeres' in Margaret Bullen and Carmen Diez Mintegu (eds), *Retos Teóricos y Nuevas Practices* (Ankulegi Antropología Elkartea 2012) 216; Messuti (n 38) 74.

[120] Marcela Lagarde y de los Rios, Expert Opinion in *Cotton Field Case* (n 12) para. 10.

[121] Lagarde y de los Rios (n 39) xxi.

[122] Julia Monárrez, 'La Cultura del Feminicidio en Ciudad Juarez' (1993–1999) 12(23) *Frontera del Norte* 1–12.

[123] Rosa-Linda Fregoso and Cynthia Bejarano, 'Introduction: A Cartography of Femicide in the Americas' in Fregoso and Bejarano (n 16) 1–44.

[124] World Health Organization (WHO) and Pan American Health Organization, 'Understanding and Addressing Violence against Women: Feminicide', WHO/RHR/12.38 (2012), 1, https://apps.who.int/iris/handle/10665/77421.

[125] Ibid.

[126] Ibid., 3.

UN Offices and the UN General Assembly (UNGA) have adopted many, at times divergent, definitions of femicide.[127] When asking States to collect and provide data in the context of her 'femicide watch' initiative, the UN Special Rapporteur on Violence Against Women described femicide as 'gender-related killings of women.'[128] In 2021, the European Institute for Gender Equality seemingly equated femicide to domestic violence, centering on an intimate relationship, which may exclude acts of femicide committed by strangers.[129] One of the most comprehensive approaches to femicide was adopted by the UN Regional Office for Central America and UN Women in its *Latin American Model Protocol for the Investigation of Gender-related Killings of Women (Femicide/Feminicide)* (Latin American Model Protocol), which defines femicide broadly as:

> the murder of women because they are women, whether it is committed within the family, a domestic partnership, or any other interpersonal relationship, or by anyone in the community, or whether it is perpetrated or tolerated by the state or state agents.[130]

The Latin American Model Protocol lists different types of femicide, such as feticide, infanticide, dowry-related killings, sexual killings, honor killings, killings of women suspected of being witches, domestic violence, and homicide-suicides, among others.[131] In May 2019, the Organization of American States (OAS) launched a model law on femicide/feminicide to guide States in drafting and amending criminal legislation on femicide. The model law is laudable in listing reasons behind femicide—including honor offences, political activity, organized crimes, and conflict-related sexual violence—and ensures adequate investigation, prosecution, and penalties. Regrettably, since the model law does not consider gender as grounds for attack, and requires perpetrators to be men and boys, its impact is limited.[132]

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[127] See e.g., UNGA, 'In-depth Study of all Forms of Violence against Women' (6 July 2006) UN Doc A61/122/Add.1, 14 [hereinafter UNGA, 'In-depth Study'].

[128] OHCHR, Taking Stock of the Femicide Watch Initiative (12 July 2021), https://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/CFI-taking-stock-femicide.aspx.

[129] European Institute for Gender Equality, 'Measuring Femicide in the EU and Internationally: An Assessment' (2021), 30 https://eige.europa.eu/publications/measuring-femicide-eu-and-internationally-assessment.

[130] UN Entity for Gender Equality and the Empowerment of Women, Latin American Model Protocol for the Investigation of Gender-related Killings of Women (Femicide/Feminicide) (2004) [hereinafter the Latin American Model Protocol], 13.

[131] See definitions in ibid., 33; WHO (n 124) 1; UNGA, 'In-depth Study' (n 127) 84.

[132] OAS, Inter-American Model Law on the Prevention, Punishment and Eradication of the Gender-Related Killing of Women and Girls (Femicide/Feminicide), III. Series: OEA/Ser.L/ II.7.10 MESECVI/CEVI/doc.240/18. IV. Series. OEA/Ser.L/II.6.21, 2018.

The Council of Europe (CoE) condemned violence in Mexico as femicide but primarily with respect to Latin America, notably after two Dutch women were killed in Ciudad Juarez.[133] However, recent spates of violence against women in Europe have made femicide a European matter. In 2015, a motion was brought in the European Parliament, calling for the adoption of a definition in the European legal context, but so far no femicide definition has been adopted.[134] Since 2018, the European Union (EU), in collaboration with the UN, has been attempting to end femicide in Latin America through the spotlight initiative.[135] The CoE and the EU have yet to recognize femicide adequately in Europe.

Domestic Criminal Law

Latin American States have been especially progressive in designing specific criminal legislation on femicide/feminicide. Since these laws protect women from femicide, as opposed to domestic violence, they are highlighted here as attempts to address femicide at the domestic level. Several States criminalize femicide (Guatemala, Chile, Costa Rica, Nicaragua, and Uruguay) or feminicide (El Salvador, Mexico, Peru, and Brazil).[136] And yet, there is con-

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[133] Council of Europe, Parliamentary Assembly, Disappearance and Murder of a great number of Women and Girls in Mexico, Resolution 1454 (21 June 2005) http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17351&lang=en; Ana Salado Osuna, 'Feminicidio: Una Perspectiva Europea' in Mariño et al. (eds), *Feminicidio, El Fin de la Impunidad* (Tirant lo Blanche 2012) 148.

[134] Aldo Patriciello, 'Motion for a Resolution of Femicide' (15 October 2015), www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2015-1203&language=EN.

[135] Spotlight Initiative Press, 'European Union and United Nations join Forces to end Femicide in Latin America under the Spotlight Initiative' (27 October 2017), http://spotlightinitiative.org/press/european-union-and-united-nations-join-forces-end-femicide-latin-america-under-spotlight. See also Karen Zraick, 'Most Dangerous Place for Women Is the Home, U.N. Report Finds' *New York Times* (27 September 2018), www.nytimes.com/2018/11/27/world/female-homicide-gender-violence.html.

[136] I focus on Latin American legislations because they are among the world's few and most progressive in addressing feminicide/femicide. Among these States, Guatemala, El Salvador, Nicaragua, and Costa Rica include femicide as a specific crime in a law dealing with violence against women. Guatemala is the only State where the law itself is on femicide. Mexico and Peru have added to existing criminal legislation; some countries have included femicide either in parricide (Peru and Chile) or as an independent crime in the existing criminal code (Mexico). Brazil included feminicide as a criminal offence in 2015. In 2017, Uruguay followed suit with femicide as a criminal offense. The Inter-American Commission on Human Rights (IACHR) welcomed legislation codifying the crime of femicide in Uruguay. IACHR, 'IACHR Welcomes Passage of Legislation Codifying the Crime of Femicide in Uruguay' *IACHR Press*

siderable divergence as to the scope, content, and implications of femicide.[137] El Salvador, Nicaragua, and Costa Rica include femicide as a specific crime in a general law on violence against women, whereas Peru and Chile read the crime of femicide/feminicide as a female proxy to homicide into their criminal code's homicide provision.[138] Guatemala has spearheaded femicide legislation by adopting a specific law, exclusively dealing with femicide, titled *Law against Femicide and other Forms of Violence against Women*. This law is one of the most elaborate pieces of legislation, defining femicide as the 'violent death of a woman, caused by a context of unequal power relations between women and men, through which a man exercises power over a women.'[139] The Commentary to the Guatemalan femicide law explains that violence perpetrated at home or in public can constitute femicide: it includes economic, psychological, and physical violence.[140] The ample differences between domestic approaches to femicide are apparent when comparing the Guatemalan law with, e.g., the Peruvian criminal code, which only punishes 'he who intentionally kills his ascendant, descendant, natural or adoptive, or she who is or has been his spouse, his partner, or with whom he is or has maintained a similar relationship' for the crime of femicide.[141] These different codifications have led to confusion as to the scope of femicide.

A key element of the crime of femicide, as envisioned by most Latin American domestic laws, is that the criminal conduct requires the murder of a woman.[142] Other than that, discrepancies exist regarding the perpetra-

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Release (6 October 2017), http://www.oas.org/en/iachr/media_center/PReleases/2017/153.as. For a summary of some domestic laws on femicide and feminicide, see Lianet Goyas Cespedes et al., 'Violencia Contra la Mujer y Regulación Jurídica del Femicidio en Ecuador' (2018) 12(23) *Revista de Investigación en Derecho, Criminología y Consultoría Jurídica* 129–150; Latin American Model Protocol (n 130) 143–144.

137 Patsilí Toledo, 'Criminalising Femicide in Latin American Countries – Legal Power working for Women?' in Adrian Howe and Daniela Alaattinoğlu, *Contesting Femicide, Feminism and the Power of Law Revisited* (Routledge 2019) 42.

138 Law No 29819 amending Article 107 of Peru's Criminal Code (2011), http://blog.pucp.edu.pe/blog/conciliacion/2011/12/29/ley-29819-que-crea-el-tipo-penal-de-feminicidio/; Law No 20480 amending Article 11 of Chile's Criminal Code (2010), http://perso.unifr.ch/derechopenal/assets/files/legislacion/l_20181108_05.pdf.

139 Art. 3(e) Guatemalan Law against Femicide and other Forms of Violence against Women, No 22-2800, www.oas.org/dil/esp/Ley_contra_el_Femicidio_y_otras_Formas_de_Violencia_Contra_la_Mujer_Guatemala.pdf [unofficial translation by the author].

140 Hilda Morales Trujillo and Grupo Guatemalteco de Mujeres (n 23).

141 Law No 29819 amending Article 107 of Peru's Criminal Code [unofficial translation by the author]; see also Law No 20480 amending Article 11 of Chile's Criminal Code.

142 All of the examined legislations refer to the act of killing ('dar muerte,' 'causar la muerte,' or 'privar de la vida').

tors, whether the violence is gender-based, and if an intimate relationship is required.[143] These laws either explicitly define perpetrators as exclusively male, or implicitly do so by requiring a relationship between the perpetrator and a woman.[144] Some laws (Chile, Peru, and Costa Rica) require a relation between victims and perpetrators, e.g., an intimate partnership and/or cohabitation. Killings by unrelated strangers are excluded in these legislations, as femicide is restricted to violence in the domestic sphere.[145] The Mexican legislation simply suggests that intimate relations prove that the crime is gender-based, while El Salvador and Nicaragua require no nexus to the private sphere.[146]

Some legislations, like the Mexican and Guatemalan laws, recognize a 'gender-based' element—i.e., the violence must be committed against women because they are women. Gender-based murders either require an intimate relationship—such as when a perpetrator kills a woman because he was frustrated at her unwillingness to enter into an intimate relationship with him—or are recognized by the way the victim's body is found after death—e.g., types of bodily injuries, signs of previous sexual violence, capitation, and/or necrophilia.[147] Similarly, El Salvador requires that the killings of women must be due to 'hatred and contempt' to be considered femicide.[148] As previously mentioned, Peru and Chile do not consider femicide a gender-based crime, equating femicide with parricide.[149]

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[143] See Cespedes et al. (n 136) 129–150; see also UNETE and Ana Isabel Garita Vílchez, 'La regulación del delito de Femicidio/Feminicidio en América Latina y el Caribe', 2011, 17 and 48 https://periodicooficial.jalisco.gob.mx/sites/periodicooficial.jalisco.gob.mx/files/la_regulacion_del_delito_de_femicidio_feminicidio_en_america_latina_y_el_caribe-_ana_isabel_garita_vilchez.pdf.

[144] As many Latin American States do not recognize homosexual relationships, the reference to women's partners' must thus mean men and boys. Art. 9 Nicaraguan femicide law (perpetrator is male). In Peru, Chile, Costa Rica and El Salvador, the perpetrator is not mentioned, because of the required relationship with the woman, but it can be inferred that he is a man. In Guatemala, the perpetrator is presumably male. Only Mexican and Guatemalan legislation remain unclear about whether the perpetrator is a man. Ibid.

[145] Cohabitation or an intimate relationship is required under Chilean, Peruvian and Costa Rican legislation. This requirement excludes cases of killings by unrelated strangers for no apparent reason. Ibid.

[146] Ibid.

[147] Art. 45(a) Guatemalan Femicide Law; Art. 325 Mexican Criminal Code; similarly, Art. 8 Nicaraguan Law on Violence against Women.

[148] Art. 45 El Salvador Femicide Law.

[149] Parricide refers to the killing of one's parents or other family members. Chile and Peru both criminalize feminicide as a form of parricide. Art. 107 of Peru's Criminal Code, Law 29819; Law No 20.480 amending Article 11 of Chile's Criminal Code.

These approaches to femicide, limited to the domestic level, do not clarify the scope of femicide as a human rights violation. Considerable uncertainty remains over what elements femicide comprises and how it is framed. Questions remain about whether femicide involves a woman's murder, and whether the existence of an unequal societal context is required. States may be unable to identify and respond to acts of femicide or to gather and compare statistical data.[150] Of course, murders of women and girls can be acts of femicide and should be primarily defined in line with the Guatemalan approach, which mirrors to some extent the femicide concept I propose. An act of femicide as a domestic crime is helpful for data collection on femicide, however, it does not yet grasp the systemic nature of femicide in human rights law.

CONCEPTUAL DIFFERENCES TO SIMILAR HUMAN RIGHTS VIOLATIONS

Domestic Violence

The term 'domestic violence' as used by human rights bodies describes violence committed within the family. As the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) specifically deals with domestic violence, I use its definition of domestic violence as:[151] '[A]ll acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.'[152]

The proposed femicide concept may include acts of domestic violence. Femicide has been seen as a Latin American and non-western problem. However, the social reality of structural, serious harm to women and girls also exists in Europe, often in the form of domestic violence. Of course, domestic violence as part of femicide must be placed in the contexts of widespread human rights violations. Some scholarship has already established a link between femicide and domestic violence in Europe. Furthermore, the ECtHR has also mentioned the term 'femicide' in a domestic violence case.[153] Not all

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[150] Toledo (n 137) 46. See Cespedes et al. (n 136) 129–150.

[151] Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (adopted 7 April 2011, entered into force 1 August 2014).

[152] Art. 3 Istanbul Convention; see also Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2011) 111–112.

[153] See e.g., Daniela Bandelli, *Femicide, Gender and Violence: Discourses and Counterdiscourses in Italy* (Palgrave Macmillan 2017); European Court of Human Rights (ECtHR), *Talpis v. Italy*, App No 41237/14 (2 March 2017).

instances of domestic violence would fall within the ambit of the proposed femicide concept. I maintain that a certain level of severity threshold (either torture and/or killing) is what makes acts of domestic violence femicide. Femicide is not limited to killings resulting from domestic violence, as this would exclude other severe acts of domestic violence. A focus on killings alone reemphasizes a human rights violation often targeting men and boys.

In contrast to domestic violence, which can affect men and boys as well,[154] femicide targets women and girls exclusively. Femicide does not require any intimate relationship and may occur in the public arena, whereas domestic violence is typically associated with the intimate sphere where the victim is targeted by a family member.[155] Femicide should cover severe violence in domestic settings as well as violence which occurs outside the home, including acts committed by strangers.

Enforced Disappearance

Enforced disappearance is a human rights violation that typically affects men and boys.[156] Article 2 of the Convention on Enforced Disappearance defines 'enforced disappearance' as:

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

The set of human rights violations in enforced disappearance differs from femicide insofar femicide does not need to include deprivation of liberty, and entails other, gender-based human rights violations.[157] Furthermore, acts of enforced disappearance are committed in much closer cooperation with the State, that is, by 'agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State.' Acts of femicide are typically committed by non-state actors, characterized by state inaction—yet, the State may have contributed to the risk for women and girls of being abducted. Although some similarities to enforced disappearances exist—e.g.,

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[154] Sjöholm (n 45) 398.
[155] See Meyersfeld (n 152) 122–124.
[156] Lisa Ott, *Enforced Disappearances in International Law* (Intersentia 2011) 1.
[157] See Art. 2 International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010).

its recurrent nature and a refusal to acknowledge the human rights violation—femicide includes acts beyond the abduction of women and girls.[158]

CONCEPTUALIZING FEMICIDE MATTERS

Why should femicide be dealt with on the international plane, rather than leave States to answer such violence at the domestic level? The answer is two-fold. First, due to state impunity, acts of femicide cannot simply be corrected at the domestic level. The victims of femicide (or their family members on their behalf) often face obstacles in having their claims heard or obtaining redress. The international arena may be the sole forum where women and girls can attain justice. Second, human rights law ought to respond to harm which affects women to the same extent as it does to violence that impacts men and boys. Finally, specified as an issue of international concern, femicide is more likely perceived as severe violence and will be addressed by States, as state responsibility is triggered when States fail to discharge their duties under international law.[159]

Place Femicide in the Spotlight

Femicide includes 'private' acts like forced marriage, domestic violence, FGM, and some forms of sexual slavery often occurring in the so-called 'private sphere.'[160] As domestic and cultural issues, many acts of femicide are disregarded by international law.[161] This exclusion from human rights law can be explained by reference to the conception of the liberal State, which 'constructs a social and political order which seeks to emancipate the individual from the oppression of political structures that reinforce hierarchical forms of human association,' an idea deeply rooted in human rights law.[162] Freedom is negatively conceived in the liberal State, i.e., one has 'the right to do or be without interference from other persons,' hence, States are reluctant to interfere

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[158] See *Velásquez Rodríguez v. Honduras*, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 4 (29 July 1988), paras 156–159.

[159] Rashida Manjoo, 'Closing the Normative Gap in International Law on Violence against Women: Developments, Initiatives and Possible Options' in Jackie Jones and Rashida Manjoo (eds), *The Legal Protection of Women from Violence* (Routledge 2018) 201 [hereinafter Manjoo, 'Closing the Normative Gap'].

[160] Carin Benninger-Budel, *Due Diligence and Its Application to Protect Women from Violence* (Brill 2008) 2–3.

[161] Rebecca Cook, 'State Responsibility for Violations of Women's Human Rights' in Sari Kouvo and Zoe Pearson (eds), *Gender and International Law* (Routledge 2014) 47; Romany (n 30) 105.

[162] Romany, ibid. 90.

when non-state actors commit crimes at home, a space where the State is generally absent.[163] As an atrocity that targets the female social group, however, femicide potentially affects half of humanity, and must thus be addressed.[164] Since femicide is not yet recognized as a human rights violation—resting on the premise that it is not an issue of state responsibility, States frequently fail to help female human rights victims.

Conceptualizing femicide in human rights law will help overcome this public/private dichotomy, which consigns women to the private or 'other' sphere and awards men power over the public sphere, where governments operate. The private sphere, in many cultures, refers to the domestic space: where women bear, nourish, and nurture children while performing household work; yet, the boundaries of this private sphere shift in other cultures, and may, e.g., include fieldwork outside the home.[165] Since women have the biological ability to bear children, the confinement to their homes is sometimes seen as dictated by nature in western cultures.[166] At home, women are alienated from individual citizenship, absorbed by the family unit headed by the father.[167] Encapsulated in a family unit, women were (and frequently still are) subject to male domination, which at times entails violence.[168]

Over many centuries, women's 'natural' confinement to the private sphere has been enshrined in domestic laws and policies.[169] Romany notes that a paradox exists between the social contract that excludes women from the public sphere based on nature, on the one hand, and political rights constructed based on equality on the other hand.[170] Critiqued through a feminist lens, Pateman notes that the social contract which regulates freedom, liberty, and equality is governed in the public sphere, and relegates women to the private sphere through the 'sexual contract.'[171] Indeed, until recently, husbands had, via a 'marriage contract,' the power to give or deny women permission to enter the workforce and to legally rape their wives in many countries.[172] These

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[163] Ibid., 100.

[164] See ibid., 105.

[165] Carol Pateman, *The Sexual Contract* (Stanford University Press 1988) 118; Angela Harris, 'Race and Essentialism in Feminist Legal Theory' in Kelly Weisberg (ed), *Feminist Legal Theory, Foundations* (Pennsylvania University Press 1993) 350.

[166] Pateman, ibid.

[167] Ibid.

[168] Latin American Model Protocol (n 130) 42.

[169] Ibid.

[170] Romany (n 30) 99.

[171] Ibid., 154–188. See Nadine Taub and Elizabeth M. Schneider, 'Women's Subordination and the Role of Law' in Kelly Weisberg (ed), *Feminist Legal Theory, Foundations* (Pennsylvania University Press 1993) 10–13.

[172] Pateman (n 165) 154–188. See Taub and Schneider, ibid.

boundaries demarcating the private/public divide 'cripple [] women's citizenship'[173] and have prevented international and human rights law from interfering in the private sphere, where femicide often operates.[174] This separation of spheres could be enforced by the head of the family unit, the father, through violence.[175] As Tamale claims, domestic violence has been used as a tool to enforce this colonial order in the African context.[176] However, femicide can be placed in the international spotlight through its recognition as a distinct human rights violation.

Eliminate Femicidal Violence

Conceptualizing femicide as a human rights violation is complex and its implementation depends on whether States are willing to act in the face of femicide.[177] However, the concept has the potential for States to recognize femicide, and thus ensure that they can adequately identify femicide and protect women and girls from this form of violence.[178] In this vein, former UN Special Rapporteur on Violence against Women, Rashida Manjoo remarked that '[the adoption of] clear and enforceable provisions [on violence against women] is critical in order to establish patterns and design appropriate and effective responses to eliminate violence and gender-motivated killings of women.'[179] As an international legal standard, femicide can help homogenize regional and domestic efforts to combat violence against women.[180]

Furthermore, the concept of femicide could impact litigation efforts, help social movements advocate for and create social change, and thus respond to legitimize demands for freedom from violence. For example, Simmons' study suggests that ratification of the CEDAW helped women organize and fuel

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[173] See Romany (n 30) 101.
[174] Ibid., 97.
[175] Ibid., 2; Latin American Model Protocol (n 130) 42.
[176] Tamale (n 64) 320.
[177] See Ogg and Craker (n 72) 195; Rees and Chinkin (n 74) 1220.
[178] See Guatemala Human Rights Commission/US, 'Guatemala's Feminicide Law: Progress Against Impunity?' (2009), www.ghrc-usa.org/Publications/Femicide_Law_ProgressAgainstImpunity.pdf, 1–17.
[179] Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences (Rashida Manjoo), A/HRC/20/16/Add., (16 May 2012), 10.
[180] David Richards and Jillienne Haglund, 'Exploring the Consequences of the Normative Gap in Legal Protections Addressing Violence Against Women' in Jackie Jones and Rashida Manjoo (eds), *The Legal Protection of Women from Violence* (Routledge 2018) 66.

litigation to change laws in some countries, such as Colombia and Japan.[181] As a result of ratifying CEDAW, Colombia amended its constitution to recognize women's reproductive choices and right to access family planning services,[182] while Japan amended its legislation to improve women's access to and protection in employment.[183] Similarly, Richards and Haglund associate specific domestic violence laws and those prohibiting marital rape with decreasing rates of violence in practice.[184] The existence of international legal norms and the perceived duty to implement them, especially in countries with a strong rule of law, has advanced gender equality.[185]

Conceptualizing femicide in human rights law, can lead to positive outcomes in the protection of women from violence.[186] The proposition of a specific femicide concept is critical to creating the conditions for mobilization which will encourage change in domestic legislation and action.[187] Framing femicide as a human rights violation gives human rights bodies the opportunity to address femicide and issue relevant judgments which can elicit legislative and social change; it might also be used to publicize state obligations to prevent femicide internationally.[188]

Characterize Harm in Femicide

Femicide must be enshrined in human rights law to make harm inflicted on women and girls visible and specific.[189] In French, human rights law is termed 'droit de l'homme,' 'homme' meaning 'man.'[190] Many human rights instruments are characterized by male-specific language: 'his' property,

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[181] Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009) 345.

[182] Ibid., 245–253.

[183] Ibid., 255.

[184] Richards and Haglund (n 180) 55–66.

[185] See Simmons (n 181) 254. See also Oona Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111(8) *Yale Law Journal* 1937–2042.

[186] Richards and Haglund even associate specific domestic violence laws with lower rates of HIV infections and higher human development. Richards and Haglund (n 180) 59 and 66.

[187] See also Manjoo, 'Closing the Normative Gap' (n 159) 201.

[188] See Simmons (n 181) 245–255.

[189] Messuti (n 38) 51–53.

[190] See Art. 1 of the French translation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), (adopted 4 November 1950, entered into force 3 September 1953). The French version mentions 'homme' 35 times to refer to all humans generically.

'man,' 'mankind,' and 'he.'[191] Holmes demonstrates that human rights, such as those in the UDHR (e.g., the right to property or the right to nationality), which categorically mention 'he' or 'his' to refer to human rights are 'rarely extended to women around the world.'[192] While seemingly generic and trivial, this entrenched bias in language has limited the application of human rights law to women.[193] The adoption of 'clear and enforceable provisions is critical in revealing patterns and designing appropriate and effective responses to eliminate violence and gender-motivated killings of women.'[194] Articulated in specific language, detailing each aspect of VAWG, the human rights violation of femicide becomes visible and can be applied by human rights bodies to address atrocities targeting women and girls.[195]

CONCLUDING REMARKS

Femicide is a global issue which requires immediate international attention. The abductions of schoolgirls by Boko Haram, the sexual enslavement of Yazidi women and girls, and the multitude of abductions, rape, and slaughter of women and girls in Ciudad Juarez illustrate the issue of femicide. Even if representing only snapshots of how femicide manifests across the world, these examples show that femicide is often characterized by sexual violence and that women and girls are targeted collectively on the basis of their gender.

The issue of femicide has only just begun to gain traction in international legal discourse. To date, no universal definition of violence against women, let alone femicide, exists. Some States have attempted to capture femicide in domestic criminal laws; yet, most have not foreseen that femicide is a systemic issue, going beyond the murder of a woman by her partner. Policy instruments are often unclear about femicide, and provide a myriad of definitions. This work intends to create clarity by proposing a clear international legal approach to femicide beyond a misleading focus on killings. It considers that sexual violence and other forms of gender-based violence can constitute methods of femicide to relegate the targeted female social group to a lower social position, where such violence remains unpunished by the State—while keeping the female social group alive. A human rights concept of femicide would help

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[191] The English text of the ECHR and its Protocols use male language, 'he,' eight times in listing human rights violations, Art. 5(2)(a), (c) and (e) ECHR (right to liberty and security).

[192] Holmes (n 27) 260. See also n 190.

[193] Ibid., 250–251; MacKinnon (n 25) 41–43.

[194] UNGA, 'Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences' (16 May 2012) UN Doc A/HRC/20/16/Add., 10.

[195] Ibid.

States recognize harm to women and girls as continuous and multi-faceted, thereby enabling them to take adequate preventive measures.

PART I

FEMICIDE AND INTERNATIONAL CRIMINAL LAW

This Part seeks to understand how core international crimes—i.e., war crimes, crimes against humanity, and genocide—relate to the concept of femicide. I identify relevant elements from this analysis to delineate aspects of femicide in international law and foreshadow state responsibility for femicide. Given that each element of a crime must be met for individual criminal liability to apply, this part examines each element of the relevant crime separately. Part I is neither primarily concerned with the impact of the prosecution's decision to bring or amend charges relating to gender-based crimes, nor does it describe international criminal responsibility, complicity, and command responsibility for gender-based crimes. Instead, this part draws lessons from the ways in which gender-based violence, and especially sexual violence as an ingredient of femicide, was dealt with in international criminal law.

Part I includes three steps. Its first chapter (Chapter 2) addresses femicide and armed conflict broadly. Considering historical attempts to outlaw rape in war, Chapter 2 shows that precedents exist to criminalize acts of femicide, such as rape, in international law, on which I can build to conceptualize femicide. In light of the vast research on conflict-related rape and sexual violence, Chapter 2 provides a glimpse of the legal framework on gender-based violence in times of war. This particularly informative look at how the laws of war address crimes against women and girls is the primary point of inquiry in formulating a concept of femicide in human rights law. A glance at the gendered nature of wars, including the exclusion of women from combatant forces, illuminates the context in which acts of femicide occur. At the same time, how authorities deal with rape in armed conflict (i.e., whether they prohibit such conduct) impacts soldiers' behavior in peacetime, absent an adequate transitional justice mechanism dealing with past human rights abuses.

Chapter 3 analyzes the elements of crimes against humanity to consider whether some aspects of this crime may serve to conceptualize femicide. Since women and girls make up around half of the world's 'humanity,' aspects of crimes against humanity, such as the contextual element, and its 'methods,' may be particularly promising in conceptualizing femicide. Chapter 4 then draws parallels, and highlights distinctions, between femicide and genocide. This discussion expounds on the crucial role sexual violence plays in the commission of genocide, and likewise in femicide. It explains the limits of recognition for sexual violence when it is not clearly named in statutory language. Another characteristic of genocide is its focus on entire groups, rather than a civilian population in crimes against humanity, which makes it particularly interesting for comparison with femicide. Lessons learned from the genocide framework may inspire the construction of femicide as a human rights violation.

2. Femicide and (the laws of) war

INTRODUCTION

The first attempts of the international community to deal with femicide are present in historical 'laws of war' and international humanitarian law (IHL), one of the oldest branches of international law, which is particularly biased against women and girls whom it rarely views as rights holders. Gendered conflict dynamics can be seen in the protection of the object of femicide, the female social group, which makes up a large part of the civilian population. Equally important, this chapter exposes the role of sexual violence—the most distinctive experience of gendered harm of women in armed conflict—as a typical method of femicide, merely seen as an honor offence in armed conflict. Conflict-related rape and sexual violence have also been considered in the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)'s case law, which remedied some of IHL's failures to address sexual and other gender-based violence. These approaches highlight that sexual violence has long been addressed and condemned in the law. They also show some of the struggles in reading sexual violence, which ought to be a serious human rights violation, into existing IHL concepts. Beyond IHL approaches to sexual violence, the wartime context of violence where femicide occurs, tends to translate into post-conflict peacetime rapes committed by private individuals. This relationship between peacetime and post-conflict violence sheds light on the contextual element of femicide and its systemic nature.

GENDERED CONFLICT DYNAMICS

Female Civilian Populations

The objects of attack in femicide are women and girls, often the civilian population for which IHL provides limited protection in the deeply gendered context of armed conflict. In many societies, the law requires able men (and sometimes boys) to take up arms, while the mainly female civilian population

is kept from the battlefield and is victimized by war.[1] As civilians, women and girls tend to perform roles as caretakers of younger generations and the elderly in conflict settings.[2] Even though women and girls may occasionally take up arms and may even be compelled to serve in the military, this is not a widespread phenomenon.[3] Consequently, women may be underrepresented in military leadership roles. Men decide on how war is waged and what methods are permissible.[4] Feminist scholars have argued that the military is a zone for preservation of masculinity and power, where 'women are passive spectators to the action in the center of the ring.'[5] That the military is a male institutionalized space can also illustrate how the laws on armed conflict treat women and girls.

Although IHL protects female and male combatants alike, it protects civilians to a lesser extent. While it does not openly favor men over women, IHL chiefly protects combatants' (and therefore often male) conduct. Sexual violence and rape, mostly suffered by civilian women, has remained largely unaddressed.[6] At a first glance, the limited protection awarded to women may seem legitimate. As the main actors in the arena of warfare, men are more likely to be killed or captured in their role as combatants.[7] However, examples from the war in Syria show that civilians account for most war casualties in

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1 Marco Sassoli and Antoine Bouver, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 2nd edition (ICRC 2006), Vol. I, 176.

2 Christine Chinkin, 'Gender and Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 682–683. See Kathrin Greve, *Vergewaltigung als Völkermord, Aufklärung Sexueller Gewalt gegen Frauen vor Internationalen Strafgerichten* (Nomos 2008) 192. See also Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law, a Feminist Analysis* (Juris Publishing 2000) 256–257; Kelly Askin, *War Crimes Against Women* (Kluwer Law International 1997) 254; Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 *International and Comparative Law Quarterly* 55–80 at 59.

3 Mandatory military service may only be compulsory for men. For example, it applies for Swiss men, while women may join the armed forces voluntarily. Israel is an exception, as women are regularly integrated in the armed forces. See Askin (n 2) 254; Art. 59 Federal Constitution of the Swiss Confederation of 18 April 1999 (Swiss Constitution) [unofficial English translation, https://www.fedlex.admin.ch/eli/cc/1999/404/en]. All online sources were accessed 30 October 2021.

4 Askin (n 2) 254.

5 Susan Brownmiller, *Against Our Will* (Fawcett Columbine 1975) 32.

6 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Rules* (Cambridge University Press 2009) 475.

7 Charlesworth and Chinkin (n 2) 251.

modern warfare.[8] Security Council (SC) Resolution 1820 (2008) notes that the predominantly female civilian population is specifically at risk of harm in wartime.[9]

Peacetime and Wartime Rapes

The scale of rapes and sexual violence committed in peacetime femicide situations could be compared to the civilian casualties in war.[10] But what is the relationship between peacetime and wartime rapes? Generally, the prevalence of wartime rape correlates to how prevalent rape and sexual violence are in peacetime situations.[11] Conversely, wartime rapes also seem to influence the frequency of rapes in post-war periods. Wood notes an absence of sexual violence on the part of the Tamil insurgent group Liberation Tigers of Tamil Eelam against civilians and some insurgents in El Salvador, presumably springing from a peacetime context with little domestic violence.[12] After the war in the former Yugoslavia, reports revealed a significant rise in the domestic violence rates in Croatia.[13] Where peacetime domestic violence was present, women were more likely to be raped in times of war.[14] In this sense, the rapes of Tutsi women and girls during the Rwandan genocide arose from a peacetime context

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[8] Watson Institute of International Affairs, Brown University, 'Costs of War' (2019), https://watson.brown.edu/costsofwar/costs/human/civilians.

[9] UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820. The UN SC has issued a number of resolutions on 'women, peace, and security,' some of which concern the commission of conflict related rapes. See, e.g., UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325; UNSC 1960 (16 December 2010) UN Doc S/RES/1960, and most recently, UNSC Resolution 2467 (23 April 2019) UN Doc S/RES/2467. Askin (n 2) 251; Laignee Barron, 'I Am Doing This for Every Place Where Rape Is a Weapon of War: Meet the Woman Documenting Sexual Violence Against Myanmar's Rohingya' *TIME* (27 March 2019), https://time.com/5559388/razia-sultana-rohingya-myanmar-sexual-violence-documentation/.

[10] See Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2007) 144.

[11] Elizabeth Wood, 'Armed Groups and Sexual Violence: When Is Wartime Rape Rare?' (2009) 37(1) *Politics & Society* 131–162 at 143; Maria Olujic, 'Embodiment of Terror: Gendered Violence in Peacetime and Wartime in Croatia and Bosnia-Herzegovina' (1998) 12(1) *Medical Anthropology Quarterly* 31–50 at 32–33.

[12] Wood (n 11) 132 and 143.

[13] See Samantha Bradley, 'Domestic and Family Violence in Post-Conflict Communities: International Human Rights Law and the State's Obligation to Protect Women and Children' (2018) 20(2) *Health and Human Rights Journal* 123–136 at 123–126.

[14] Rashida Manjoo, 'Widespread and Pervasive Violation of our Human Rights' (2016) 72 *Socialist Lawyer* 36–38 at 38.

plagued by domestic violence and sexual assault.[15] Consequently, women's social status in peacetime affects how they are targeted in wartime and vice versa. Being mindful of this link is valuable for a general understanding of the social context in which femicide emerges and which facilitates its widespread occurrence in turn.

Femicide is often characterized by widespread sexual violence. In contrast to (instant) killings, the paradigmatic method perpetrated against men and boys, sexual violence is the classic way by which femicide is committed. As such, sexual violence must not be overshadowed by instant killings.[16] Not all sexual violence committed everyday would become femicide. Only sexual violence that is exacerbated by war or another catastrophe would make rape and other violence femicide. Brownmiller, Copelon and MacKinnon agree that conflict-related rapes are an intensified form of peacetime violence against women.[17] Brownmiller suggests that riots and wartime constitute an 'excuse' for some men to engage in rapes and sexual violence, a statement which may be excessively broad considering the many causes for war.[18] MacKinnon points out that '[the Bosnian war] is to everyday rape what the Holocaust was to everyday anti-Semitism,' which points towards the similarities between femicide and genocide.[19] She further recognizes the intersectional composition of the targeted social group as she mixes ethnicity into the equation, arguing that it intersects with gender since women in armed conflict are raped as women as well as members of an ethnic population.[20] Copelon insists that rape in armed conflict is akin to rape committed in everyday contexts of domestic violence, and that attempts to emphasize conflict-related rapes bear the risk of trivializing the pervasive rapes committed in peacetime.[21] She maintains that '[r]ape and genocide are separate atrocities. […] [R]ape is sexualized violence that seeks to destroy a woman based on her identity as a woman.'[22] In line

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[15] Jennie Burnet, 'Rape as a Weapon of Genocide: Gender, Patriarchy, and Sexual Violence in the Rwandan Genocide' (2015) 13 *Anthropology Faculty Publications* 1–31.

[16] See Margareth Etienne, 'Addressing Gender-based Violence in an International Context' (1995) 18 *Harvard Women's Law Journal* 139–170 at 142.

[17] MacKinnon (n 10) 144.

[18] Brownmiller (n 5) 114 and 256.

[19] MacKinnon (n 10) 144.

[20] Ibid., 144–146.

[21] Rhonda Copelon, 'Gendered War Crimes: Reconceptualizing Rape in Time of War' in Julie Peters and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (Routledge 1995) 197 and 199–200.

[22] Rhonda Copelon, 'Surfacing Gender: Re-Engraving Crimes Against Women in International Humanitarian Law' (1994) 5(2) *Hastings Women's Law Journal* 243–266 at 246.

with Copelon, I consider that the aim of femicide is distinct from genocide (typically, the physical extinction of a group). Femicide aims at socially subjugating a group, femicide should exist as a parallel human rights violation, alongside the term genocide.

Furthermore, what States do or do not do in war may, at least, contribute to, if not engage, international state responsibility for femicide. Wood suggests that when military leaders tell their subordinates to refrain from raping and they enforce these orders, rapes are less likely to take place.[23] Conversely, should national authorities order their troops to rape, they likely contribute to the risk for women and girls to be subjected to violence.[24] Ample attention has been devoted to rape inflicted on women's bodies under orders.[25] SC Resolution 1820 (2008) is vocal on the use of sexual violence against women as a weapon of war, noting that 'as a tactic of war in order to deliberately target civilians or as part of a widespread or systematic attack against civilian populations, [sexual violence] can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security.'[26] Some state authorities have ensured that their troops refrain from violating female civilians, condemning and even prohibiting rape.[27] Of direct relevance to the post-conflict femicides in Guatemala (see Chapter 7), sexual violence was used to oppose insurgent groups in the Guatemalan civil war which has influenced the frequency of sexual violence today. This structural component of femicide, which makes it a widespread human rights violation, committed against a group, foreshadows that ICL can be useful in conceptualizing femicide.

WAR-RELATED APPROACHES TO SEXUAL VIOLENCE

An Ancient Crime

The idea that sexual violence should be addressed in the strongest terms, as I propose it should in a femicide concept, is nothing new. Some of the earliest laws of war fiercely outlawed sexual violence and rape. These precedents can

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[23] Wood (n 11) 140.

[24] Ibid.

[25] On rape as a strategy of war in the former Yugoslavia, see UNSC, Final Report of the Commission of Experts Established Pursuant to UNSC Res 780 (27 May 1994) UN Doc S/1994/674, para. 250.

[26] UNSC Res 1820 (29 June 2008) UN Doc S/RES/1820, para. 1.

[27] See Alexander Gillespie, *A History of the Laws of War: The Customs of War with Regards to Civilians in Times of Conflict* (Hart Publishing 2011), Vol. II, 121.

be regarded as the first step in the quest to conceptualize femicide. Grotius (1583–1645), also known as the father of international law, condemned rape as brutal and unnecessary, calling for its criminalization in times of war and peace.[28] Grotius maintained that sexual assault was not only inconsistent with the laws of war but should be prohibited as a part of the laws of nations. He concluded that '[rape] deserves to be punished in every Country [sic].'[29] Gentili (1552–1608) also called for the prohibition of rape during armed conflict. Gentili argued that even women who took an active part in warfare, should not be raped.[30] Taking a more patriarchal approach, Emer de Vattel (1714–1767) contended that women should only be spared from sexual violence as long as they kept to the duties of their sex and did not take up arms.[31] Yet, in reference to the abduction and rapes of the Sabine women, he stated that 'no woman in particular can be constrained in her choice, nor become, by right, the wife of a man who carries her off by force.'[32] These early jurists concluded that, under most circumstances, rape was indeed prohibited under the laws of war.

The most notable precedent for the prohibition of rape in wartime was set during the US Civil War with the 1863 Lieber Code, which codified customary international law (CIL) related to warfare. Especially progressive concerning the protection of the civilian population, Article 44 of the Lieber Code fiercely prohibited rape, making it punishable by death.[33] The Lieber Code further required 'punishment for crimes punishable by all penal codes,' such as rape committed on hostile territory.[34] Although the Lieber Code was a national code of warfare, it laid essential foundations for the laws of war in IHL and constituted a gain for the recognition of rape as a prohibited act.[35] However, entering

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[28] Hugo Grotius (au), Richard Tuck (ed), *The Rights of War and Peace Book III* (Liberty Fund 2005); Kelly Askin, 'Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward' in Anne-Marie De Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2012) 24.

[29] Grotius (n 28) 1301.

[30] Askin, 'Treatment of Sexual Violence' (n 28) 22.

[31] Emer De Vattel (au), Béla Kapossy and Richard Whitmore (eds), 'The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury' (Liberty Fund 2008) 145.

[32] Ibid., 122 and 145.

[33] Art. 44 Lieber Code, promulgated as General Orders No 110 by President Lincoln, 24 April 1863, http://avalon.law.yale.edu/19th_century/lieber.as.

[34] Arts 44 and 47 Lieber Code; Rhonda Copelon, 'Toward Accountability for Violence Against Women in War' in Elizabeth D. Heineman (ed), S*exual Violence in Conflict Zones, From the Ancient World to the Era of Human Rights* (University of Pennsylvania Press 2011) 235.

[35] Askin (n 28) 26.

into force one year after the adoption of the Lieber Code, the 1864 Geneva Convention, and the three subsequent 1949 Geneva Conventions, codifying contemporary IHL, were blind to the severity of rape.

An Offence against Honor

IHL presupposes that woman are 'weak' and 'powerless' and thus considers them insofar their 'honor' is violated.[36] Only seen as an attack against men's honor and property, violence against women was an historically accepted by-product of war.[37] Armed forces who had won a war had earned the privilege to rape women as a sort of trophy for their service.[38] If men failed to protect 'their' women from rapes and sexual violence, men's sense of masculinity and their (and society's) honor was violated, an issue still seemingly prevalent in many honor crimes today.[39]

The historical legitimacy of rape during war explains why the laws of war provide little legal protection for women and girls in conflict-settings.[40] IHL, also known as *ius in bello* (law in war), attempts to mitigate the effects of armed conflict by protecting wounded soldiers, prisoners of war, and the civilian population. It comprises the Hague Conventions—humanitarian law instruments on the use of weapons and methods of warfare, adopted by the Hague Peace Conferences of 1899 and 1907—and the four 1949 Geneva Conventions, supplemented by three Additional Protocols (APs).[41] Under IHL,

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[36] Judith Gardam, 'War, Law, Terror, Nothing New for Women' (2010) 32 *Australian Feminist Law Journal* 61–75 at 62.

[37] Gardam (n 2) at 57; Gillespie (n 27) 120.

[38] Kelly Askin, 'Prosecuting Wartime Rape and other Gender-Related Crimes under International Law, Extraordinary Advances, Enduring Obstacles' in Sari Kouvo and Zoe Pearson (eds), *Gender and International Law* (Routledge 2014) 182.

[39] Copelon (n 21) 200.

[40] Fionnuala Ní Aoláin et al., 'Criminal Justice for Gendered Violence and Beyond' (2011) 11 *International Criminal Law Review* 425–443 at 428.

[41] See Copelon (n 34) 235. The Hague Conventions of 1899 (II) and 1907 (IV) respecting the Laws and Customs of War on Land; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1945, entered into force 21 October 1950) 6 UST 3114, 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1945, entered into force 21 October 1950) 6 UST 3217, 75 UNTS 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War (adopted 12 August 1945, entered into force 21 October 1950) 6 UST 3316, 75 UNTS 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1945, entered into force 21 October 1950) 6 UST 3516, 75 UNTS 287; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of

relevant provisions protect women from attacks against their honor or dignity. IHL has awarded ambiguous, and at times patronizing protection to civilian women and girls. The Hague Convention 1907 disregarded the Lieber Code's recognition of rape as a prohibited crime. Instead, Article XLVI merely protects individuals against attacks on family honor, implicitly encompassing rape and sexual violence. Moreover, the Geneva Conventions I–IV and the APs do not define rape. Much of the obscured nature of rape and sexual violence in IHL becomes evident when examining the scant legal framework relevant to civilian women in armed conflict.

First and foremost, Common Article 3, which is identical in each of the Geneva Conventions and applies to both internal and international armed conflict,[42] sets forth minimum guarantees which parties to the conflict must observe.[43] While Common Article 3 does not refer to sexual crimes, '[o]utrages upon personal dignity, in particular humiliating and degrading treatment' have been interpreted to include rape and sexual crimes.[44] Novak suggests that 'outrages upon personal dignity' is comparable to 'degrading treatment' in human rights law. As such, it constitutes the 'least serious type of ill-treatment under [IHL].'[45] To make the severity of the harm of rape visible, 'torture,' also prohibited under Common Article 3, is generic enough to encompass rape and sexual abuse.[46]

Most relevant to the female civilian population, Geneva Convention IV, Relative to the Protection of Civilian Persons in Time of War, states in Article 27(2) that '[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.'[47] Article 27(2) Geneva Convention IV does not recognize rape as a violent crime, but it has been interpreted as a legally binding norm which

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International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3, 16 ILM 1331; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

[42] *Prosecutor v. Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72 (2 October 1995) [hereinafter *Tadić Jurisdiction Decision*], paras 98–127.

[43] Askin (n 2) 249.

[44] Copelon (n 34) 236.

[45] Manfred Nowak, 'Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 400.

[46] Copelon (n 21) 202.

[47] Art. 27(2) Geneva Convention IV.

prohibits sexual assault on women.[48] Its problematic understanding that rape infringes upon women's honor, both in wartime and more generally, must be criticized for several reasons. First of all, the framing in terms of honor ignores that rape and sexual crimes are experienced by women as severe violent acts.[49] Seen as a severe offense, rape would warrant prosecution as torture, whereas mere insults of someone's honor or reputation may not.[50] This reference to honor stereotypes women as secondly, when women's honor is the protected good, what about women who society perceives to be dishonorable, such as prostitutes, or those who follow a lifestyle contrary to existing moral standards? The protection of women's honor could lead to problematic investigations into women's prior sexual conduct to determine whether these women are worthy of legal protection.[51] Regrettably, these stereotypes of women's worth in terms of their honor lead to inaction by state authorities and perpetuate impunity in femicide. In addition, the reference to honor centers on the victim, blaming and shaming her for being raped, instead of punishing the perpetrator.[52] Finally, protecting women based on honor may mean that women are viewed as accessories and dependants on men.[53] These stereotypes thus limit the application of IHL to women and girls.[54]

Geneva Convention I, for the Amelioration of the Condition of the Wounded in Armies in the Field 1864, and Geneva Convention II, for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949, reflect the gender dynamics of armed conflict, where men engage in combat. Both Conventions state that women 'shall be treated with all consideration due to their sex.'[55] The Geneva Convention III, relative to the Treatment of Prisoners of War, adds that '[women] shall in all cases benefit by treatment as favourable as that granted to men,'[56] and specifies that women prisoners of war 'shall be confined in separate quarters from male prisoners

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[48] See Helen Durham, 'International Humanitarian Law and the Protection against Women' in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (Brill 2005) 98. See also Chinkin (n 2) 682; Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present, and Future* (Brill 2011) 70.

[49] Copelon (n 34) 236; Daniela Nadji, *International Criminal Law and Sexual Violence Against Women: The Interpretation of Gender in the Contemporary International Criminal Trial* (Routledge 2018) 61; Hagay-Frey (n 48) 70.

[50] Nadji (n 49) 62; Gardam (n 2) 74.

[51] See Greve (n 2) 88–89; Copelon (n 21) 201.

[52] See also Askin (n 2) 367.

[53] Gardam (n 36) 71–72.

[54] Ibid., 72–73.

[55] Art. 12 Geneva Convention I and Geneva Convention II.

[56] Art. 14 Geneva Convention III.

of war.'[57] The separation of women and men who are deprived of their liberty could be seen as an attempt to protect women prisoners of war from sexual violence.[58]

The Additional Protocols to the Geneva Conventions respond to VAWG by explicitly listing rape and sexual violence.[59] One evident shortcoming is their limited reach, confined to the States which have ratified them.[60] Article 76 AP I regards women as the 'object[s] of special respect [who] shall be protected in particular against rape, forced prostitution and any other form of indecent assault.'[61] While it does not mention family honor, Article 76 AP I conveys the message that women are vulnerable and weak beings.[62] This shifts the focus to the notion of the delicate female victim who needs to be shielded from the perpetrator, instead of the much-needed consideration of the perpetrator's criminal responsibility and the violent nature of the acts.[63] AP I still does not fully see women as subjects who can make their own decisions, but at least recognizes that certain gender-based acts, such as rape and forced prostitution, must be prohibited.[64] AP II, applicable to non-international armed conflicts, contains similar weak language on the protection of women and girls.[65] It should be noted that rape and sexual violence are not listed among the 'grave breaches' of IHL, which would attract universal jurisdiction.[66] While efforts such as the 1974 Declaration on the Protection of Women and Children in

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[57] Arts 14 and 97 Geneva Convention IV.

[58] ICRC, 'Customary IHL: Rule 134, Women,' www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter39 rule134.

[59] Copelon (n 34) 237.

[60] Hagay-Frey (n 48) 75–76. 174 States ratified, and three States signed Additional Protocol I; 169 States ratified, and three States signed Additional Protocol II. ICRC, Treaties, States Parties and Commentaries (AP I), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument; CRC, Treaties, States Parties and Commentaries (AP II), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument.

[61] See Chinkin (n 2) 682.

[62] Nadji (n 49) 62.

[63] Greve (n 2) 89–90; Hagay-Frey (n 48) 71–72.

[64] Nadji (n 49) 61.

[65] See Art 4(1)–(2) AP II; Chinkin (n 2) 682.

[66] Art 50 Geneva Convention I; Art 51 of Geneva Convention II; Art. 130 Geneva Convention III; Art. 147 Geneva Convention IV. See also Arts 11(4) and 85 Protocol I; Askin (n 38) 189–190. On grave breaches and universal jurisdiction, see Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) 180; Copelon (n 22) 250.

Emergency and Armed Conflict have attempted to denounce violence against women, their non-binding nature limits their impact.[67]

Sexual violence and rape fall either directly or by interpretation under the Geneva Conventions as well as under Common Article 3, despite the patronizing lens through which IHL views women.[68] Yet, rape and sexual harm are only recognized as implicit offences against honor or personal dignity, rather than serious crimes. As Askin explains, it is not enough to implicitly recognize rape and sexual violence in vague and ambiguous provisions. To recognize harm, international courts must 'call the crimes what they are: rape, forced prostitution, etc.' Language like outrages upon personal dignity, is 'neither legally explicit nor commonly understood.'[69] Crimes against women must be clearly identified as such for violence against women to be taken seriously in IHL. In order to hone these vague and ambiguous provisions, judges could interpret these terms broadly, or a new AP to the 1949 Geneva Conventions could be adopted.[70]

A 'Modern' Crime?

The Charter of the first international criminal tribunal, the International Military Tribunal in Nuremberg (IMT), did not include rape and sexual violence as war crimes or crimes against humanity.[71] Nevertheless, the Nuremberg transcripts listed ample evidence of rapes committed by German troops:

> In the Ukrainian village of Borodayevka, […] the fascists violated every one of the women and girls. […] drunken German soldiers assaulted and carried off all the women and girls between the ages of 16 and 30. […] The Germans first raped and then savagely murdered 36 [other girls]. [T]he soldiers marched L.I. Melchukova, a 16-year-old girl, into the forest, where they raped her. A little later some other women who had also been dragged into the forest saw some boards near the trees

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67 Declaration on the Protection of Women and Children in Emergency and Armed Conflict, UNGA Res 3318(XXIX) (14 December 1974) UN Doc A/Res3318(XXIX), para. 5; Hagay-Frey (n 48) 76; Askin (n 2) 250.

68 See also Askin (n 2) 336.

69 Ibid., 370.

70 Ibid., 367; Gardam (n 2) 77.

71 Art. 6(b) International Military Tribunal in Nuremberg (IMT) Charter. The IMT had jurisdiction over 'crimes against peace,' 'war crimes,' and 'crimes against humanity'. On 8 August 1945, France, the UK, the US and the USSR entered the 'Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis' and its Annex the Charter of the International Military Tribunal (IMT) (15 March 1951) 82 UNTS 279.

> and the dying Melchukova nailed to the boards. The Germans had cut off her breasts in the presence of these women.[72]

This extract of evidence demonstrates extremely violent acts of rape and sexual violence on the record. However, the legal implications of sexual violence remained unaddressed. Chief Prosecutor Jackson barely investigated the existing evidence and uncomfortably pronounced that '[t]he Tribunal will forgive me if I avoid citing the atrocious details which follow,' and 'rapes were committed. [..] I pass on.'[73] Without being assessed properly, the evidence of sexual crimes was absorbed into crimes against humanity and war crime convictions.[74] Committed by all parties to the conflict, including Allied powers, prosecuting sexual VAWG was likely seen as in neither sides' interest.[75] That the IMT failed to confront sexual violence seriously, damaged its recognition in the simultaneously developing human rights law.[76]

By contrast, the International Military Tribunal for the Far East in Tokyo (IMTFE), the Asian counter-part to the IMT, found two defendants guilty in the mass rapes of around 20,000 women and girls in Nanjing, China.[77] Although the IMTFE's Statute was silent on the issue of rape and sexual violence, the prosecution's indictment listed rape as a war crime under 'inhumane treatment,' 'ill-treatment,' and a 'failure to respect family honor and rights.'[78] However, much of the IMTFE's contribution to the recognition of gender-based harm is half-hearted. It discussed the rapes in Nanjing summarily: 'Even girls of tender years and old women were raped in large numbers throughout the city, and many cases of abnormal and sadistic behavior in connection with these [sic] rapings occurred. Many women were killed after the act, and their bodies mutilated.'[79] Two reasons may have led the IMTFE to adjudicate sexual violence. The first reason relates to the potential of a politi-

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[72] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, Vol. 7, paras 454–456, www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html.

[73] Ibid., paras 405–406.

[74] Chinkin (n 2) 682; Askin (n 28) 33.

[75] Copelon (n 22) 244. See also Askin (n 2) 163.

[76] See MacKinnon (n 10) 177.

[77] International Military Tribunal for the Far East (IMTFE) (12 November 1948), in John Pitchard and Sonia Zaide (eds), *The Tokyo War Crimes Trial* (Garland Publisher 1981) [hereinafter IMTFE Judgment], paras 49 and 791–792; James Burnham Sedgwick, 'Memory on Trial: Constructing and Contesting the "Rape of Nanking" at the International Military Tribunal for the Far East 1946–1948' (2009) 43(5) *Modern Asian Studies* 1229–1254 at 1233.

[78] Askin (n 2) 202.

[79] IMTFE Judgment, para. 49605.

cized endeavor to vilify the Japanese army as rapists. The second issue at hand was that the extent of the massacre and rapes could not be easily ignored.[80] The IMTFE's adjudication did not seem to come from a desire to punish perpetrators, as Judge Pal vehemently questioned the veracity of the rape evidence.[81] Regrettably, the Tribunal failed to hear testimony from any surviving rape victim.[82]

Conspicuously, the IMTFE completely disregarded the Japanese army's sexual enslavement of women and girls.[83] Between 1937 and 1945, Japan recruited—often under false pretexts—200,000 'comfort women,' a euphemism for sex slaves, for the Japanese army.[84] It was precisely the Japanese military policy which made Japanese soldiers prone to commit rapes against civilians in Nanjing; the soldiers had been trained to regard women as sexual objects.[85] The orchestrated system for the enslavement of women to 'comfort' combatants was such a normalized aspect of war that the Prosecution must have viewed it as its by-product. It is remarkable that rape used against adverse forces was examined, whereas sexual slavery against their own and occupied female social groups fell outside the purview of punishable acts.[86]

More recently established international criminal tribunals have made some successful attempts to address rape and sexual violence as a war crime.[87] The ICTY Statute does not list rape and other sexual crimes as violations of the laws or customs of war, or as grave breaches. However, rape and sexual violence can be read into the ICTY Statute's war crime and the expansive grave

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[80] See Timothy Brook, 'The Tokyo Judgment and the Rape of Nanking' (2001) 60(3) *The Journal of Asian Studies* 673–700 at 673–674.

[81] Some of Pal's objections to the evidence of the rapes of Nanking are discussed in ibid., 677–678.

[82] Sedgwick (n 77) 1249.

[83] Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217–240 at 221. On the comfort women's attempt to receive compensation in domestic courts, see Yuma Totani, 'Legal Responses to World War II Sexual Violence: The Japanese Experience' in Elizabeth Heineman (ed), *Sexual Violence in Conflict Zones* (Pennsylvania University Press 2013) 222.

[84] Copelon (n 83) 221.

[85] Totani (n 83) 220.

[86] Copelon (n 21) 204. See also the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, a movement aiming to make women's experiences visible, which has gathered relevant testimonies discussing the fate of the Japanese Comfort Women in 2001. Women's Caucus for Gender Justice, 'Transcript of Oral Judgment, delivered in The Hague, The Netherlands' (4 December 2001), www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/tokyo/summary.html.

[87] Ken Roberts, 'The Contributions of the ICTY to the Grave Breaches Regime' (2009) 7(4) *Journal of International Criminal Justice* 743–761 at 760.

breaches provisions through interpretation.[88] Article 3 ICTY Statute (violation of the laws and customs of war) is an 'umbrella provision' which extends the Court's jurisdiction to all offences which would not otherwise be covered.[89] Furthermore, in *Prosecutor v. Mucic (Čelebići)*, the ICTY held that rape of female prisoners in Čelebići prison camp constituted a grave breach as torture under Article 2(b) ICTY Statute.[90] Hence, rape, sexual assault, and other gendered harm could be prosecuted despite their absence from the statutory language.[91] Without specific mention, however, the recognition of rape and sexual violence remains dependent on prosecutorial discretion and judicial interpretation.[92] The ICTR Statute mirrors Common Article 3, but adds rape to the 'outrages upon personal dignity.'[93] The most progressive recognition of crimes against women is included in the International Criminal Court (ICC)'s founding document: the Rome Statute.[94] The Statute recognizes 'rape, sexual slavery, enforced prostitution, [and] forced pregnancy' under its war crimes as well as its grave breaches provisions.[95]

CONCLUDING REMARKS

The concept of femicide addresses an old problem in its modern iteration. Remarkably, the idea that sexual crimes should be criminalized dates back to Roman times and provides historical grounding for a concept of femicide. IHL provides the basis for international criminal tribunals' recognition of rape and sexual violence as international crimes, even though it is largely inadequate for conceptualizing femicide due to its focus on honor, implying moral wrongdoing on the part of the victim, and failure to recognize sexual violence as serious crimes. Although women and girls are not ideally protected and modern IHL provisions take a paternalistic approach to sexual violence, the issue of sexual violence was brought to the attention of the international community

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[88] See also Askin (n 2) 310–311.

[89] *Tadić Jurisdiction Decision* (n 42) paras 89–93; *Prosecutor v. Kunarac et al*. (Appeals Judgment) ICTY-96-23 and 23/1 (12 June 2002), para. 68.

[90] *Prosecutor v. Mucic (Čelebići)*, Case No. ICTY-96-21-A, Appeals Judgment, 20 February 2001, paras 125 and 136. See Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7 *Journal of International Criminal Justice* 811–831 at 813.

[91] Askin (n 2) 313.

[92] Ibid.

[93] As the Rwandan conflict was an internal one, no grave breaches provision was included in the ICTR Statute. De Brouwer (n 66) 176.

[94] Statute of the International Criminal Court (Rome Statute) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544.

[95] Arts 8(xxii) and 7(2)(f) Rome Statute.

in any case. The need to unveil and name the harm inherent in femicide was exemplified with the ad hoc tribunal's statutory language and the limits of its interpretation. By creating a human rights law concept of femicide, the harm can be exposed and given voice. Finally, the societal context of wartime can shed light on the contextual aspect of femicide. Wartime strategy of violence may persist against the female social group in peacetime.[96] This is evidenced by Guatemala's Dos Erres and Plan de Sanchez massacres, and the recent kidnappings and murders of Maria Isabel Veliz Franco and Claudina Velásquez Paiz examined in Chapter 7.

[96] Wood (n 11) 136–137.

3. Femicide and crimes against humanity

> I worked for five years as a 'comfort woman,' but all my life I suffered from it. My intestines are mostly removed because they were infected so many times, I have not been able to have intercourse because of the painful and shameful experiences. I cannot drink milk or fruit juices without feeling sick because it reminds me too much of those dirty things they made me do.
>
> Chong Ok Sun[1]

INTRODUCTION

Crimes against humanity—widespread or systematic attacks directed against any civilian population, intentionally committed through various acts of violence—are among 'the most serious crimes of international concern.'[2] At the core of this crime lies an offence against humankind itself.[3] Although scholars have suggested that femicide is a crime against humanity, they have not systematically explored its elements in relation to femicide.[4] This chapter carefully investigates which aspects of crimes against humanity are useful to conceptualize femicide in human rights law. The study of this concept of crime is crucial as it includes some of the most progressive underlying acts in relation to femicide.[5] My focus is on rape, sexual slavery, and forced marriage. These elements are relevant to the violence committed against female Yazidi groups, forcibly married schoolgirls in Nigeria, and abductions and murders

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[1] Testimony of former 'comfort woman' Chong Ok Sun. Omar Swartz, *Transformative Communication Studies, Culture, Hierarchy and the Human Condition* (Troubadour Publishing 2008) 232–233.

[2] Art. 1 and Preamble Statute of the International Criminal Court (Rome Statute) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544.

[3] See Fausto Pocar, 'Persecution as a Crime under International Law' (2008) 2 *Journal of National Security Law & Policy* 355–365 at 355.

[4] Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present, and Future* (Brill Nijhoff 2011) 151; Emily Chertoff, 'Prosecuting Gender-based Persecution: The Islamic State at the ICC' (2017) 126(4) *Yale Law Journal* 1050–1117; Ana Messuti, 'La Dimension Jurídica Internacional del Feminicidio' in Graciela Atencio (ed), *Feminicidio, el Asesinato de Mujeres por ser Mujeres* (Catarata 2015) 52; Fernando Mariño, 'Una Reflexión sobre la posible Configuración del Crimen de Feminicidio' in Fernando Mariño et al. (eds), *Feminicidio, El Fin de la Impunidad* (Tirant lo Blanche 2012) 113.

[5] Art. 7(g) Rome Statute.

of female groups in Ciudad Juarez, mentioned in Chapter 1. I also unearth the composite elements of persecution based on gender. With its contextual element, the crimes against humanity concept also comes close to recognizing widespread violence against the female social group. The 'systematic' or policy requirement in crimes against humanity should yield to other contextual elements, such as the widespread nature of such crimes, in the concept of femicide. Finally, the content of crimes against humanity has reformed over time, in contrast to the demarcation of the crime of genocide, which has remained static. This suggests a certain latitude of its content and an openness to its reinterpretation.

ELEMENTS OF CRIMES AGAINST HUMANITY

Crimes against humanity consist of three main elements, known as 'elements of crime.' Firstly, a prohibited act, e.g., rape or sexual enslavement, must be committed.[6] Secondly, the crime must be part of an 'attack,' that is, a pattern of other acts. The attack must further be embedded in the required context: a widespread or systematic attack against a civilian population.[7] A link to an armed conflict is sometimes required. In relation to femicide, however, it is sufficient to center on the widespread or systematic elements, which constitute the umbrella requirements under the Rome Statute.[8] Thirdly, since it is an international crime, the perpetrator must intend to commit the act and must be aware that the act is committed within the required context.[9] As it provides for the most advanced conception of crimes against humanity in international criminal law (ICL), the Rome Statute is the starting point for my quest to conceptualize femicide.

The Attack against any Civilian Population

The attack

At first glance, an 'attack against any civilian population' may seem to correspond to attacks targeting a female social group. Crimes against humanity

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[6] See Art. 3 ICTR Statute; Art. 5 ICTY Statute.

[7] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edition (Oxford University Press 2016), 144.

[8] Ibid. Art. 7(g) Rome Statute and Art. 3(g) ICTR Statute do not require a connection to an armed conflict. The ICTY's case law rejected the requirement of a policy or plan in *Prosecutor v. Kunarac et al*. (Appeals Judgment) ICTY-96-23 and 23/1 (12 June 2002) [hereinafter *Kunarac Appeal*], paras 85–86 and 98. See ICC, Elements of Crimes (EoC), 2011, para. 3.

[9] Art. 7(1) Rome Statute.

occur within a widespread or systematic attack against any civilian population. Article 7(2) Rome Statute defines an attack as 'a course of conduct involving the multiple commission of acts […] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.'[10] The notion of attack refers to peacetime occurrences as opposed to military acts under international humanitarian law (IHL). The attack, a 'campaign' or 'operation,'[11] comprises multiple acts ('underlying acts' or 'crimes') set out in Article 7(1)(a)–(g) Rome Statute.[12] An individual is accountable for a crime against humanity if he or she commits an underlying act which is linked to the overall attack.[13] Even when committed at a distance from the main attack, acts can still be part of the initial attack.[14] Could the attack include patterns of acts which terrorize the female social group as it occurs in femicide?

The 'attack' in femicide differs from 'an attack against any civilian population.' While acts of femicide, such as rape or sexual slavery, are underlying acts of crimes against humanity and would seem to form part of the attack, acts of femicide carry a political message directed at a defined female social group, thus going beyond the attack itself.[15] When States do not punish perpetrators who kill women, others may emulate the perpetrator, which may put the female social group at risk of being harmed. When Lucia Perez was brutally killed in Argentina, her brother demanded: 'We want justice seriously, that all the causes in which they are involved are investigated.'[16] Such insidious violence in femicide, where judicial systems fail to respond to crimes against women and girls, amplifies and proliferates in a social climate of impunity.[17]

The political message conveyed through acts of femicide serves to warn other women and girls, and ultimately maintains the female social group in

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[10] Art. 7(2) Rome Statute.

[11] *Prosecutor v. Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014), para. 1101.

[12] Ibid., para. 1097.

[13] *Prosecutor v. Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72 (2 October 1995) para. 649; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law, a Feminist Analysis* (Juris Publishing 2000) 320.

[14] *Kunarac Appeal* (n 8) para. 99.

[15] See Jane Caputi and Diana Russell, 'Femicide: Sexist Terrorism against Women' in Jill Radford and Diana Russell (eds), *Femicide, The Politics of Women Killing* (Twayne Publishers 1993) 15.

[16] Mar Centenera, 'Matías Pérez, Hermano de Lucía, Asesinada y Violada: "'Queremos Justicia en Serio'" *El Pais* (19 October 2016), https://elpais.com/internacional/2016/10/18/argentina/1476814557_975224.html. All online sources were accessed 30 October 2021.

[17] See Caputi and Russell (n 15) 15.

a subordinate position.[18] When women's bodies, presumably killed in private, with cut or removed breasts are left in the streets, parking lots and cotton fields, female members of society may be terrorized.[19] Segato compellingly argues that the public displacement of bodies unmistakably conveys the message that perpetrators have the right to kill a woman and that they can do so in public with impunity.[20] The perpetrators assert political power when violence is left unanswered and crimes against women and girls are not investigated. Subtle 'political' messages may also include instances of 'overkilling,' where more bullets are used than necessary to kill the victim, often a characteristic of domestic violence cases.[21] Why is such extreme cruelty inflicted on women and girl's bodies?

Some women and girls are killed for attempting to assert power in a society that does not allow women to exercise their rights fully.[22] The aim of this violence can be to remove power from women and girls.[23] When a woman is trying to end a relationship, refusing to give her earnings to her husband, or doing something contrary to her protector's will, some men and boys respond with violence.[24] The violence then expresses the message: 'Women stay in your place and behave as you ought to behave like women.'[25] Girls abducted by Boko Haram are coerced into their socially assigned place as wives through forced marriages, denying them the possibility to continue their secular education.[26] As a result of Boko Haram's threats, women and girls might refrain

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[18] See Mercedes Oliveira, 'Violencia Feminicida: Violence Against Women and Mexico's Structural Crisis' in Rosa-Linda Fregoso and Cynthia Bejarano (eds), *Terrorizing Women, Feminicide in the Americas* (Duke University Press 2010) 51.

[19] Ibid., 13. See also Susan Brownmiller, *Against Our Will* (Fawcett Columbine 1975) 184–188.

[20] Rita Laura Segato, 'Territory, Sovereignty, and Crimes of the Second State' in Rosa-Linda Fregoso and Cynthia Bejarano (eds), *Terrorizing Women, Feminicide in the Americas* (Duke University Press 2010) 79.

[21] UN Entity for Gender Equality and the Empowerment of Women, Latin American Model Protocol for the Investigation of Gender-related Killings of Women (Femicide/Feminicide) (2004), 72.

[22] Oliveira (n 18) 50.

[23] Susan Harris Rimmer, *Gender and Transitional Justice, The Women of East Timor* (Routledge 2010) 126.

[24] Caputi and Russell (n 15) 15. E.g., Editorial Board, '#NiUnaMenos: estos son los cinco casos de feminicidio registrados en el 2019' *El Comercio* (12 January 2019), https://elcomercio.pe/peru/niunamenos-son-cinco-casos-feminicidios-registrados-2019-noticia-596032.

[25] Caputi and Russell (n 15) 15; Duncan Kennedy, *Sexy Dressing Etc., Essays on the Power and Politics of Cultural Identity* (Harvard University Press 1993) 141.

[26] Hilary Matfess, *Women and the War on Boko Haram: Wives, Weapons, Witnesses* (Zed Books 2017) 118–123. Oriola stresses that women attained more agency under Boko Haram, since they 'only' needed to cook and clean. Temitope Oriola, '"Unwilling

from pursuing an education where they are subject to potential abductions.[27] Similarly, in 2021, female Afghan judges were hunted by released prisoners whom they had helped to convict.[28] Such violence takes away women and girl's democratic power and alienates them from citizenship.[29]

Any civilian population

As women and girls are predominantly represented in the civilian population, it may be conceivable that the term civilian population encompasses attacks directed against women and girls as they occur in femicide.[30] Crimes against humanity must be directed against any civilian population, meaning that the civilian population is the primary object of the attack.[31] An attack under the crimes against humanity provision must be directed towards civilians, rather than unintentionally injuring them.[32] Whether the attack is directed against civilians, depends on 'the means and methods used […], the status of the victims, their numbers, the discriminatory context of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time […].'[33] The notion of the civilian population must be understood in broad terms. Any civilian population can be targeted. This means that *individuals* in their capacity as civilians—irrespective of national, racial, or ethnic background—in contrast to the protection awarded to 'national, ethnic, racial, and religious' *groups* in genocide can be attacked.[34] Since crimes against humanity are not necessarily related to or committed in armed conflicts, the term 'civilian population' is comprehensive. Even soldiers and resistance fighters who usually would not enjoy the same protection as civilians under IHL could belong to the civilian population, e.g., when they lay down their weapons and are thus hors de combat.[35]

Cocoons:" Boko Haram's War Against Women' (2017) 40(2) *Studies in Conflict & Terrorism*' 99–121 at 105 and 112.

[27] Global Coalition to protect Education from Attack, 'I Will Never Go Back to School' 34, www.protectingeducation.org/sites/default/files/documents/attacks_on_nigerian_women_and_girls.pdf.

[28] Claire Press, 'Female Afghan judges hunted by the Murderers they convicted' *BBC* (28 September 2021), https://www.bbc.com/news/world-asia-58709353.

[29] See Rimmer (n 23) 126.

[30] See Charlesworth and Chinkin (n 13) 321.

[31] *Kunarac Appeal* (n 8) para. 90; *Katanga* (n 11) para. 1103.

[32] *Prosecutor v. Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo) ICC-01/05.01/08 (15 June 2009), para. 75.

[33] *Katanga* (n 11) para. 1104.

[34] Ibid., para. 1103.

[35] Schabas (n 7) 154; *Prosecutor v. Kordic* et al. (Judgment) ICTY-95-14/2 (26 February 2001), para. 80; *Tadić* (n 13), para. 638.

However, women and girls in femicide are collectively targeted on the basis of their gender, not merely because they happen to be women and girl civilians.[36] As envisioned by Lauterpacht, crimes against humanity protect individual rather than group-related violence.[37] The collective aspect of femicide cannot be adequately addressed by the crimes against humanity concept which focuses on the protection of individuals from violence, but is best captured by Lemkin's concept of genocide, which only protects individuals to the extent they are affiliated with a protected group.[38] Finally, the term civilian population is misleading in recognizing harm inflicted on women and girls since its generic language bears the risk of neglecting that some harm exclusively targets women and girls.[39] To emphasize that women and girls are the victims in femicide, a specific response which helps unearth and name harm to women and girls, is needed.[40]

The Contextual Elements

A regular crime becomes a crime against humanity when it takes place in the relevant widespread or systematic context, and sometimes it has to meet the additional requirements of a state policy or armed conflict.[41] Femicide has a central structural component, as a result of which the discussion of relevant contextual elements (i.e., widespread; systematic; plan or policy) is informing.[42] As shown below, the 'widespread element' captures the structural component of femicide. Notably, I do not rely on a policy requirement to conceptualize femicide, as such a requirement could be used to legitimize dismissing rape charges as acts of femicide absent a *state* policy. Femicide often being committed without an explicit state policy, this would perpetuate the very impunity I seek to address. Through a formalistic legal exercise, the policy element might be construed to include violence against female social groups. Such an exercise is however impractical and redundant.

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[36] Simone De Beauvoir, *The Second Sex* (Vintage Books 2011) 7–9; Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2011) 123–124.

[37] See Philippe Sands, 'East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"' (2018) 16(4) *Journal of International Criminal Justice* 959–961.

[38] See ibid.

[39] See Hagay-Frey (n 4) 118.

[40] Messuti (n 4) 53–54.

[41] Antonio Cassese et al. (eds), *Cassese's International Criminal Law*, 3rd edition (Oxford University Press 2013) 93.

[42] See Marcela Lagarde y de los Rios, 'Preface' in Rosa-Linda Fregoso and Cynthia Bejarano (eds), *Terrorizing Women, Feminicide in the Americas* (Duke University Press 2010) xx–xxi.

Widespread

The 'widespread' element is one of the legal ingredients to establish the contextual framework for crimes against humanity and is useful to conceptualize femicide in human rights law. Neither the Rome Statute nor the International Criminal Court (ICC)'s Elements of Crimes (EoC)—a policy document which assists the ICC in interpreting the Rome Statute—outline the meaning of the term. The International Criminal Tribunal for the former Yugoslavia (ICTY) specified that 'widespread' refers to the 'large-scale nature of the attack and the number of targeted persons.'[43] An attack can be characterized as widespread when a pattern of many violent acts exists (as opposed to isolated incidents) which produces multiple victims.[44] The widespread attack is either 'cumulative,' committed through 'a series of inhumane acts,' or 'singular [based on] an inhumane act of extraordinary magnitude,' the former being of relevance to femicide.[45] The term 'widespread' refers to the extent to which multiple acts affect the civilian population, yet it does not require a specific number of people to be harmed.[46] Femicide achieves a magnitude comparable to crimes against humanity without being organized in the common sense.[47] The widespread violence inherent in femicide is 'rooted in social, political, economic, and cultural inequalities.'[48] Widespread violence against female social groups may multiply in direct relation to the State's non-response to the practices.[49] In this context, the term widespread adequately covers the multiple acts of violence characterizing femicide, such as the killings of four women per day in Brazil.[50]

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[43] *Prosecutor v. Kunarac et al.* (Judgment) ICTY-96-23 & 23/1 (11 February 2001), para. 428; see Schabas (n 7) 148.

[44] Douglas Guilfoyle, *International Criminal Law* (Oxford University Press 2016) 266; Cassese et al. (n 41) 93.

[45] Schabas (n 7) 148; *Kordic* (n 35) para. 179.

[46] Guilfoyle (n 44) 246.

[47] Mariño (n 4) 114–115.

[48] Rosa Fregoso and Cynthia Bejarano, 'Introduction: A Cartography of Femicide in the Americas' in Rosa-Linda Fregoso and Cynthia Bejarano (eds), *Terrorizing Women, Feminicide in the Americas* (Duke University Press 2010) 5; Franz Christian Ebert and Romina Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention' (2015) 15(2) *Human Rights Law Review* 343–368 at 363.

[49] World Conference on Women, Beijing Declaration and Platform for Action, Fourth World Conference on Women, UN Doc A/CONF.177/20 and A/CONF.177/20/Add.1 (15 September 1995) [hereinafter Beijing Platform for Action], para. 118; 'Murder and Machismo, Fighting Femicide in Argentina' *The Economist* (5 November 2016), www.economist.com/the-americas/2016/11/05/murder-and-machismo.

[50] Reuters, 'Brazil: Four Women killed Every Day in 2019, Human Rights Body Says' *The Guardian* (4 February 2019), www.theguardian.com/world/2019/feb/04/brazil-women-killed-2019-rate-alarming-iachr.

Systematic

The term 'systematic' would not adequately describe femicide, as the term implies a premeditated plan or policy; random and accidental acts are excluded.[51] Only repeated acts of violence would qualify as 'systematic' and satisfy this contextual element.[52] Being committed by (ex-)partners, family members, and others, femicide is usually carried out absent a state policy.[53] Of course, acts of femicide may be systematic when executed within the context of a military strategy. Endorsed by the authorities' failure to deal with crimes against the female social group, crimes against women could be systematic by omission. However, it may be challenging to legally qualify acts committed by non-state actors as planned under the 'systematic' element, especially as femicide is still treated as an isolated crime.[54] The question remains whether the state policy requirement, which is easier to satisfy than the 'systematic' element, can be used to conceptualize femicide.[55]

Policy Requirement

As the violence in femicide, such as in many cases of domestic violence, is systemic and resembles a policy, a policy requirement to conceptualize femicide might be a foregone conclusion. However, I consider such a requirement to be largely inadequate because of how it could be misused to exclude unorganized VAWG. The main argument for inclusion of a policy requirement is its link to the State, which justifies the prosecution of crimes against humanity at the international plane.[56] According to Bassiouni, the policy demands that the State play an active role in its creation and issuance. As a result, he excludes widespread violence which '[is the] result of spontaneous or uncontrolled group conflict,' as is seemingly the case in femicide.[57] Scholars are reluctant to consider non-state actors as planners of state policies, especially if they are not 'state-like,' although the ICC has affirmed that policies can spring from private

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[51] *Kunarac Appeal* (n 8) para. 94. See Charles Chernor Jalloh, 'What Makes a Crime against Humanity a Crime against Humanity' (2013) 28(2) *American University International Law Review* 381–441 at 407.

[52] *Kunarac Appeal* (n 8) para. 94.

[53] See Meyersfeld (n 36) 111.

[54] See e.g., Christina Pausackl, 'Frauenmorde in Österreich, Ich schlachte dich ab wie ein Schwein' *ProfilAt* (14 January 2019), www.profil.at/oesterreich/frauenmorde-oesterreich-10590171.

[55] See *Katanga* (n 11) para. 1108.

[56] Cherif Bassiouni, *Introduction to International Criminal Law*, 2nd revised edition (Brill Nijhoff 2013) 72.

[57] Ibid.

entities.[58] While the ICC's EoC affirm in Footnote 6 that state inaction, e.g., in the face of mass rapes, could satisfy the required plan or policy element, ICC case law on the issue is non-existent. The violence in femicide should be candidly described as 'widespread' rather than being twisted to fit the policy requirement.

ICL has revealed the inadequacy of the policy element to some extent. A policy was not required by the International Military Tribunal in Nuremberg (IMT)'s Charter or Control Council Law and was only initially relied on by the ICTY and the International Criminal Tribunal for Rwanda (ICTR).[59] The ICTY called for 'some form of policy' in *Tadić*, but subsequent case law abandoned this.[60] Notably, in *Prosecutor v. Kunarac*, a case which involved the enslavement and rape of women in a prison camp, the ICTY concluded that customary international law (CIL) did not require a policy for the commission of crimes against humanity.[61] If the ICTY had required a policy in *Kunarac*, the rapes and sexual violence in prison camps, in the absence of explicit orders to rape, might not have reached the prerequisite threshold for a state policy. However, in Article 7 (2) Rome Statute, the policy element providing that the attack must be committed 'in furtherance of a State or organizational policy,' re-emerged.[62] The ICC considered the policy requirement to mean 'that a State or organisation intends to carry out an attack against a civilian population, whether through action or deliberate failure to take action.'[63] The policy omits to list a series of repeated acts (like the 'systematic' element) so as to not undermine the disjunctive nature of the widespread or systematic element.[64]

Non-state actors

International criminal tribunals recognize that non-state actors can plot and carry out policies under the crimes against humanity provision. Already in *Tadić*, with respect to its then required policy element, the ICTY noted

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[58] Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Brill Nijhoff 2005) 151–152; see also Schabas (n 7) 152 and 158.

[59] See Art. 6(c) IMT Charter. See *Prosecutor v. Semanza* (Judgment) ICTR-97-20-T (15 May 2003), citing *Kunarac Appeal* (n 8) para. 98. See also *Prosecutor v. Gacumbitsi* (Judgment) ICTR-2001-64-T (17 June 2004).

[60] *Prosecutor v. Tadić,* Case No. IT-94-1-T, Trial Judgment, 7 May 1997, para. 653.

[61] *Kunarac Appeal* (n 8) para. 98.

[62] Art. 7(2) Rome Statute. See on the drafters' discussion to include a contextual element, Darryl Robinson, 'Defining "Crimes against Humanity" at the Rome Conference' (1999) 93(1) *The American Journal of International Law* 43–57 at 47.

[63] *Katanga* (n 11) para. 1108.

[64] Ibid., para. 1112.

that the 'governmental, organizational, or group policy' could stem from 'non-government forces with de facto control over, or free movement within, a defined territory.'[65] As set out in the ICC's EoC, in addition to state actors, 'organizations' can devise and carry out a policy.[66] The ICC clarified that an organization refers to 'an organized body of people with a particular purpose,' not necessarily comparable to that of a State.[67] The ICC focused on the group's capacity to carry out an attack and clarified that an organization with 'sufficient means to promote or encourage the attack' qualifies as a policy-maker for crimes against humanity.[68] The Court pointed out that a contemporary interpretation of the policy requirement does not require the group to possess State-like qualities.[69] In principle, therefore, some manifestations of femicide, such as the abduction and enslavement of women and girls by terrorist organizations like Boko Haram and the Islamic State in Iraq and Al-Sham (ISIS), would be covered by the policy requirement.

While the ICC recognizes that both state and non-state actors can devise and carry out a policy pursuant to the attack, this inclusion of non-state actors as creators of policies is far from established. Should the Court follow Bassiouni's suggestion and exclude policies of terrorist or mafia organizations, even when they are state-like (e.g., ISIS and Boko Haram), many types of large-scale violence against women would be excluded from the protection of crimes against humanity.[70] While conceding that the notion 'State' must be construed broadly to cover 'state-like actors,' Schabas still argues that, even when non-state actors carry out policies, those could be dealt with at the domestic level and would not necessitate international intervention.[71] The policy element would help to draw the line between crimes which belong to national and those which pertain to international jurisdiction.[72] However, this approach disregards the fact that the type of violence women experience in femicide is rarely dealt with at the domestic level and that States are often reluctant to act when faced with situations of mass violence, as revealed in the (non-)response to the enslavement of women by ISIS and the inadequate investigations and search efforts in Ciudad Juarez.

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[65] *Prosecutor v. Tadić*, paras 654–655.

[66] Art. 7(3) ICC, EoC.

[67] *Katanga* (n 11) para. 1119 [unofficial translation by the author].

[68] *Prosecutor v. Bemba* (Judgment) ICC-01/05-01/08 (21 March 2016), para. 158, citing *Katanga* (n 11) para. 1119.

[69] Ibid.

[70] Bassiouni (n 58) 151–152; see also Schabas (n 7) 152 and 158.

[71] Schabas (n 7) 972.

[72] William Schabas, 'State Policy as an Element of International Crimes' (2008) 93(3) *Journal of Criminal Law and Criminology* 953–982 at 954, 974 and 982.

Most violence in connection with femicide is not committed pursuant to organizational policies. These types of violence include endemic acts of domestic violence, honor killings, and dowry-related killings in certain regions, committed by different individuals in various family contexts.[73] Under the law, these acts may be erroneously regarded as random, unrelated crimes outside the scope of the policy requirement.[74] The plan and policy requirement is problematic and impractical, at least when rapes and other acts perpetrated against women are not actively ordered through a state or organizational policy or plan.[75]

Inaction

A notion of policy through inaction would ideally capture VAWG committed by private individuals where States remain passive. However, it is an untried and obscure element satisfying legal argumentation rather than practical reality. Footnote 6 EoC suggests that a policy may 'in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such an attack.' The second sentence blurs the contours of this concept by adding that the passive state policy 'cannot be inferred solely from the absence of governmental or organizational action.'[76] The scope of this requirement remains uncertain since the ICC has not yet interpreted this footnote. Footnote 6 appears to require some sort of bad faith in 'deliberate' inaction. Conversely, should States remain agnostic about honor killings and domestic violence, their inaction may not satisfy the policy requirement. Considering that the 'policy by inaction' no longer necessitates a state contribution, practically speaking, the policy by inaction element could be equated to the 'widespread' one.

Finally, the state policy requirement prevents international law from applying to large-scale violence against women which occurs as seemingly unorganized and unplanned acts. If used, the policy element potentially excludes widespread rapes committed by non-state actors. However, violence present in femicide happens every day and, if unchecked, it quickly develops into large-scale violence against women which qualifies as 'widespread.' The policy requirement is impractical: Even if interpreted broadly (recognizing both the State and any organization as designers of policies), the low threshold required to satisfy the policy element (contribution to an attack) makes establishing the policy element a tedious and unnecessary legal exercise. Should the

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73 See Meyersfeld (n 36) 111.
74 See Hagay-Frey (n 4) 151.
75 Ibid.
76 Art. 5 ICC EoC, fn. 6.

policy requirement be interpreted to cover state inaction, it would be deprived of legal substance due to its almost reduction to describing the extensive nature of violence, an aspect already included in the widespread element.

Selected Acts

'Traditional' acts like 'murder,' 'extermination,' 'enslavement,' 'torture,' and others are listed as underlying acts of crimes against humanity in the Rome Statute. At the same time, Article 7(a)–(g) Rome Statute establishes a set of crimes directly relevant to femicide: 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' among others; these acts would also breach human rights protected from femicide.[77] The inclusion of sexual crimes as underlying acts in the Rome Statute directs attention towards sexual violence as independent crimes which, until recently, were either interpreted in more general provisions (e.g., 'enslavement') or masked by vague wording (e.g., 'serious mental and bodily harm' in genocide and 'outrages upon personal dignity' in war crimes).[78]

The acts counting as crimes against humanity, while progressive, have yet to include forced marriage, female genital mutilation, and other gender-based acts predominant in femicide.[79] Article 7(a)–(g) is worded in neutral terms. However, many sexual crimes disproportionately affect women, and some are exclusively perpetrated on women's bodies, such as those targeting their reproductive function, like forced pregnancy.[80] The next sections center on rape—a component of many sexual crimes—sexual slavery, forced marriage and persecution based on gender.[81] This selection should not be understood to exclude other acts from the application of femicide.

Rape

The term rape has been considered a crime against humanity for some time now. Control Council Law No. 10, empowering Allied forces to try war

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[77] Art. 7 (1)(g) Rome Statute; see Cassese et al. (n 41) 92.

[78] Hagay-Frey (n 4) 83 and 115.

[79] Scholars have criticized the Rome Statute for unduly focusing on sexual crimes. See Valerie Oosterveld, 'Gender-based Crimes Against Humanity' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011) 79. See also Hagay-Frey (n 4) 120.

[80] See Schabas (n 7) 170 and 186.

[81] See Christine Chinkin, 'Gender and Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 687.

criminals in their occupation zones, has listed rape under its crimes against humanity provision.[82] The ICTR and the ICTY statutes also recognize rape as a crime against humanity alongside other violent crimes, such as murder and torture.[83] Yet, the scope of rape has remained undefined and is often subject to debate. Among the ICL concepts of rape, a definition must be found which takes account of the many ways in which women and girls are raped in femicide, some of which include mutilating body parts, and occur in a large-scale context of violence.

Case law clarifying the scope of rape under ICL has developed slowly. Initially, the ICTY solely considered rape and sexual violence with respect to men. In *Tadić*, Witness F reported that she was raped by Tadić, a guard in the Omarska prison camp. Witness F, afraid of repercussions, declined to testify; as a result, the prosecution withdrew the counts for rape as a war crime and a crime against humanity, and amended the initial indictment.[84] While many imprisoned in Omarska, both male and female, were raped and tortured, the *Tadić* Trial Chamber discussed sexual assault against men, but did not account for the female rape victims.[85]

The ICTR's *Akayesu* case, recognizing rape as genocide, is the cornerstone for the definition of rape in ICL. *Akayesu* established that 'rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.'[86] Rejecting formalistic criteria in describing the scope of rape, the Trial Chamber defined rape as 'physical invasion of a sexual nature, committed against a person under circumstances which are coercive.'[87] Furthermore, it clarified that 'coercive circumstances need not be evidenced by a show of physical force' but 'may be inherent in certain circumstances' (i.e., armed conflict or the presence of threatening armed forces).[88] Accordingly, *Akayesu* considered the coercive context in which consent is expressed as relevant to the definition of rape.[89]

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[82] Art. 2(1)(a) Control Council Law No 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3 Berlin, 31 January 1945 [hereinafter Control Council Law], 50–55.

[83] Art. 5(g) ICTY Statute; Art. 3(g) ICTR Statute.

[84] *Prosecutor v. Tadić*, paras 4.1-4.4 and 27.

[85] 'Witness H was ordered to lick his naked bottom and G to suck his penis and then to bite his testicles'. *Prosecutor v. Tadić*, para. 206.

[86] International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T (2 September 1998), para. 597.

[87] Ibid., paras 598 and 688.

[88] Ibid., para. 688.

[89] Ibid., paras 692–697.

Following *Akayesu*, the ICTY replicated the definition related to rape as torture (as a war crime) in *Prosecutor v. Delalic*[90] and *Čelebići*.[91] It argued that, in the context of armed conflict, rape inevitably entails 'punishment, coercion, discrimination or intimidation,' and can thus amount to torture.[92] Hence, the ICTY accepted that, in line with *Akayesu*, coercion is central to the inquiry whether a rape could be said to have occurred under ICL. However, in *Prosecutor v. Furundžija*, which recognized that rape could constitute a crime against humanity, the ICTY deviated from the *Akayaesu* standard in relation to rape as a war crime without explanation.[93] *Furundžija* provides a mechanical description of different elements of rape in strict detail. The Tribunal defines rape as 'sexual penetration, however slight,' listing the 'vagina or anus' and 'the mouth' as body parts which can be raped 'by the penis of the perpetrator or any other object.' The definition further adds that rape is committed 'by coercion or force or threat of force against the victim or a third person.'[94] This rape definition potentially excludes rape committed by other means, such as by cutting the victim's navel, as it may occur in femicide. However, the *Furundžija* definition must be understood in its context, which differs from the circumstances of femicide. The facts of the case involved forced oral sexual intercourse. The ICTY described body parts, likely to decide if these facts were covered by the definition of rape.[95] Concerns over the principle of legality also led the Tribunal to enter into detail on which parts are concerned in rape.[96] Such concerns are hardly valid, however, as perpetrators can be expected to know that violence is prohibited, be it sexual or not, even in the absence of a description of body parts.

Another approach to rape, adopted in *Kunarac*, referred to consent in contexts of armed conflict. In *Kunarac*, which recognized rape as a crime against humanity, the ICTY had to decide whether or not consent might have legitimized the sexual intercourse between a detained woman and a military commander. The Tribunal explained that a woman who had initiated sexual intercourse with Kunarac, a military commander, while she was held in captivity shortly after she had been raped by three soldiers and was told by one of her

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[90] *Prosecutor v. Delalic et al*. (Judgment) ICTY-96-21-T (16 November 1998), paras 478–479.

[91] *Prosecutor v. Mucic (Čelebići)* (Trial Judgment) ICTY-96-21 (16 November 1998), paras 478–479.

[92] Ibid., para. 495.

[93] *Prosecutor v. Furundžija,* IT-95-17/1 (10 December 1998), para. 172.

[94] Ibid., para. 185.

[95] Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) 112 and 114.

[96] See *Furundžija* (n 93) para. 177.

rapists to 'keep their commander hard all night,' acted under circumstances of coercion. Although she appeared to have consented and even initiated sexual intercourse, this consent was the consequence of direct threats to her life, which invalidated it.[97] The *Kunarac* Trial Chamber maintained *Furundžija*'s overly detailed definition of rape (including an element of penetration and coercion) and supplemented it by clarifying that 'consent [must be] given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.'[98] The *Kunarac* Appeals further noted that women's detention in the Omarska prison camp 'amount[s] to circumstances that were so coercive as to negate any possibility of consent,'[99] thereby signaling that coercive circumstances, such as crimes against humanity, negate consent.[100] The ICTY thus considered that physical force is not required for rape under international law.[101]

The *Furundžija* definition for rape is used in the EoC, albeit unfortunately tailored to require an 'inva[sion of] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.'[102] The EoC sets out that the term invasion is gender-neutral, and includes different interferences with the victim's body.[103] Consent is considered in passing, discussed in a paragraph concerning force and coercion, specifically relating to cases where rape is committed against 'a person incapable of giving genuine consent.'[104] However, Rule 70 of the ICC's Rules of Procedure relating to sexual violence clarifies that, in a coercive environment, consent cannot be derived from the words nor the conduct of the victim.[105] The ICC's definition is a hybrid of *Furundžija*'s description of sexual intercourse and *Kunarac*'s consent as expressed in

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[97] *Kunarac* (n 43) paras 96, 645 and 646.
[98] Ibid., para. 460.
[99] *Kunarac Appeal* (n 8) para. 132.
[100] See also Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2007) 951.
[101] *Kunarac Appeal* (n 8) paras 129–130. 'A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.' *Akayesu* (n 86) paras 598 and 688. See also MacKinnon (n 100) 946. See Rule 96 ICTY Rules of Procedure and Evidence, which does not allow consent as a defense in coercive circumstances.
[102] Arts 8, 28 and 36 (rape in relation to a crime against humanity and a war crime) ICC EoC.
[103] Ibid., Art. 8, fn. 15.
[104] Ibid., Art. 8, fn. 16.
[105] *Katanga* (n 11) para. 966.

coercive circumstances.[106] The ICC has tested its rape definition in *Katanga*, although it did not enter a conviction for rape. Based on the EoC and ad hoc case law, the ICC argued that rape (as a war crime and as a crime against humanity) entails penetration and coercion.[107] The ICC has handed down a final conviction on rape as a crime against humanity in *Ntaganda* in March 2021.[108] The approach adopted in *Akayesu* (rape as physical invasion under coercive circumstances) and, in attenuated form, in the *Kunarac* Appeal (coercive circumstances imply non-consent) would ideally capture rape in femicide. The question what such coercive circumstances consist in, however, must be considered in the light of feminist legal approaches to rape.

A key issue raised by feminist legal scholars is whether rape is mainly about denying the victim agency and sexual freedom or whether it revolves around exercising power over an individual in a coercive context. De Brouwer and MacKinnon rightly assert that consent becomes irrelevant in specific contexts as consent is not possible for war crimes, crimes against humanity, or genocide,[109] nor for sexual intercourse which is part of an international crime.[110] MacKinnon pertinently notes that '[n]o other crime against humanity has ever, once the other standards are met, been required to be proven nonconsensual.'[111] She worries that a consent requirement translates into the presumption that the rape victim wanted sexual intercourse. Criticizing the *Furundžija* approach, MacKinnon points out that national rape definitions were crafted for circumstances of individual rape.[112] She argues that rape replicates unequal power relations, which govern the victim/perpetrator relationship, and which are reinforced in armed conflict. She notes that rape as an international crime is not a separate crime but forms part of genocide, crimes against humanity, and war crimes—circumstances which are inherently coercive.[113]

The widespread nature of femicide supports these arguments. For example, women held in captivity may agree to sexual intercourse, hoping to remain alive by doing so. In contexts of widespread domestic violence, explicit consent in word or deed would also be negated on the same basis as it is in war contexts since women may fear being harmed and/or know that the police are unlikely to respond to their complaints. Liberal feminist scholars, including

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[106] See also MacKinnon (n 100) 957–958.

[107] Arts 8(2)(e)(vi) (war crime) and 7(g) Rome Statute, see *Katanga* (n 11) paras 961–962 and 965.

[108] *Prosecutor v. Ntaganda* (Appeals Judgment) ICC-01/04-02/06 (30 March 2021).

[109] De Brouwer (n 95) 455; MacKinnon (n 100) 952.

[110] De Brouwer, ibid.

[111] MacKinnon (n 100) 952.

[112] Ibid., 946.

[113] Ibid., 240–246.

Halley and West, critique MacKinnon and de Brouwer's approach, insisting that the consent element is the distinguishing factor between consensual sexual relations and rape.[114] Halley's objection is that every sexual intercourse in a war would amount to rape, which is accurate to the extent that the focus on coercion might unduly sanction exceptional cases where sexual intercourse occurs in a place of love and respect between a soldier and a woman belonging to the targeted civilian population.[115] However, Halley appears overly concerned with the effect on the excessive costs for the perpetrator, i.e., the burden of being undeservedly accused. This approach protects the minority of men who are wrongly accused.[116] Ultimately, Halley's focus on consent stems from her understanding that rape denies women sexual agency, an agency which is restricted in any event in the context of war, crimes against humanity, and genocide—and femicide.[117] Instead, these challenges in evaluating whether consent to sexual intercourse is valid in widespread violent contexts, such as armed conflict, can be proffered as a reason to abandon the consent element for acts of femicide altogether. As long as a given contextual element is present even seemingly consensual acts would be rape in femicide.

Sexual slavery

As people cannot voluntarily engage in sexual slavery, the consent question is particularly illuminating in this context. Sexual slavery differs from enslavement in important ways. The 1926 Slavery Convention defines the term slavery as the condition of a person over whom 'any or all of the powers attaching to the right of ownership are exercised.'[118] According to the ICC's EoC, in order to make slavery sexual, a person has to be forced 'to engage in one or more acts of a sexual nature.'[119] As a crime which has been overlooked, sexual slavery now covers not only the power which slave owners hold over

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[114] Robin West, 'Sex, Law and Consent' (2008) 71 *Georgetown Law Faculty Working Papers* 1–44.

[115] Janet Halley, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work and Sex Trafficking: Four Studies in Contemporary Governance Feminism' (2006) 29(2) *Harvard Journal of Law & Gender* 335–423 at 383.

[116] Maria Grahn-Farley, 'The Politics of Inevitability: An Examination of Janet Halley's Critique of the Criminalisation of Rape as Torture' in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspective on Contemporary International Law*, *Between Resistance and Compliance?* (Hart Publishing 2011) 114–115.

[117] See Halley (n 115) 341.

[118] Art. 1(1) Slavery Convention 1926, League of Nations. Convention to Suppress the Slave Trade and Slavery (Slavery Convention) (adopted 25 September 1926, entered into force 9 March 1927) 60 LNTS 253.

[119] See ibid. and ICC EoC, Sexual Slavery.

their slaves' reproductive functions—i.e., to decide whether their 'property' should bear children—but also possibly acts committed in rape camps and military brothels.[120] Especially relevant to femicide, the widespread context of sexual slavery can be exemplified with the so-called 'comfort women' in Japan who were kept in barbed-wired camps, where they were made to receive up to 40 men a day; they were executed if they resisted, tried to escape, or contracted venereal diseases.[121] To date, their plight still has not been recognized as a crime against humanity and remains under addressed.[122]

Modern examples of sexual slavery can be found in the context of the war in the former Yugoslavia. In Foča, Bosnia-Herzegovina, many women and girls were detained in schools and sports halls. From there, they were taken to private apartments, where they were forced to clean and cook and to entertain their captors sexually before they were traded and sold to others.[123] In response to these crimes, the ICTY opened legal pathways towards recognizing sexual slavery as crimes against humanity. The Tribunal's pioneering *Kunarac* case expanded its statutory language, which merely listed enslavement, to cover sexual slavery, defining it as an 'exercise of any or all of the powers attaching to the right of ownership over a person,' including 'the control of sexuality.'[124] Noteworthy is that the ICTY mentioned that a prolonged period of detention or lack of consent is not required for the crime of 'enslavement,'[125] reasoning which can be transposed to 'sexual' slavery in femicide.

The Special Court for Sierra Leone (SCSL), a court with jurisdiction over the Sierra Leone (1991–2002) conflict, characterized by sexual slavery, included 'sexual slavery' as a crime against humanity in its statute and addressed it in

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[120] Art. 5(c) ICTY Statute; Michelle Jarvis and Elena Martin Salgado, 'Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice' in Anne-Marie De Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2012) 106.

[121] Testimony of former 'comfort woman' Chong Ok Sun. Omar Swartz, *Transformative Communication Studies, Culture, Hierarchy and the Human Condition* (Troubadour Publishing 2008) 232–233.

[122] In January 2021, a South Korean court ordered the Japanese government to compensate Korean women forced into sexual slavery during World War II. Choe Sang-Hun, 'South Korean Court Orders Japan to Pay Compensation for Wartime Sexual Slavery' *New York Times* (7 January 2021), www.nytimes.com/2021/01/07/world/asia/south-korea-comfort-women-japan.html. See also UN Commission on Human Rights, Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime, 52nd Session, UN Doc E/CN.4/1996/53/Add.1 (1996).

[123] *Kunarac* (n 43) paras 574, 577 and 767.

[124] Ibid., para. 119.

[125] Ibid., paras 119–121.

its formative case law.[126] The Special Court outlined the elements of 'sexual slavery' in *Brima* but did not find a conviction for this crime.[127] The first explicit conviction for sexual slavery was entered by the SCSL in *Sesay et al*.[128] The Court essentially echoed the elements of the ICC's EoC on sexual slavery and clarified that sexual slavery as a crime against humanity can bring to light its use as a 'tactic of war to humiliate, dominate, and instill fear in victims, their families, and communities during armed conflict.'[129]

Especially relevant for femicide are the SCSL Trial Chamber's considerations on the deprivation of liberty and the question of consent. The Trial Chamber recognized that 'similar deprivation of liberty' covers victims who 'would have nowhere else to go and feared for their lives.'[130] This notion of deprivation of liberty could apply to situations of psychological pressure, such as those found in domestic violence cases where a woman is economically dependent on her husband and, afraid to lose custody of her children, continues to live with her abuser. Moreover, the Trial Chamber considered that sexual violence requires neither any specific duration of enslavement nor an element of consent, consent only being relevant to determine whether the perpetrator exercised ownership.[131] The context in which the sexual slavery occurred (the conflict-ridden parts of Sierra Leone) negated free consent, according to the Trial Chamber.[132] The crime of sexual slavery seems to support the claim that, for conceptualizing femicide, the crime itself—such as rape and sexual violence—should be viewed within its context, in which consent may no longer be possible.

Although the ICC's crime against humanity provision explicitly includes sexual slavery as a crime against humanity and allows for its direct adjudication as an international crime, the ICC's *Katanga* case on sexual slavery presents a significant setback to the recognition of sexual slavery as an international crime. [133] It displays the challenges to, and limitations of adjudication for sexual crimes even where statutory language provides clear instructions to hold perpetrators accountable. In *Katanga*, the ICC found that the Patriotic Resistance Front (PRF) militia committed sexual slavery and rape as a crime

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[126] Valerie Oosterveld, 'Sexual Slavery and the International Criminal Court: Advancing International Law' (2004) 25 *Michigan Journal of International Law* 605–651 at 626.

[127] *Prosecutor v. Brima* et al. (Judgment) SCSL-04-16-T (20 June 2007), para. 709.

[128] *Prosecutor v. Sesay, Kallon and Gbao* (Judgment) SCSL-04-15-T (2 March 2009), paras 678, 682 and 685.

[129] Ibid., paras 156 and 158–159.

[130] Ibid., para. 161.

[131] Ibid., para. 163.

[132] Ibid., paras 1466 and 1470–1771.

[133] *Katanga* (n 11) paras 973–978.

against humanity during and after their attack on the Bogoro village in the Democratic Republic of the Congo (DRC).[134] For example, soldiers visited Witness 249 at night only to engage in sexual assault without speaking a word; Witness 132 was 'inherited' by a combatant.[135] The ICC was convinced that the combatants were aware of the women's situation as captives who were entirely deprived of their liberty of movement and whom they utilized for sexual purposes, and that they intentionally exercised powers attaching to the right of ownership over the women while the women were held captive at the militia camp.[136]

The Trial Chamber concluded that sexual slavery was part of the attack directed against the Hema civilian population.[137] However, the ICC did not hold Germaine Katanga, the militia leader, responsible for crimes of sexual slavery as the Trial Chamber considered that murder, destruction of property, and pillaging, were included in the common purpose to erase the Hema ethnicity, but sexual slavery was not.[138] The way in which the attack was conducted, i.e., the militia hunting down and killing Hema civilians and destroying their means of living, confirmed this common purpose required under Article 25(d) Rome Statute.[139] The Trial Chamber reasoned that sexual slavery (1) was not sufficiently widespread;[140] (2) was not committed prior to the attack, unlike the murder, pillaging, and destruction of property;[141] (3) did not aim to erase the Hema ethnicity, since some women were raped and enslaved instead of being killed after they managed to conceal their ethnicity.[142] Hence, although the militia had committed sexual slavery, the Trial Chamber acquitted Katanga of rape and sexual slavery as crimes against humanity,[143] finding him guilty of war crimes and other crimes against humanity.[144] Katanga's acquittal for

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134 Ibid., paras 1008, 1013, and 1019–1023.
135 Ibid., para. 1007.
136 Ibid., paras 1013 and 1018–1019.
137 Ibid., para. 1167.
138 Ibid., paras 1658, 1661 and 1664.
139 Ibid., paras 1654–1657 and 1163–1167.
140 The Chamber held that 'no evidence is laid before the Chamber to allow it to find that the acts of rape and enslavement were committed on a wide scale and repeatedly'. Ibid., para. 1663. See Kelly Askin, 'Prosecuting Wartime Rape and other Gender-Related Crimes under International Law, Extraordinary Advances, Enduring Obstacles' in Sari Kouvo and Zoe Pearson (eds), *Gender and International Law* (Routledge 2014).
141 *Katanga* (n 11), paras 1658 and 1661.
142 Ibid., paras 1163–1164 and 1167.
143 Ibid., para. 1664.
144 Ibid., paras 1658, 1676, 1661 and 1679; Art. 25(3)(d) Rome Statue,

sexual slavery is 'an appalling double standard, and perpetuates the view that rape is a byproduct of war, instead of an instrument of warfare.'[145]

Katanga's problematic acquittal for rape and sexual slavery, despite the Trial Chamber's establishment of those acts as crimes against humanity, seems rooted in the Chambers' lack of sensitivity to the gender dynamics of armed conflict. First, whether the women were actually 'spared' (i.e., enslaved and raped instead of killed) because they convinced their perpetrators they were not of Hema ethnicity, is debatable. For example, the evidence did not disclose if Witness 132 concealed or revealed her ethnicity.[146] The manner in which the Trial Chamber identified the common purpose is also questionable. As the Trial Chamber found that some women were raped and enslaved after they managed to conceal their ethnicity,[147] the Trial Chamber should have considered *how* women and girls are typically harmed in such attacks. Asking the woman question, the ICC might have noted that women and girls are usually raped and enslaved during armed conflict, whereas men and boys are killed. The ICC could have found that rape was part of the attack and might have underlined the importance of adjudicating crimes against women.[148] The Trial Chamber did not inquire about Katanga's presence during the witnesses' cross-examination or ask the prosecution to further investigate crimes against women and, if necessary, amend the criminal charges or rely on additional witnesses, as it had done in *Akayesu*.[149] Therefore, conclusions on these matters cannot safely be drawn. *Katanga* has demonstrated that the recognition of sexual slavery by itself is not enough; the contextual element must be adequately constructed to adjudicate crimes against women and girls.

Having sensed, perhaps, that *Katanga* had gone wrong in terms of recognizing gendered harm, the Office of the Prosecutor released a policy paper on sexual and gender-based crimes in 2014, emphasizing its commitment to prosecute these crimes.[150] In July 2019, the ICC finally entered a conviction for

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[145] Kelly Askin, 'Katanga Judgment Underlines Need for Stronger ICC Focus on Sexual Violence, Open Society Foundations' *Open Society Initiative* (11 March 2014), www.opensocietyfoundations.org/voices/katanga-judgment-underlines-need-stronger-icc-focus-sexual-violence.

[146] Witness 132 claimed that she saw Katanga three times in the camp. *Katanga* (n 11) paras 202–206 and 1664.

[147] Ibid.

[148] Askin (n 145).

[149] Askin (n 140) 196; Hagay-Frey (n 4) 97; Alice Edwards, *Violence Against Women under International Human Rights Law* (Cambridge University Press 2011) 105.

[150] Office of the Prosecutor, 'Policy Paper on Sexual Crimes and Gender-based Violence' (2014), www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.

sexual slavery as a crime against humanity, confirming the elements of sexual slavery as a crime against humanity.[151]

The first case on sexual slavery at the domestic level, the Guatemalan Supreme Court's historic *Sepur Zarco Judgment* of 2016, mirrors many present-day femicide cases discussed in Chapter 7.[152] In response to indigenous communities' attempts to secure land titles in the 1980s, the Guatemalan military abducted and killed many male villagers while sexually enslaving women and girls who were forced to clean, wash, and cook at Sepur Zarco military camp, while soldiers repeatedly sexually assaulted and raped them.[153] The Guatemalan Supreme Court held that Maya women and girls' sexual enslavement at Sepur Zarco military camp constituted an 'inhumane act against the civilian population' (substantively a crime against humanity) and sentenced the perpetrators to thirty years imprisonment.[154]

Sepur Zarco is notable for the judges' examination of the case through a gendered lens. The judges focused on why sexual slavery was perpetrated against women and girls and how the enslavement impacted them, arguing that the aim was to isolate the women and girls from their male 'protectors' by killing their husbands and sons. Once this task was completed, the soldiers considered the women 'fair game' as they were left without male protection: '[T]he result was to leave the women alone, frightened, helpless, at the disposal of the soldiers to sexually abuse them, using physical and psychological force, bending their will, treating them worse than animals.'[155] Guatemala's Supreme Court found that, through sexual enslavement, the soldiers humiliated the women and 'produce[d] the social breakdowns.'[156]

Their enslavement and rape also had an adverse effect on the broader community. The Court considered that women's bodies have a spiritual meaning as bearers of life in indigenous culture.[157] By raping them, the perpetrators destroyed life itself and denied them their humanity. As the Court held, '[t]he violence they experienced transcended the minds and bodies of the women and caused a complete rupture of the social fabric.'[158] As such, the crimes against women and girls had an impact on their economic status, their future lives, and

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[151] *Prosecutor v. Ntaganda* (Trial Judgment) ICC-01/04-02/06 (8 July 2019), paras 954, 957–960.

[152] *Sepur Zarco* (Judgment) Guatemalan Supreme Court of Justice C-01076-2012-00021 (26 February 2016).

[153] Ibid., paras 111–112.

[154] Art. 378 Guatemala Criminal Code [unofficial translation by the author].

[155] *Sepur Zarco* (n 152) paras 102 and 112.

[156] Ibid., paras 81–82.

[157] Ibid., paras 82–83.

[158] Ibid., para. 487.

their cultural traditions. The Court also considered that they were domestic slaves since the women had to cook and perform domestic tasks as part of the enslavement, an aspect which is usually neglected in the case law on sexual slavery.[159] The sexual enslavement of women and girls in the Sepur Zarco military camp was committed during Guatemala's civil war. The impunity and failure to address these acts have contributed to the widespread existence of femicide in modern-day Guatemala, as is substantiated in Chapter 7.[160]

Forced marriage

Forced marriage is not categorized as an independent crime under the Rome Statute. As unambiguous language is key in recognizing harm, I argue for an unequivocal recognition of forced marriage as independent from sexual slavery. However, as can be seen in the example of forced marriage, conceptualizing acts of femicide in ICL is limited by the principle of legality.[161] Under Article 7(1)(g) Rome Statute, forced marriage may amount to a crime against humanity as 'any other form of sexual violence,' a residual clause also covering forced nudity.[162] To satisfy the principle of legality, forced marriage must be of 'comparable gravity,' and thereby similar in seriousness to other crimes listed in Article 7(1)(g) Rome Statute.[163]

The SCSL examined the crime of forced marriage, on the charge of 'other inhumane acts' in addition to charges of sexual slavery. Regrettably, the *Brima* Trial Chamber stated that forced marriage was covered by sexual slavery, dismissing the forced marriage charges as redundant.[164] However, Judge Doherty's dissent argued that forced marriage was different from sexual slavery, and should constitute a crime against humanity.[165] Although consent was often given by the wives' parents or next of kin in traditional Sierra Leonean marriages, Doherty compellingly argued that forced marriage was different, since neither the woman nor her next of kin had consented to her marriage.[166] Many of the abducted women became so-called 'bush

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[159] Ibid., para. 488.

[160] Hilda Morales Trujillo, 'Femicide and Sexual Violence in Guatemala' in Rosa-Linda Fregoso and Cynthia Bejarano (eds), *Terrorizing Women, Feminicide in the Americas* (Duke University Press 2010) 133–135.

[161] Victoria May Kerr, 'Should Forced Marriages be Categorised as "Sexual Slavery" or "Other Inhumane Acts" in International Criminal Law?' (2020) 35(1) *Utrecht Journal of International and European Law* 1–19 at 2.

[162] *Akayesu* (n 86) para. 697; *Prosecutor v. Kvocka* (Appeals Judgment) IT-98-30/1 (2 November 2001), para. 180.

[163] Oosterveld (n 79) 94.

[164] *Brima* (n 127) paras 713–714.

[165] Ibid., Doherty Dissent, para. 71.

[166] Ibid., para. 36.

wives' without a proper marriage ceremony in which a woman (or her family members) freely consented.[167] Assigned to a soldier who had the exclusive right to rape her, a forcibly married woman would have to work for him and satisfy his sexual desires in exchange for 'protection' against assaults by other rapists.[168] When women ceased to perform or when their husbands got tired of them, they once again became the prey of the other soldiers. Doherty distinguished forced marriage from sexual slavery, noting that 'unmarried' women were held as sex slaves—fair game for every soldier and gang rape—while forced marriage—'the imposition, by threat or physical force arising from the perpetrator's words or other conduct, of a forced conjugal association by the perpetrator over the victim'[169]—did not require abduction, enslavement, or rape.[170] Drawing on Doherty's analysis, the *Brima* Appeals Chamber reversed the Decision. It rightly considered that forced marriage was a separate offence, meriting adjudication under 'other inhumane acts.' The Appeals Chamber defined forced marriage as 'a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person] by force, threat of force, or coercion to serve as conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.'[171]

In the Decision on the confirmation of charges against Dominic Ongwen, the ICC confirmed the SCSL's definition of forced marriage.[172] The Court considered two elements in distinguishing forced marriage from sexual slavery. It argued that, 'unlike sexual slavery, forced marriage implied a relationship of exclusivity between the "husband" and "wife," which could lead to disciplinary consequences.'[173] The second element is that forced marriage violates the victim's right to 'consensually marry and establish a family.'[174] The Extraordinary Chamber in the Courts of Cambodia (ECCC) entered a conviction for forced marriage as a crime against humanity in 2018 for a Khmer Rouge policy under which thousands of men and women were forcibly married.[175] Forced marriage is not limited to sexual acts and is usually more

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[167] Ibid., para. 50.
[168] Ibid., para. 49.
[169] Ibid., para. 53.
[170] Ibid., para. 70.
[171] *Prosecutor v. Brima et al.* (Appeals Judgment) SCSL-2004-16-A (22 February 2008) (*Brima Appeal*), para. 196.
[172] *Prosecutor v. Ongwen* (Decision on the Confirmation of the Charges) ICC-02/04-01/15 (23 March 2016).
[173] Ibid., para. 93.
[174] Ibid., para. 94.
[175] ECCC, 002/19-09-2007/ECCC/TC (16 November 2018).

long-term than sexual slavery.[176] Unfortunately, it can only be adjudicated indirectly as other inhumane acts. Yet, this case-law evidences the existence of first approaches to forced marriage as a violation, and presents the basis for conceptualizing forced marriage, such as the coercion of women and girls into marriage by Boko Haram, as an act of femicide.

Persecution based on gender

At a first glance, persecution based on gender—'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity' under the Rome Statute[177]—appears similar to femicide. As a sub-method in crimes against humanity, 'persecution based on gender' recognizes acts of femicide in indirect terms, causing gendered violence to become disguised if not invisible. Crimes can only amount to persecution provided that the acts constitute severe deprivation of fundamental rights.[178] The commission of persecutory acts under the Rome Statute, unlike the ICTY and ICTR Statutes, must be connected with an underlying act listed in Article 7(1)(a)–(k) as a crime against humanity, or other crimes within the ICC's jurisdiction.[179] This rather opaque, untested connection criterion restricts the use of persecutory methods under the Rome Statute.[180]

As an underlying act of a crime against humanity, persecution is limited to individuals. Although Article 7(2)(g) Rome Statute identifies persecution against 'any identifiable group or collectivity—seemingly suggesting that, akin to the crime of genocide, groups must be targeted—the EoC clarifies that, rather than groups, individuals are targeted 'by reason of the identity of the group or collectivity.'[181] The purpose of persecution is to alienate individuals from a society 'in which they live alongside the perpetrators, or eventually from humanity itself,' not to destroy a protected group, as is the case in genocide.[182] Hence, persecution provisions protect minority populations from discriminatory policies and practices.[183] The collective violation of women's

[176] See Kerr (n 161) 9.
[177] Art. 7(2)(g) Rome Statute.
[178] Caroline Fournet and Clotilde Pégorier, '"Only One Step Away from Genocide:" The Crime of Persecution in International Criminal Law' (2010) 10(5) *International Criminal Law Review* 713–738 at 727.
[179] Art. 7(1)(h)(4) Rome Statute.
[180] See Chertoff (n 4) 1050.
[181] Arts 7(h)(2) and 10 ICC EoC. See also Schabas (n 7) 197.
[182] *Prosecutor v. Kupreskic* (Appeals Judgment) IT-95-16-T (14 January 2000), para. 634.
[183] Schabas (n 7) 194.

rights in femicide could only partially be covered under persecution based on gender.[184]

Finally, the term gender as used in the Rome Statute mirrors concerns related to 'gender groups' discussed in Chapter 4. Irrefutably, ICL has taken a leap forward by officially recognizing gender as grounds for persecution as a crime against humanity.[185] The 1996 International Law Commission Draft Code of Crimes against the Peace and Security of Mankind did not yet recognize gender as grounds for persecution[186] but the ad hoc tribunals had already included sexual violence as persecutory acts based on ethnicity.[187] Even though the explicit inclusion of gender as grounds for persecution in Article 7(h) Rome Statute is an important step,[188] the ICC has not yet entered a conviction for persecution based on gender. Under the Rome Statute, gender is constructed restrictively to refer to 'the two sexes, male and female, within the context of society.'[189] This narrow concept unnecessarily limits the scope of the term and it will hardly cover the social constructions and inequalities in femicide.[190]

CONCLUDING REMARKS

Crimes against humanity is the most advanced ICL category in terms of recognizing gender-based harm. Although the Nuremberg Charter does not mention rape, the ad hoc Statutes do so. Most progressively, the Rome Statute not only includes rape, but also covers sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence as forms of crimes against humanity.[191] Besides these acts, some of which are congruent with the acts in femicide, the widespread element of the crime is

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[184] See Meyersfeld (n 36) 123–134.

[185] Luis Moreno-Ocampo, 'The Place of Sexual Violence in the Strategy of the ICC Prosecutor' in Anne-Marie De Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2012) 152.

[186] Art. 18(e) ILC Draft Code of Crimes against the Peace and Security of Mankind.

[187] *Prosecutor v. Sainovic* (Appeals Judgment) IT-05-87 (23 January 2014), paras 579, 580–599, 600 and 1552.

[188] Both the Nuremberg and the Tokyo Charters recognized persecution based on 'political, racial, or religious grounds' as a crime against humanity. Ad hoc tribunals included provisions prohibiting persecution for 'political, racial, or religious' grounds. Art. 6(c) IMT Charter; Art. II(1)(c) Control Council Law No 10; Art. 5(c) Tokyo Charter; Art. 3(h) ICTR Statute; Art. 5(h) ICTY Statute; Art. 2(h).

[189] Arts 7(2)(g) and 7(3) Rome Statute.

[190] Oosterveld (n 79) 82.

[191] Art. 7(1)(g) Rome Statute. See also Claus Kress, 'The Crime of Genocide Under International Law' in Antonio Cassese et al. (eds), *International Criminal Law, Critical Concepts in Law* (Routledge 2015) 162–201.

also useful to understand femicide. As illustrated with the abduction of schoolgirls by Boko Haram, femicide occurs in a time and space comparable to the 'widespread' element. Another related element is the aspect of impunity as acts of femicide are rarely investigated.

Certain aspects of crimes against humanity are nevertheless lacking in terms of encompassing the scope of harm inherent in femicide. Some gendered acts potentially constituting femicide—like forced marriage, sex-selective killings, dowry-related murders, psychological harm, and economic harm—are absent from the crime against humanity provision.[192] Furthermore, the attack in crimes against humanity does not envision an effect beyond the conduct effectuated through individual underlying acts. The attack is an end in and of itself; unlike the case for genocide, the attack does not need to pursue a larger goal of physically destroying a specific population group. As such, the attack in crimes against humanity merely partially encapsulates the aim of femicide. The larger aim of femicide is to subordinate women and girls, thereby creating an effect beyond maltreating the civilian population, such as the message that she is an object to be abused, sold, and potentially killed. In addition to objectifying her, this treatment instils fear in other women and girls whom the State has left at the mercy of perpetrators.

The second reason why crimes against humanity is an inappropriate model for the construction of femicide is that its target is the civilian population. As seen in Chapter 1, women and girls are part of the civilian population in most armed conflicts. However, from a feminist perspective, the notion of civilians is not specific enough because it does not highlight that femicide occurs against *women and girls*. As women's gender plays a fundamental role in femicide, this aspect should be recognized, as is discussed in Chapter 4.

[192] Art. 7(1)(g) Rome Statute.

4. Femicide: Genocide by another name?

INTRODUCTION

As the 'crime of crimes,' the crime of genocide denotes the most severe instances of collective human suffering, aimed at the extermination of different groups.[1] To fulfil the promise of never again, the international community has pledged to cooperate in the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).[2] Article 2 Genocide Convention defines the term genocide as 'any act […] committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.' Such acts include killing, causing serious bodily and mental harm, deliberately inflicting certain conditions of life, imposing measures to prevent birth, or forcibly removing children.[3] This definition is enshrined verbatim in the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) Statutes. The extermination of six million Jews by the Nazi regime (1933–1945) in the Holocaust and around 800,000 Tutsi over the course of three months (1994) in Rwanda, and the executions of 8,000 men and boys in Srebrenica (1995) in Bosnia and Herzegovina have left tragic marks on the conscience of mankind. While the international community qualifies the persecution and extermination of human groups as genocide, the specific fate of women and girls in similar contexts has received little attention.

Genocidal atrocities against female groups have been overlooked for too long. They merit examination as potential crimes of genocide and may benefit from the recognition as severe acts attached to the term. 300,000 Peruvian Quechua women and girls were forcibly sterilized under unsafe conditions,

[1] Claus Kress, 'The Crime of Genocide Under International Law' in Antonio Cassese et al. (eds), *International Criminal Law, Critical Concepts in Law* (Routledge 2015) 124.

[2] Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

[3] Art. 2(a)(e) Genocide Convention.

causing pain and physical ailments for the rest of their lives,[4] and women and girls are routinely subjected to torture and mutilation by being strangled, raped, and/or skinned alive in Honduras.[5] And yet, crimes against women are characterized by impunity.

Considering these gloomy outlooks for women's lives, some scholars and politicians—such as Dworkin, Segato, and Hirsi Ali—contend that femicide (or 'gynocide') is a form of genocide targeting *women as women*, based on their gender alone.[6] Other scholars, such as Mesutti and Mariño, are skeptical about using the genocide framework in cases of femicide.[7] In particular, Mesutti argues that femicide does not fit the legal requirements of genocide given that the female social group cannot constitute a group targeted for destruction, and that women in femicide are attacked rather than destroyed by virtue of their gender.[8]

Femicide is not defined in international criminal law (ICL), let alone recognized as a sub-form or method of genocide. Could crimes against women on account of their gender rise to the level of genocide? This chapter examines whether femicide is separate from genocide and should be defined in its own right, or whether it is a sub-form of genocide. This chapter shows that the current genocide definition fails to fully cover mass atrocities committed

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[4] The Quipu Project, https://interactive.quipu-project.com/#/en/quipu/intro. As late as 2017, indigenous women in the Canadian Saskatoon region reported being coerced or forced into sterilization. Yvonne Boyer and Judith Bartlett, 'Tubal Ligation in the Saskatoon Health Region: The Lived Experience of Aboriginal Women' *Sakotaan Health Region* (22 July 2017), www.saskatoonhealthregion.ca/DocumentsInternal/Tubal_Ligation_intheSaskatoonHealthRegion_the_Lived_Experience_of_Aboriginal_Women_BoyerandBartlett_July_22_2017.pdf. All online sources were accessed 30 October 2021.

[5] Sonia Nazario, 'Someone Is Always Trying to Kill You' *New York Times* (5 April 2019), www.nytimes.com/interactive/2019/04/05/opinion/honduras-women-murders.html?smid=pl-share.

[6] Andrea Dworkin, *Woman Hating* (Penguin Books 1974) 93. See also Segato, who considers women as 'genus,' advancing the term 'femigenocide' to categorize feminicide in international law. Rita Laura Segato, *La Guerra Contra las Mujeres* (Cofás 2016) 149. See Warren's gender-neutral approach. Mary Anne Warren, *Gendercide, The Implications of Sex Selection* (Rowman & Allanheld Publishers 1985). See also Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law: Past, Present, and Future* (Brill Nijhoff 2011) 131.

[7] Ana Messuti, 'La Dimension Jurídica Internacional del Feminicidio' in Graciela Atencio (ed), *Feminicidio, el Asesinato de Mujeres por ser Mujeres* (Catarata 2015) 48–49 and 56. Mariño considers that, constituting 'half of humanity,' women and girls are too extensive of a group to form a protected group. Fernando Mariño, 'Una Reflexión sobre la posible Configuración del Crimen de Feminicidio' in Fernando Mariño et al. (eds), *Feminicidio, El Fin de la Impunidad* (Tirant lo Blanche 2012) 113.

[8] Messuti (n 7) 56.

against women and girls. The crime of genocide lacks specificity as it only indirectly comprises sexual violence by way of interpretation. The crime of genocide also limits its protection to 'national, ethnic, religious, and racial groups,' classifications which do not cover gender-based attacks on women. In this sense, the crime of genocide requires reform. Yet, through the expansion of the four protected groups, attacks on female social groups would still not be adequately addressed as the crime of genocide aims at the physical extermination of groups. This chapter explains the nuance in the concept of femicide, i.e., the social destruction of women, which serves to keep them in their place, rather than the physical destruction of an identified group. It shows that some elements of the crime of genocide may inform the human rights' concept of femicide. I recognize the limitations to suggesting a change to the genocide framework, considering the high threshold required and its political connotation.[9]

DEFINING GENOCIDE IN INTERNATIONAL LAW

The crime of genocide concerns the survival of entire groups, and its history suggests that it may be open to protecting human groups such as those constituted by women and girls. Lemkin coined the term 'genocide'—'geno' meaning race or tribe and 'cide' meaning killing—in 1944.[10] Although its semantics imply that the crime is only applicable to killings of racial and national groups, Lemkin conceived of the crime of genocide in much broader terms. Lemkin described Nazi Germany's crimes as an attack against civilizations and a 'war against peoples.'[11] Although Lemkin used national groups as a principal example—mentioning racial, religious, and ethnic groups as key contributors to humanity—he was more interested in the groups' correlation and contribution to a 'human cosmos' than in defining the protected groups. He viewed groups as socially constructed 'in the minds of people' and envisioned broad protection from state-sponsored persecution for many groups.[12] The transformation of a nation's societal structures and subsequent imposition of the oppressor's structure was at stake in Lemkin's definition. Accordingly, he saw the annihilation of a group in disintegrating its social and political

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[9] Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (Cambridge University Press 2014) 274.

[10] Raphael Lemkin, *Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposals for Redress* (Rumford Press 1944) 79.

[11] Ibid., 81.

[12] Douglas Irvin-Erickson, 'Genocide, the "Family of Mind" and the Romantic Signature of Raphael Lemkin' (2013) 15(3) *Journal of Genocide Research* 273–296 at 279.

fabric and imposing the oppressor's culture on the group. Therefore, while extermination could be carried out through killings, it could also occur through other means more present in femicide.[13]

The abhorrent Nazi atrocities and occupation set out in Lemkin's *Axis Rule in Occupied Europe*, resonate in current understandings of genocide.[14] While closely associated with the Holocaust, the crime of genocide is absent from the International Military Tribunal Charter; World War II atrocities were adjudicated as 'crimes against humanity.'[15] Lemkin lobbied for the recognition of the crime of genocide until the Genocide Convention was adopted on 9 December 1948. Article 2 Genocide Convention defined the crime of genocide as 'any of the following acts committed with the intent to destroy, in whole or in part, national, ethnic, racial or religious groups, as such,'[16] including various methods of genocide.[17] Through these underlying acts, the requisite intent to destroy and the identification of the four protected groups, the crime of genocide is also distinguishable from crimes against humanity. In contrast to the scope of crimes against humanity, which has evolved, the scope of the crime of genocide remains stagnant: the latter was replicated verbatim in international criminal tribunals' statutes.[18] The crime of genocide has not grown to reflect the harms of today or been adapted to current developments in international law, counteracting Lemkin's intention to 'denote an old practice in its modern development.'[19]

Since the 1990s, international tribunals have taken some steps towards recognizing rape and sexual violence as types of violence which can bring about the destruction of protected groups.[20] Through rape, entire communities can fall apart, as women who have been raped may no longer wish to procreate or emotionally contribute to their communities. However, most harm in femicide entails continuous measures or an arduous life, female genital mutilation

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[13] Ibid. See also UNGA Res 96(1) (11 December 1946) UN Doc A/RES 96 (1) [hereinafter UNGA Resolution on Genocide.

[14] Lemkin (n 10).

[15] Antonio Cassese et al. (eds), *Cassese's International Criminal Law*, 3rd edition (Oxford University Press 2013) 109.

[16] Art. 2 Genocide Convention. See Art. 6 Statute of the International Criminal Court (Rome Statute) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544. See also Lars Berster, 'Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary' in Christian J. Tams, Lars Berster and Björn Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Hart Publishing 2014) 279–283.

[17] Art. 6 Rome Statute; Art. 4(2) ICTY Statute; Art. 2(2) ICTR Statute.

[18] Art. 2 ICTR Statute; Art. 4 ICTY Statute; Art. 6 Rome Statute.

[19] Lemkin (n 10) 79. See also Cassese (n 15) 110.

[20] Hagay-Frey (n 6) 128.

(FGM), and forced marriage, inflicting injuries which may cause long-term health complications and/or eventual death.[21] Against this backdrop, international tribunals continue to struggle to fit crimes affecting women as women into the narrow genocide definition.

'Traditional' Methods of Genocide

The methods of genocide committed against, and intended to destroy, a protected group are not all equal.[22] Being female is a significant factor which influences the manner of ill-treatment a woman or girl suffers in a situation of genocide, where the perpetrator attempts to destroy the group. Archetypally, women and girls are attacked through rape, sexual enslavement, or other slow-death measures.[23] Perpetrators of genocide tend to eliminate civilian men and boys by killing them. While killings are listed as the first measure, rape and other harm are not even mentioned.

Killing

The act of 'killing members of a group' is seen as emblematic of the violence committed during a genocide; it is no coincidence that this method features first in the definition of genocide offered by the Genocide Convention.[24] In the early phase of genocide, perpetrators usually execute the men and boys of the protected group.[25] The Convention covers immediate killings of men and boys, but falls short of encompassing slow-death measures against women

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[21] Susan Deller Ross, *Women's Human Rights: The International and Comparative Law Casebook* (University of Pennsylvania Press 2013) 455–501; James Burnham Sedgwick, 'Memory on Trial: Constructing and Contesting the "Rape of Nanking" at the International Military Tribunal for the Far East 1946–1948' (2009) 43(5) *Modern Asian Studies* 1229–1254. Testimony of former 'comfort woman' Chong Ok Sun. Omar Swartz, *Transformative Communication Studies, Culture, Hierarchy and the Human Condition* (Troubadour Publishing 2008) 232–233; Hagay-Frey (n 6) 128.

[22] Cassese (n 15) 110.

[23] Elisa von Joeden-Forgey, 'Gender and the Future of Genocide Studies and Prevention' in Amy E. Randall (ed), *Genocide and Gender in the Twentieth Century* (Bloomsbury 2015) 299; Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) 48.

[24] Michelle Jarvis and Elena Martin Salgado, 'Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice' in Anne-Marie De Brouwer et al. (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2012) 118.

[25] Adam Jones, *Gendercide and Genocide* (Vanderbilt University Press 2004) 3.

and girls, where women and girls are kept alive for sexual abuse.[26] As Von Joeden-Forgey observes, 'the subtle argument sometimes seems to be that (civilian) men suffer the worst fate because they are so often targeted for direct killing.'[27] However, women and girls may be killed through slow-death measures as time passes, sometimes years after the genocide.[28] For example, Hutu militia brutally raped women by introducing sharp objects, such as broken glass, into their vaginas. Even if this treatment did not kill all of them, it severely physically and mentally injured the survivors for the rest of their lives.[29] At other times, soldiers raped women to inflict them with HIV, an ultimately lethal disease which women would transmit to their husbands and the community at large.[30] Of course, slow-death measures, such as the impalement of the genitals of a young Tutsi girl who died of her injuries, can constitute 'killing members of a group.'[31] However, sexual violence which leaves women alive may not be covered by 'killing members of a group' at the time of prosecution. Since complications may happen later in life, it is thus important that slow-death violence frequently targeting women and girls is covered by other methods of genocide. Equally important, some women and girls' resilience and resistance contribute to their survival, an aspect which must be acknowledged in methods of femicide.[32]

Causing serious bodily or mental harm

Even though the act of 'causing serious bodily or mental harm' is the paradigmatic method used to adjudicate rape as genocide, on the face of it, it does not include sexual violence. Before 1998, no international tribunal had envisioned or interpreted sexual violence as a form of genocide. The many rapes of Jewish women and girls in the Holocaust were largely ignored, possibly because Nazi law prohibited sexual intercourse between those of Jewish origin and so-called Arians. Testimonies by survivors suggest that sexual violence against and

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[26] Helen Fein, 'Genocide and Gender: The Uses of Women and Group Destiny' (1999) 1(1) *Journal of Genocide Research* 43–63 at 51.

[27] Von Joeden-Forgey (n 23) 299.

[28] Ibid., 303–304.

[29] De Brouwer (n 23) 50.

[30] International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T (2 September 1998), para. 731; *Prosecutor v. Krstic* (Judgment) ICTY-98-33 (2 August 2001), para. 513; UN Economic and Social Council, Report on the Situation of Human Rights in Rwanda (29 January 1996) UN Doc E/CN.4/1996/68, para. 20.

[31] See *Prosecutor v. Gacumbitsi* (Judgment) ICTR-2001-64-T (17 June 2004), paras 261 and 288.

[32] Susan Harris Rimmer, *Gender and Transitional Justice, The Women of East Timor* (Routledge 2010) 98.

forced prostitution of female concentration camp internees was much more common than commonly assumed.[33]

In *Akayesu,* the ICTR interpreted 'causing serious bodily and mental harm' to include rape as a genocidal act if perpetrated with the intent to destroy a protected group. While Akayesu did not rape the victims himself, he was a local mayor with considerable influence over his community who facilitated and encouraged the rape of Tutsi women and girls.[34] The initial indictment included charges of rape as a crime against humanity and a war crime, but no charges on sexual violence as a means of genocide. Only when witnesses started testifying about rape perpetrated by Hutu militias during the Rwandan genocide, did the only female judge on the bench, Navanteheem Pillay, urge the Prosecutor to amend the indictment to include rape in the genocide charges.[35]

The ICTR held that the repeated rapes of Tutsi women, often in public and by several different perpetrators, constituted the prohibited genocidal act of serious bodily and mental harm.[36] One rape survivor witnessed her mother begging one of the rapists to 'kill her daughters rather than raping them in front of her,'[37] to which the perpetrator replied that 'the principle was to make them suffer.'[38] The Trial Chamber concluded that the suffering inflicted on women was 'one of the worst ways of inflicting harm' considering sexual violence causes bodily *and* mental harm, noting that such harm went beyond individual harm and targeted the destruction of the Tutsi group.[39] Akayesu's conviction for rape as genocide was ground-breaking in recognizing harm to women and girls as genocide.[40]

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[33] Rochelle Saidel, *The Jewish Women of Ravensbrück Concentration Camp* (University of Wisconsin Press 2006) 213.

[34] *Akayesu* (n 30) para. 693.

[35] For discussions on Judge Pillay and other Judges' roles, see Kelly Askin, 'Prosecuting Wartime Rape and other Gender-Related Crimes under International Law, Extraordinary Advances, Enduring Obstacles' in Sari Kouvo and Zoe Pearson (eds) *Gender and International Law* (Routledge 2014) 196; Hagay-Frey (n 6) 97; Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press 2011) 105.

[36] *Akayesu* (n 30) para. 731.

[37] Ibid., paras 423 and 430.

[38] Ibid.

[39] Ibid., para. 731. See also Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law, a Feminist Analysis* (Juris Publishing 2000) 318.

[40] For other charges under 'serious bodily and mental harm,' see (rape of a girl by the accused) *Prosecutor v. Muhimana* (Judgment) ICTR-95-1B (28 April 2005), para. 513; (rape of girls before killing them) *Prosecutor v. Rutaganda* (Appeals Judgment) ICTR-96-3 (26 May 2003), paras 392 and 398.

Subsequent ICTR and ICTY case law endorsed the inclusion of rape as a form of genocide 'causing serious bodily and mental harm.'[41] For example, in *Prosecutor v. Krstic*, the ICTY held that 'inhuman treatment, torture, rape, sexual abuse and deportation' constitute 'serious mental and bodily harm.'[42] Moreover, the Tribunal found that serious bodily and mental harm 'results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life'[43] and involves injuries that 'go […] beyond temporary unhappiness, embarrassment or humiliation.'[44] The injury need not be 'permanent and irremediable' to amount to serious bodily and mental harm but it 'must be assessed on a case by case basis and with due regard for the particular circumstances.'[45] In *Prosecutor v. Gacumbitsi*, the ICTR recognized that the retaliatory rapes and sexual mutilation of eight women and girls, including one pregnant woman who had previously refused to marry a Hutu man, caused 'physical harm' to the members of the Tutsi group and constituted the actus reus of genocide.[46] This method of serious bodily and mental harm has become equated with rape instrumentalized for genocide.[47]

Despite this body of case law on sexual violence as genocidal acts, the drafters of the Rome Statute replicated the ad hoc tribunals' implicit language of 'causing serious bodily and mental harm,' missing the opportunity to include rape in the statutory language.[48] Fortunately it is included at least in the Elements of Crime (EoC), which state that '[serious bodily and mental harm] may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.'[49] This marginal recognition of rape and sexual violence as forms of genocide in the Rome Statute nevertheless underestimates and obscures harm inflicted on women,[50] enabling the prosecution to exercise discretion when bringing rape charges.[51]

The statutory definition of genocide is clear: rape is only a method of genocide when it is committed with the requisite intent to destroy a protected racial, religious, ethnic, or national group. However, as feminist legal scholars have

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41 E.g., *Prosecutor v. Furundžija,* IT-95-17/1 (10 December 1998), para. 172; *Prosecutor v. Musema (Appeals Judgment)* ICTR-96-13 (16 November 2001), para. 156; *Prosecutor v. Semanza*, ICTR-97-20 (15 May 2003) paras 320–321.

42 *Krstic* (n 30) para. 513.

43 Ibid., paras 486 and 513. See also *Akayesu* (n 30) para. 731.

44 *Krstic* (n 30) para. 513.

45 Ibid.

46 *Gacumbitsi* (n 31) paras 215, 224 and 292–293.

47 Jarvis and Salgado (n 24) 118.

48 See Art. 6(b) Rome Statute.

49 Art. 6, ICC EoC, fn. 3.

50 See also Charlesworth and Chinkin (n 39) 321.

51 See Hagay-Frey (n 6) 95.

argued, rape and sexual violence also attack women as women. MacKinnon considers that women in genocide are raped both as members of an ethnic group and based on their gender.[52] The paradigmatic rapes during the Rwandan genocide support MacKinnon's view, as the targeted women were almost exclusively of Tutsi ethnicity, while Hutu women were generally spared.[53] A case in point: when a Hutu man found out that he had 'mistakenly' raped a Hutu woman, believing her to be a Tutsi, he apologized to her.[54] This suggests that women were targeted because they belonged to the Tutsi ethnicity.[55] In addition to the destruction due to their ethnicity, certain instances of violence demonstrate dominance over, contempt for and intent to terrorize women.[56] In one incident, 'the accused, on a public road, ordered militia to undress the body of a Tutsi woman who had just been shot dead, to fetch and sharpen a piece of wood, which he then instructed them to insert into her genitalia. […] The body of the woman, with the piece of wood protruding from it, was left on the roadside for some three days thereafter.'[57] In line with MacKinnon's proposition, the ICTR thus exposed the contempt perpetrators held for, and their intent to harm Tutsi women based on their gender as well as their Tutsi 'ethnicity.'

Meanwhile, Copelon stresses that harm in genocide is mainly gendered. She notes that genocidal rape (aimed at ethnic destruction) is mistakenly seen as rating hierarchically higher than other typologies of rape, for example, 'rape […] for domination, terror, booty, or revenge in Bosnia and [rape in and outside armed conflict].'[58] Thus, she considers that gendered aspects of rape are at risk of being obfuscated by an overemphasis on ethnic rape in genocide.[59] Copelon emphasizes that 'torture and rape in conflict situations have too much in common with rape in the marital bedroom' and that peacetime and wartime rapes are therefore similar.[60]

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[52] Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2007) 5–16 and 187.

[53] Ibid.

[54] *Muhimana* (n 40) paras 517–518.

[55] Arsiné Grigoryan, 'Severing the Next Generation: Sexual Violence in Genocide' (2015) 3(2) *Journal of Legal Issues* 41–63; *Akayesu* (n 30) 732.

[56] See MacKinnon (n 52) 5–16 and 187.

[57] *Prosecutor v. Niyitegeka* (Judgment) ICTR-96-14-T (16 May 2003), para. 316.

[58] Rhonda Copelon, 'Surfacing Gender: Re-Engraving Crimes Against Women in International Humanitarian Law' (1994) 5(2) *Hastings Women's Law Journal* 243–266 at 259.

[59] Ibid., 246.

[60] Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217–240 at 239.

The exposure of gendered harm to women is an objective of conceptualizing femicide. While Copelon rightly considers that no hierarchy of severity should be attributed on the basis of where the rape occurs, MacKinnon persuasively shows that the persecution of women and girls is complexly influenced by various factors, which can help us define the targeted group in femicide. I consider that (1) gender is the predominant factor in femicide, with the caveat that other factors, such as nationality, ethnicity, religion and race, influence the violence experienced by women. For example, irrespective of their age and socio-economic background, women and girls have been attacked in Ciudad Juarez in Mexico. At the same time, immigration status, ethnicity, religion, and other criteria have effect on the likelihood of women being attacked and the kind of violence to which they are subjected.[61] However, I also consider that (2) in femicide, dominance over women is so pronounced that it forms part of the group's ideology, even where ethnicity and other factors play a crucial role in how women and girls are attacked.[62] Although Yazidi's beliefs lie at the heart of their persecution, the female Yazidi population is targeted in distinctive ways: They are captured, inventoried, priced, sold, and sexually enslaved at Islamic State in Iraq and Al-Sham (ISIS)' slave markets.[63] An ISIS pamphlet accentuates ISIS' ideology justifying the use of female Yazidi as sexual slaves.[64]

Inflicting adverse life conditions

Another method by which the destruction of a protected group can be achieved, is the steady extermination of a group through the imposition of adverse life conditions.[65] Through sexual violence and rape, forced marriage, enforced abortion, and sexual slavery, perpetrators can inflict life conditions which bring about a group's physical destruction.[66] This method, although unspecific to women, could in principle capture the slow-death measures imposed on women and girls, and their community. Having been raped, a girl may become an outcast and deemed unfit for marriage, bringing shame to her family, which

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[61] See Rosa Fregoso and Cynthia Bejarano, 'Introduction: A Cartography of Femicide in the Americas' in Rosa-Linda Fregoso and Cynthia Bejarano (eds), *Terrorizing Women, Feminicide in the Americas* (Duke University Press 2010) 12.

[62] See Messuti (n 7) 56.

[63] Valeria Cetorelli and Sareta Ashraph, 'Counting Mass Atrocity: A Demographic Documentation of ISIS's Attack on the Yazidi Village of Kocho' *LSE Blogs* (5 July 2019), https://blogs.lse.ac.uk/mec/2019/07/05/counting-mass-atrocity-a-demographic-documentation-of-isiss-attack-on-the-yazidi-village-of-kocho/.

[64] See Mah-Rukh Ali, 'ISIS and Propaganda: How ISIS Exploits Women', *Reuters Institute Fellowship Paper* (University of Oxford 2015) 19.

[65] *Akayesu* (n 30) paras 505–506. See also Kress (n 1) 176.

[66] Deller Ross (n 21) 407.

may destroy her relationship with the larger community, leading to the group's gradual physical destruction.[67] Physical injuries leading to infertility and inability to give birth along with the infection with diseases, such as HIV, concern another facet of such slow-death measures.[68] While this method of genocide recognizes women's plight, it remains dead letter because no court has applied it. Had it been stronger worded, this method may have been conducive to the recognition of acts of femicide.

Imposing measures to prevent birth

This method can be understood as attacks on a group's members' reproductive function, which limits the group's capacity to reproduce and sustain itself.[69] Such examples include forced sterilization, forced birth control, forced pregnancy, forced abortion, or injury through rape.[70] In the context of the holocaust, women and girls were subjected to malnourishment and living conditions in concentration camps, often causing their menstruations to stop, which had long-term effects on their reproductive capacity in some instances.[71] Survivors from Ravensbrück concentration camp have testified to having been forced to abort in the final stages of pregnancy.[72] All pregnancies up to seven months had to be terminated in the Terezin Ghetto, Adolf Eichmann, one of the organizers of the holocaust, being held criminally responsible for his role in imposing measures to prevent births by an Israeli court.[73]

Birth can also be prevented through psychological and physical means. Rape can have a 'chilling effect on the normative relations between a man and a woman as the victims may be traumatized in such a way that they no longer wish to procreate.'[74] A physical way to prevent births is through the appropriation of women and girl's bodies. For example, Bosnian Muslim women were raped until pregnant, which physically prevented them from giving birth to their own ethnic group.[75]

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[67] *Akayesu* (n 30) para. 731; *Krstic* (n 30) para. 513.

[68] Catharine MacKinnon, 'Rape, Genocide and Women's Human Rights' (1994) 17 *Harvard Women's Law Journal* 5–16 at 9; *Akayesu* (n 30) para. 508.

[69] Fein (n 26) 43.

[70] See Jonathan Short, 'Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court' (2003) 8 *Michigan Journal of Race & Law* 503–527 at 510. *Akayesu* (n 30) para. 508. See for forced sterilization in a concentration camp, Saidel (n 33) 211.

[71] Saidel (n 33) 210.

[72] Ibid., 211.

[73] *Attorney-General of Israel v. Adolf Eichmann*, Judgement (District Court of Jerusalem) (1968) 36 ILR 5, para. 244.

[74] Short (n 70) 509.

[75] *Akayesu* (n 30) para. 507; Short (n 70) 510–514.

Forcibly transferring children

The act of 'forcibly transferring children' to another group is a remnant and sub-form of cultural genocide.[76] Through the removal of children from the targeted group and their transfer to another group, the children's original culture and language are susceptible to disappearance, while their physical existence remains unaffected.[77] Such a transfer of children effectively destroys the social existence and cultural identity of a protected group.[78] For example, the abduction and (sexual) enslavement of United States Native American children as 'apprentices' in American households, practiced until the 1880s, led to the physical, mental, and economic destruction of many Native tribes.[79]

The psychological pressure to give up children may also be covered under this provision. Footnote 5 of the ICC's Elements of Crimes notes that '[t]he term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.'[80] This interpretation could imply the trafficking of girls as sex slaves. Finally, as de Brouwer suggests, the forcible transfer of children is theoretically possible through the rape of women who bear children belonging to the ethnic group of the perpetrator,[81] or the abduction of girls as child soldiers who are incorporated into the perpetrator's group.[82] This method signals that the 'destruction' in genocide is not always a bio-physical one, and sometimes resembles the social subordination of groups in femicide.

Remarks

That sexual violence and rape amount to 'serious bodily and mental harm,' and can constitute forms of genocide, is now well established.[83] However, vague statutory language may occasion the prosecution not to conduct a proper investigation or forgo a charge for rape crimes as genocidal methods. As Chinkin pertinently indicates, '[ad hoc tribunals have] shown considerable sensitivity to the situation of women, but they have been constrained by the language of

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[76] Cassese (n 15) 116–117.
[77] Ibid., 117.
[78] Ibid.
[79] Lindsey Brendan, *Murder State: California's Native American Genocide 1846–1873* (University of Nebraska Press 2012) 193.
[80] ICC EoC, fn. 5. See also *Akayesu* (n 30) para. 509; De Brouwer, *Supranational Criminal Prosecution* (n 23) 59.
[81] De Brouwer. ibid., 60.
[82] Ibid.
[83] Grigoryan (n 55) 63 and 50; Hagay-Frey (n 6) 131.

their statutes.'[84] Forced marriage and sexual slavery have not yet been charged as forms of genocide; arguably present, these crimes could have been adjudicated as methods of genocide akin to rape by the ICTR.[85] De Brouwer pointedly suggests amending the Rome Statute to list 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' as genocidal methods.[86] The absence of these acts from international criminal tribunals' statutes undermines the perception of the criminal nature of crimes against women, as well as the moral condemnation and deterrent effect attached to them.[87] In their current form, these methods of genocide are not adequate to reflect the experience of women and girls in femicide.

PROTECTED GENDER GROUPS?

The Genocide Convention protects only 'national, ethnical, racial or religious groups, as such;' its text does not list gendered groups. The Genocide Convention should be expanded to cover gendered groups, including LGBT2Q+ groups, thereby responding to present-day reality and societal contexts. I make an argument for doing so in the context of the crime of genocide, while cautioning that gendercide would only constitute another neutral term which does not serve women's interests. Three provisos make expansion of the genocide definition a delicate concern. First, the scope of genocide has remained unchanged from its inception and is therefore resistant to change.[88] Second, known as 'the crime of crimes,' the crime of genocide is placed above the level of crimes against humanity. Consequently, its group-destructive violence must reach the highest threshold.[89] The third limitation relates to the conflation of the terms gender (referring to social constructs) and sex (referring to biological differences) in Article 7(3) Rome Statute, which defines gender as 'the two sexes, male and female, within the context of society,' framing

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[84] Charlesworth and Chinkin (n 39) 321.

[85] See for discussions of forced marriage, *Gacumbitsi* (n 31) paras 224 and 292–293.

[86] Daniela De Vito, *Rape, Torture and Genocide, Some Theoretical Implications* (Nova Science Publishers 2011) 106–107; De Brouwer (n 23) 80.

[87] See also De Brouwer, 'Supranational Criminal Prosecution of Sexual Violence,' in Jackie Jones et al. (eds.), *Gender, Sexualities, and the Law* (Routledge 2011) 204–205.

[88] The crime of genocide codified customary international law, making States reluctant to alter its conception. Grover (n 9) 274.

[89] Ibid.

gender as a biological issue, rather than a social construction.[90] This ICL definition has been subject to criticism for arguably determining who belongs to the protected gender group.[91] The term gender should be broadly construed to include persecution based on sexual orientation, gender identity, and similar gendered groups for expansion to be effective.

Current Scope

To date, the treaty text expressly protects 'national, ethnic, racial, and religious groups' from extermination, protection which ICL scholars consider to be limited to these four groups.[92] Objectively defined, a national group is composed of individuals who 'share a legal bond based on common citizenship'—women and girls may in some societies be legally excluded from citizenship.[93] The 'racial' group's characterization 'based on the hereditary physical traits' is problematic; taken analogously, it would concern women and girls' biological sex, an excessively restrictive notion.[94] The identification of groups as racial was the basis for Nazi Germany's persecution of peoples unrelated to the Germans—such as the Poles, Slovenes, and Serbs—[95] and the extermination of peoples—such as the Jewish and Roma people—deemed racially inferior to Aryans—such as the Germans, Dutch, Norwegians, Flemings, and Luxembourgers.[96] By contrast, an interpretation of ethnic groups as generally

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[90] Valerie Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?' (2005) 18 *Harvard Human Rights Journal* 56–82 at 71.

[91] See Valerie Oosterveld, 'Gender-based Crimes Against Humanity' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011) 96.

[92] Werle contends that the Genocide Convention's history does not suggest that other groups should be encompassed, since the crime was limited to the four stable groups. Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (Oxford University Press 2014) 301–302; Douglas Guilfoyle, *International Criminal Law* (Oxford University Press 2016) 274; Cassese (n 15) 120. See also *Krstic* (n 30) paras 6–8; *Prosecutor v. Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir)* ICC-02/05-01/09 (4 March 2009), paras 134–137.

[93] *Akayesu* (n 30) para. 510, referring to *Liechtenstein v. Guatemala (Nottebohm)* (Judgment) ICJ Reports 1955, para. 22.

[94] See *Akayesu* (n 30) 514.

[95] Lemkin (n 10) 81–82.

[96] Arguably, the encouragement of Nazis to procreate with Dutch and Norwegian women to expand the German race within States under German control constitutes rape as genocide. Lemkin (n 10) 86–87.

consisting of a collection of people who share the same culture and language,[97] could serve as a model for understanding the groups targeted in femicide, as 'ethnicity is by [its] very nature [a] social construct[].'[98] This indicates that social groups such as those characterized by their gender in femicide, could be protected under ICL. Finally, a religious group shares a 'denomination or mode of worship [or] common beliefs,' which cannot be comparable to a gender group.[99] These definitions are tools to objectively determine membership in minority groups.[100] Obviously, protection is awarded to women and girls solely insofar they belong to one of the four protected groups.

Moreover, membership in an objectively defined protected national, ethnic, religious, or racial group is also determined by the perpetrators' subjective view. Only if perpetrators perceive persons as belonging to a protected group and, on the basis of this belief, target individuals and members of said group, they are responsible for the commission of acts of genocide. The subjective criterion covers genocidal acts based on discriminatory views against a segment of the population, such as individuals with a common heritage, and other national minorities which would more tenuously classify as a national, ethnic, religious, or racial group.[101] For example, perpetrators may perceive an individual of Christian faith to have a particular trait, such as their Jewish heritage, although it may not (or no longer) objectively exist. What constitutes a group in some cases may depend on the perpetrators' subjective perceptions vis-à-vis the groups they intend to destroy.[102] Transposing this reasoning to protected female groups means that, although an individual could self-identify as a member of a protected female group, the perpetrator must view the individual as a woman for her to be stigmatized and persecuted based on her membership to the protected group.[103] The perpetrator's subjective view must match one of the four protected groups to fall under the restrictive protection of the Genocide Convention.[104] The four protected groups insufficiently consider the perpetrators' imaginative criminal minds, which may include subjective misconceptions about a group which they intend to exterminate, beyond these

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[97] *Akayesu* (n 30) para. 513.

[98] UN International Commission of Inquiry, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 (25 January 2005), para. 499.

[99] Ibid.; Werle and Jessberger (n 92) 802.

[100] *Krstic* (n 30) para. 556.

[101] See *Gacumbitsi* (n 31) para. 254; *Krstic* (n 30) paras 559–560; Hagay-Frey (n 6) 130.

[102] Hagay-Frey, ibid.

[103] *Cf.* Guilfoyle (n 92) 275.

[104] Kress (n 1).

groups' objective classifications. With this in mind, I must examine to what extent the genocide definition can be broadened.

Expanding Protection

Some precedents signal that expansion of the genocide definition to recognize gender groups may be feasible.[105] The 1951 Refugee Convention relating to the Status of Refugees has been interpreted to allow asylum seekers to receive refugee status based on claims relating to gender persecution.[106] Even the Rome Statute offers protection from persecution based on gender, albeit as a crime against humanity.[107] At the domestic level, the Uruguayan criminal code expanded its anti-genocide legislation to include 'a group with its own identity based on reasons of gender, sexual orientation, cultural and/or social values, age, and disability or health.'[108] With these precedents in mind, I explore two avenues to expand protection of the crime of genocide. This endeavor should be understood as part of the efforts to make international crimes applicable to femicide. Obviously, caution is warranted when reinterpreting the crime of genocide, and the addressed stipulations to such an attempt must be kept in mind.

Applying the Vienna Convention on the Law of Treaties (VCLT), which governs the interpretation of treaties in international law, supplemented by practical feminist legal reasoning, the definition of genocide could cover groups which do not fall under the umbrella of national, ethnic, religious, or racial groups.[109] I use feminist practical legal reasoning to argue for the inclusion of gendered groups in the genocide framework, based on a changed

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[105] Hagay-Frey (n 6) 128.

[106] Art. 1(A)(2) Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954); UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Art. 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees Guidelines on gender-based persecution (7 May 2002) UN Doc HCR/GIP/02/01 [hereinafter UNHCR Guidelines].

[107] Art. 7(3) Rome Statute.

[108] Art. 16 Law No 18.026 (2006) de Cooperación con la Corte Penal Internacional en Materia de Lucha contra el Genocidio, los Crimenes de Guerra y de Lesa Humanidad [unofficial translation by the author].

[109] Another qualification must be addressed: Akande argues that the general rules of interpretation outlined in the VCTL are restricted with regard to international criminal law treaties by principles of criminal law, such as in dubio pro reo, according to which criminal conduct must be interpreted in favor of the accused. Dapo Akande, 'Treaty Interpretation, the VCLT and the ICC Statute: A Response to Kevin Jon Heller and Dov Jacobs' *EJIL: Talk!* (25 August 2013), www.ejiltalk.org/treaty-interpretation-the-vclt-and-the-icc-statute-a-response-to-kevin-jon-heller-dov-jacobs/.

socio-cultural context.[110] In doing so, I shed light on women's present interests and take account of their historic subordination.[111] With this method, I attempt to detect and be attentive to injustices which would not otherwise be revealed by considering factors like the history of a provision, and the legal and social contexts in which a rule is implemented.[112] Although the treaty text enumerates national, ethnic, religious, and racial entities as protected groups, the object and purpose of the Genocide Convention suggests that other groups may be protected. Considering the preparatory work and the circumstances of conclusion, the meaning of protected groups is at least unclear, if not absurd and unreasonable. Given the social context in the drafting phase, the drafters left out the issue of 'gender.' The protection of gendered groups under the Genocide Convention in todays' societal context appears justified.

As provided in Article 31 VCLT, treaties must be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' The treaty text expressly protects 'national, ethnic, racial, and religious groups' from extermination.[113] However, the object and purpose of the Genocide Convention principally supports the protection of gender groups. As the International Court of Justice (ICJ)'s Advisory Opinion suggests in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the object and purpose is to protect the 'very existence of certain human groups and […] to confirm and endorse the most elementary principles of morality.'[114] The Preamble confirms that 'genocide has inflicted great losses on humanity' and that international cooperation is required 'to liberate mankind from such an odious scourge.'[115] Even though the emphasis is placed on nations, the object and purpose are the protection of entities which characterize humankind.[116] That the protection of humanity is limited to only four groups appears rather absurd in terms of Article 32 VCLT. At the very least, considering the terms of the treaty, the four protected groups and the aim of protection seem inconsistent with each other.

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[110] Katharine Bartlett, 'Feminist Legal Methods' (1990) 104(4) *Harvard Law Review* 828–888 at 855.

[111] Ibid., 861–862.

[112] Ibid., 851–853.

[113] Guilfoyle (n 92) 274; Cassese (n 15) 120; Werle and Jessberger (n 92) 301–302; *Krstic* (n 30) paras 6–8.

[114] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951.

[115] Preamble Genocide Convention.

[116] Lemkin (n 10) 79.

According to Article 32 VCLT:

> [r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

An examination of the preparatory work reveals that an understanding of gendered groups meriting protection was inexistent in the historical context. The Nazi regime systematically persecuted homosexuals.[117] Once liberated from the concentration camps, their sexual orientation was still considered a crime. The persecution based on gendered grounds went unaddressed by the International Military Tribunal, and little concern was expressed for those persecuted based on their sexual orientation.[118] In this historical context, it is unsurprising that drafters of the Genocide Convention in 1948 were silent on questions of sex and gender, sexual orientation and gender identity.

However, the ICTR found that the drafters intended the list of protected groups to include other 'permanent and stable' groups.[119] The ICTR examined whether the Tutsi group could be classified as a protected group since the Tutsi are not ethnically distinct from the Hutu group. The Tutsi separation from the Hutu is based on socially ascribed differences introduced and reinforced by colonists who divided the two groups through the distribution of ethnicity cards.[120] As the Tutsi did not fit the legal umbrella of protected 'religious, racial, national, or ethnic' groups, the ICTR pondered 'whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention.'[121] Considering the drafters intended to exclude mobile political, cultural and economic unions, in which membership could change easily,[122] the ICTR found that 'the Tutsi did indeed constitute

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[117] Alycia Feindel, 'Reconciling Sexual Orientation: Creating a Definition of Genocide that includes Sexual Orientation' (2005) 13 *Michigan State Journal of International Law* 197–225 at 197.

[118] For further discussion, see ibid.

[119] Werle and Jessberger (n 92) 293.

[120] Angela Hefti and Laura Ausserladscheider Jonas, 'From Hate Speech to Incitement to Genocide: The Role of the Media in the Rwandan Genocide' (2020) 38 *Boston University International Law Journal* 2–37 at 5.

[121] *Akayesu* (n 30) paras 516 and 701–702.

[122] Ibid., para. 511; Cassese (n 15) 119.

a stable and permanent group and were identified as such by all.'[123] Subsequent ICTR and ICTY case law relied, even if not exclusively, on the permanency requirement.[124] A group of women and girls targeted in femicide has the inner stability and cohesion ascribed to national, racial, or religious groups, although the permanency requirement may need to be revisited as gender (like ethnicity) is socially constructed and may change over time. Accordingly, women and girls could constitute a social group, similar to the Tutsi social group.[125] In this vein, the Darfur Commission also recognized that social groups might be protected from genocide.[126]

Apart from the examination of preparatory work, the 'circumstances of conclusion'[127]— i.e., the mind-set of the drafters—demonstrate why groups based on gender should receive protection more than 60 years after the adoption of the Genocide Convention.[128] In 1948, the drafters of the Genocide Convention were male, women not yet enfranchised at that time in many parts of the world.[129] The protection of groups based on gender had not yet occurred in international law. In fact, women's rights are still relatively new concepts in international law: The Convention on the Elimination of Discrimination Against Women was adopted in 1979, and the concepts of gender and recognition of persecution based on gender (as a crime against humanity) were only introduced in the Rome Statute in 1998.[130] Some years after the adoption of the Rome Statute, specialized regional human rights treaties entered into force: the Maputo Protocol (2003), the Istanbul Convention (2011), and the Convention of Belém do Pará (1994).[131] This new landscape recognizing women's rights

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[123] *Akayesu* (n 30) para. 702.

[124] William Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edition (Oxford University Press 2016) 129; Berster (n 16) 100; Werle and Jessberger (n 92) 300.

[125] See *Akayesu* (n 30) paras 516 and 701–702.

[126] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 (25 January 2005), para. 499.

[127] Art. 32 VCLT.

[128] Ibid.

[129] See Matthew Lippmann, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide' (1985) 3(1) *Boston University International Law Journal* 1–65; See also William Schabas, 'Introductory Note, Convention on the Prevention and Punishment of the Crime of Genocide' *United Nations Audiovisual Library of International Law* (July 2008), https://legal.un.org/avl/ha/cppcg/cppcg.html.

[130] Art. 7(g) Rome Statute. See Hagay-Frey (n 6) 131.

[131] Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (adopted 7 April 2011, entered into force 1 August 2014); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará Convention) (adopted 9

makes the inclusion of a gendered group practical and necessary in the contemporary context. To the extent that the intent to destroy required by the genocide definition can extend to a women's group, it should therefore be protected from the crime of genocide.

Alternatively, the customary law scope of the crime of genocide is arguably broader than the treaty-based definition. Along these lines, in *Vasiliauskas v. Lithuania*, the ECtHR indicated that the scope of the customary international law (CIL) definition of genocide is expansive.[132] The United Nations General Assembly (UNGA) Resolution 96 lists 'racial, religious, political and other groups' as protected under the genocide convention. In this vein, social groups, such as women and girls' groups, could (arguably) be protected under the genocide definition as some domestic criminal laws protect other groups from genocide.[133] In order to adequately protect women and girls, the scope of the protected groups could also be reinterpreted based on this broader perception under CIL.

Gendercide

Even assuming that a gender group is protected analogously to racial, ethnic, religious or national groups, such ostensibly equal protection from gendercide would imperfectly represent the widespread violence women suffer in femicide.[134] Warren, who conceived the term gendercide in relation to sex-selective killings of female infants, considers it a neutral term because '[t]here is a need for such a sex-neutral term, since sexually discriminatory killing is just as wrong when the victims happen to be male.'[135] While generally valid, this statement conflicts with the way Warren uses the term to relate to female-specific forms of killings which she acknowledges to be rooted in historical inequality and a social system which men have ruled for centuries.[136] This asymmetric injustice affecting women and girls is what the term 'femicide' intends to capture. The term gendercide is susceptible to advancing and maintaining a male-controlled structure of society which disregards and undervalues the

June 1994, entered into force 3 May 1995); Additional Protocol to African Charter on Human and Peoples' Rights (Maputo Protocol) (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

[132] ECtHR, *Vasiliauskas v. Lithuania*, App No 35343/05 (20 October 2015), paras 171–175.

[133] UNGA Resolution on Genocide; Uruguay, Amendment to the Criminal Code No 18026 (2006), http://www.impo.com.uy/bases/leyes/18026-2006%20.

[134] Warren (n 6) 12–19 and 22.

[135] Ibid., 22.

[136] Ibid., 22–23.

systemic violence which has affected women for centuries. This is evidenced in Jones' misuse of the supposedly neutral term gendercide to re-center on and reflect men's experiences during genocidal violence, e.g., mass executions of men and boys in Srebrenica.[137] Jones argues that, because they are men and boys, male members of the populations are killed disproportionately, thereby equating gendercide with male-selective killings.[138] This conceals women's experience of rape and subsequent death in Srebrenica, removing them from the term's protection. Jones' framing of gendercide is a way to refocus on men's experience in genocide, potentially excluding women and other groups.[139] However, the specific harm men suffer in genocide which needs scholarly attention, is sexual violence perpetrated to humiliate men and target their sense of masculinity rather than their killing, which is already recognized under the crime of genocide.[140]

Moreover, both Warren and Jones see killings as the paradigmatic form of gendercide. Warren is primarily concerned with the killings of female foetuses and new-born babies, and girls.[141] Rape and sexual violence, often committed against women, are neglected. From a feminist legal perspective, harm to women must be clearly labelled to include the distinct human rights violations against women which have been neglected in the language of international law.[142] The prefix fem~ in femicide is precise in identifying the victims of this type of gender-based violence as women and girls.[143] The identification of the specific harm in femicide enables States to better understand and respond to such violence.[144]

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[137] Jones (n 25) 8–9.
[138] Ibid.
[139] Ibid., 25–27.
[140] Christine Chinkin, 'Key Issues in Times of Armed Conflict' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 696.
[141] Warren (n 6) 24.
[142] Jackie Jones, 'The Importance of International Law and Institutions' in Jackie Jones and Rashida Manjoo (eds), *The Legal Protection of Women from Violence* (Routledge 2018) 11; MacKinnon (n 52) 43; Messuti (n 7) 52.
[143] Fregoso and Bejarano (n 61) 9.
[144] See Jones (n 142) 11.

A GROUP'S DESTRUCTION

Physical Destruction: Genocide

The physical destruction of an entire group must be intended ('intent to destroy') by the perpetrator of the crime of genocide.[145] The ICTR has inferred intent to destroy from how a group is attacked—i.e., the words used to describe the adverse group—e.g., the description of Tutsis as 'cockroaches' or 'dirt.'[146] Similarly, the means by which women and girls are attacked in genocide reveals something about the objective in femicide. In *Akayesu*, the ICTR Trial Chamber recognized that 'acts of rape and sexual violence, […] reflected the determination to make Tutsi women suffer […], the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.'[147] Women were raped near mass graves where they would later be buried. Peasants could 'borrow' captured women and rape them after promising to kill them in return.[148] As MacKinnon states regarding the conflict in the former Yugoslavia, 'first they rape them, then they kill them, and then sometimes rape them again and cut off their breasts and tear out their wombs.'[149] Therefore, the rapes, with the intention to kill, included a misogynist aspect.[150]

The objective of genocide is 'the destruction of essential foundations of the life of [a] national group [],' and the reduction of its number until the group is annihilated.[151] This destruction refers to the biological-physical extermination and elimination of an entire group. This consequence must be intended by the perpetrators but they need not be successful at destroying the group in its entirety.[152] It is sufficient that the perpetrator intends to partially destroy a protected group, whereby the destruction of a 'substantial portion of the group' is required.[153] A group is substantial enough when the destruction of a group has significant consequences for humanity, such as those inspired by mass atrocities perpetrated by the Nazi regime.[154] The killings of 8,000 Bosnian Muslim

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[145] The required intent must relate to, on the one hand, the forms of genocide, and, on the other hand, the consequences of genocide—i.e., the group's destruction in whole or in part. Cassese (n 15) 119 and 123–124.

[146] See *Gacumbitsi* (n 31) para. 259.

[147] *Akayesu* (n 30) para. 733.

[148] Ibid., paras 498 and 733.

[149] MacKinnon (n 52) 187.

[150] See Kate Manne, *Down Girl: The Logic of Misogyny* (Oxford University Press 2017) 71. See Hagay-Frey (n 6) 135.

[151] Lemkin (n 10) 79–80.

[152] Ibid., 80; Berster (n 16) 80.

[153] *Krstic* (n 30) para. 12. See Schabas (n 124) 144–148.

[154] Berster (n 16) 100.

men and boys by Bosnian Serb forces were sufficient to be considered a genocide due to their impact on the strategically important location of Srebrenica.[155]

The perpetrators of genocide often attack women and girls in different ways to achieve the physical destruction of a protected group. In *Akayesu*, the ICTR Trial Chamber focused on the ethnic nature of rape and reasoned that rape was an ethnic attack which aimed at destroying the Tutsi group since mostly Tutsi women were raped. As such, the rapes of Tutsi women were 'a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself.'[156] Gender-specific genocidal acts 'specifically target[ed] Tutsi women and specifically contribute[ed] to their destruction and to the destruction of the Tutsi group as a whole.'[157] *Akayesu* is often praised for its recognition of ethnic rape as genocide, but it did not flesh out why women were raped as part of the female social group. The ICTR barely addressed women's roles as 'sexual objects' despite some of the evidence to this effect: 'Alexia, […] and her two nieces, were forced by the Interahamwe to undress and ordered to run and do exercises "in order to display the thighs of Tutsi women." The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her, "let us now see what the vagina of a Tutsi woman tastes like."'[158] These experiences of women and girls reveal the cruelty and unnecessary harm by which Tutsi women and girls were effectively degraded, objectified, and terrorized. The ICTR failed to discuss harm inflicted on women and girls in detail, likely because it viewed their ethnicity as the driving factor behind it.

Social Destruction: Femicide

Contrary to the group's physical destruction in genocide, the subordination of women and girls in the patriarchal social order is the objective in femicide.[159] The foot binding mutilation which is practiced in some countries, relegates women and girls to the domestic and private sphere.[160] FGM subordinates women's pleasure to that of men, serving to control their sexuality.[161] Forced

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[155] Schabas (n 124) 128.
[156] *Akayesu* (n 30) para. 731.
[157] Ibid.
[158] Ibid., para. 732.
[159] See Messuti (n 7) 50–51; Mercedes Oliveira, 'Violencia Feminicida: Violence Against Women and Mexico's Structural Crisis,' in Rosa-Linda Fregoso and Cynthia Bejarano (eds), *Terrorizing Women, Feminicide in the Americas* (Duke University Press 2010) 51.
[160] Dworkin (n 6) 95–148.
[161] Deller Ross (n 21) 470.

marriage of abducted schoolgirls in Nigeria not only deprived them of an education, but it also made these girls socially and economically dependent on their oppressors.[162] These are serious acts of violence, yet they do not necessarily reduce the number of women and girls. Rather, they relegate the female social group to certain social spheres and degrade them.[163] Of course, women and girls are sometimes killed in femicide. However, these killings ensure the continuance of the social order. For example, families may kill infants and girls over dowry disputes and other costs in raising girls. Such killings are a sign of the female social group's inferior place in society.[164] Destruction in femicide can thus be understood in terms of women and girls' social destruction.[165] The genocidal technique of 'the transfer of children to another group' could be seen as such, as it destroys the children's group's culture and societal links.

Female social groups are not eliminated for two main reasons. First, men (and mankind) still depend on women's existence. As Dworkin argues, '[t]hat women have not been exterminated and will not be (at least until the technology of creating life in the laboratory is perfected) can be attributed to our presumed ability to bear children.'[166] De Beauvoir further elaborates that women and men form a reproductive unit, whereby destruction of either one of the groups would be counterproductive to the continued existence of humanity. For biological reasons, therefore, humanity is contingent on women's existence in order to thrive and to procreate.[167] Second, since women are scattered among different family units, they are unlikely to be all killed.[168] A women's group is hard to delineate as such a group would lack cohesion in historic background—apart from their prevalent discrimination—religion, or other common features—other than their sex/gender. Generally, women do not form a minority, unlike other oppressed and persecuted groups such as African Americans, Native Americans, and Jewish people.[169]

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[162] Of course, some nuances can be applied. Boko Haram does not allow women and girls to farm land, as a result of which some women felt empowered, 'only' having to perform work at home. Hilary Matfess, *Women and the War on Boko Haram* (Zed Books 2017) 112–113.

[163] Alex Alvarez, *Genocidal Crimes* (Routledge 2010) 26.

[164] Warren (n 6) 24.

[165] Martha Nussbaum, 'Objectification' (1995) 24(4) *Philosophy and Public Affairs* 249–291 at 257.

[166] Dworkin (n 6) 93.

[167] Simone De Beauvoir, *The Second Sex* (Vintage Books 2011) 8–9, 21 and 89.

[168] Ibid., 8.

[169] Ibid.

CONCLUDING REMARKS

The current definition of genocide is inadequate to respond to femicide, since the list of genocidal acts is limited with only national, ethnic, religious, and racial groups being protected. Among the methods of addressing genocide, the statutory language 'serious bodily and mental harm' covers sexual violence and rape implicitly.[170] As women and girls frequently suffer sexual slavery, rape, and other slow-death measures, it is crucial that such acts are recognized under the crime of genocide. The group dimension of genocide would serve to assert that a female social group can be protected under femicide. By means of feminist legal reasoning, the scope of the protected groups could be expanded, even if this interpretation has its limits. The term gendercide reinforces men and boys' experiences, while inadequately covering women and girls' groups which would benefit from the more explicit notion of femicide.[171] Finally, the aspect of destruction in the crime of genocide is useful to conceptualize femicide in human rights law. Contrary to the physical destruction envisioned in the crime of genocide, in femicide, the destruction should be interpreted as social destruction, i.e., as degradation, humiliation, or subordination. These attacks against women and girls are committed not for purposes of exterminating them, but rather to control and dominate the female social group. Overall, the architecture of the crime of genocide, including the forms, aims, and its focus on groups could be used to inspire a human rights concept of femicide.

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[170] Kimberly Carson, 'Reconsidering the Theoretical Accuracy and Prosecutorial Effectiveness of International Tribunals' Ad Hoc Approaches to Conceptualizing Crimes of Sexual Violence as War Crimes, Crimes Against Humanity, and Acts of Genocide' (2012) 39 *Fordham Urban Law Journal* 1249–1300 at 1293; De Brouwer (n 87) 204.

[171] No aspect of this chapter should be construed to limit the inclusion of gender groups to the protected groups in genocide.

CONCLUSION TO PART I

The context in which femicide often occurs, is set out in Chapter 2, recognizing that wartime settings of rape and sexual violence have contributed to the current peacetime occurrences of femicide in some States. Military leaders' failure to halt rape or even encouragement to rape women in wartime, has effects beyond that period. This connection in terms of the prevalence of sexual violence sheds light on state responsibility through inaction for femicide. This aspect is revisited in Chapter 10 to discuss States' role in contributing to a situation where women and girls are attacked with impunity. Another first step for conceptualizing femicide is the underlying understanding, which is very pronounced in war, that sexual violence violates women and girls' or their male protectors' honor. As such, international humanitarian law provides the basis for prohibiting crimes of rape and sexual violence under international law.

The crimes against humanity concept allows for the assertion of the 'widespread' nature of femicide, while the 'female social group' characterization in femicide draws on the crime of genocide. Furthermore, some sexual acts of crimes against humanity recognized in the Rome Statute adequately cover acts of femicide—namely rape, sexual slavery, and indirectly forced marriage (as other inhumane acts). Of course, such acts of crimes against humanity must be adequately defined to respond to harm in femicide. Based on its potential to encompass many forms of rape, the broad *Akayesu* rape definition should be adopted in femicide. The consideration of consent in acts of femicide should be informed by the discussion in *Kunarac*, where coercive contexts render consent impossible.

Finally, the aim of femicide is the social subordination of women and girls, which is only inspired by the 'destruction' under the crime of genocide insofar as it covers social destruction, such as 'the transfer of children to another group.' Since women and girls are relegated to a subordinate social status in femicide, the attack in crimes against humanity does not suitably address what occurs in femicide. Constructed in line with the crime against humanity and the crime of genocide, the human rights violation of femicide should include gender-based acts of violence, a widespread context of violence, the aim of subordinating women and girls, and a defined female social group at risk.

PART II

FEMICIDE AND HUMAN RIGHTS LAW

Part II provides an overview of human rights bodies' adjudication of gender-based harm, relevant to femicide. In each chapter, I examine human rights bodies' cases holistically in the form of 'case studies.' This allows for consideration of human rights bodies' overall response to specific situations of violence against women and reveals the relevant factual circumstances of femicide that may be important for the legal analysis. Femicide involves a compounded set of closely connected human rights violations (e.g., the prohibition of torture, the right to life, and fair trial/access to justice rights) with a gender-based component.

Part II contains Chapters 5–8, discussing regional human rights bodies and the Convention on the Elimination of Discrimination Against Women (CEDAW) Committee's approach to femicide. Chapter 5 conveys a broad understanding of the development of women's rights at the United Nations level, before delving into the specificities of CEDAW's approach to violence against women and girls. As evident from its name, the CEDAW Committee uses discrimination as the primary lens to view domestic violence, rape, and other acts of femicide. CEDAW is receptive to gender-based harm, but it tackles such harm indirectly. Chapter 5 exemplifies this focus on discrimination through a few select cases.

Chapter 6 looks at European human rights instruments relevant to femicide, the Istanbul Convention explicitly dealing with domestic violence. This chapter lays out the fundamental principles of the *Osman* test for determining state responsibility by inaction, which are applied by the Inter-American and the African human rights bodies. However, the European Court of Human Rights (ECtHR) is stagnant in its approach to recognizing rape committed by non-state actors as torture or integrating a 'gender perspective' in investigating crimes against women and girls. This may be due to the Court's margin of appreciation doctrine and its reluctance to incorporate other drastic changes, as seen throughout its case law.

Chapter 7 considers femicide in the context of Latin America, where the term femicide is most strongly anchored. Accordingly, the Inter-American system is sympathetic to identifying and recognizing gendered harm. While it relies on the *Osman* test, it advances the ECtHR's conservative approach to rape by recognizing the commission of rape as torture irrespective of the perpetrators' private or public status. It also advances the idea that States should use a 'gender perspective' in investigating crimes of violence against women and girls, thereby combatting impunity with regard to femicide. The Inter-American Court of Human Rights' (IACtHR) evolutionary case law and its in-depth discussion of gender-based violence warrant a closer analysis.

Finally, Chapter 8 addresses the African human rights system. Considering that this regional human rights system is the newest, and least studied, the developments of women's rights in the African region are thoroughly investigated. Case law on femicide by the African Commission is emerging but not yet established. The African system's collective view of human and people's rights is most relevant to address and understand the collectively targeted social group in femicide. The African system's laudable contribution to identifying widespread risks, e.g., concerning marriage by abduction, is pertinent for the discussion of state responsibility in Chapter 10.

5. Femicide, the UN system and CEDAW

> That man over there says women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain't I a woman? Look at me! Look at my arm! I have ploughed, and planted, and gathered into barns, and no man could head me! And ain't I a woman? I could work as much and eat as much as a man—where I could get it—and bear the lash as well! And ain't I a woman? I have borne thirteen children, and seen them most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me! And ain't I a woman?
>
> Sojourner Truth[1]

INTRODUCTION

International human rights law views women and girls through a male-centric lens; it is more responsive to violence men experience than violations of women's human rights. Of course, women and girls who are mistreated, forcibly disappeared, and arbitrarily executed enjoy equal protection with men and boys under human rights law.[2] Still, harm against women and girls is often different, extending beyond these 'traditional' human rights violations. For example, women and girls are forcibly sterilized or sacrificed as a result of dowry disputes.[3] To the extent that such human rights violations are specific to, and more frequently committed against women and girls—e.g., because they are sexual or reproductive in nature—such human rights issues remain largely unaddressed by international human rights law. An initial attempt to make human rights law more responsive to women was made via non-discrimination provisions. The international human rights law framework includes the right

[1] Sojourner Truth in Angela Harris, 'Race and Essentialism in Feminist Legal Theory' in Kelly Weisberg (ed), *Feminist Legal Theory, Foundations* (Pennsylvania University Press 1993) 350.

[2] Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2007) 141–142.

[3] Daniela Nadji, *International Criminal Law and Sexual Violence Against Women: The Interpretation of Gender in the Contemporary International Criminal Trial* (Routledge 2018) 35.

to equality before the law, as well as other human rights relevant to women.[4] Yet, non-discrimination clauses are a specific remedy that does not change the overall male-centric nature of human rights law.[5]

This dichotomy between what women require and what they receive from human rights law can be illuminated with the example of the Universal Declaration of Human Rights (UDHR), a milestone in the history of human rights.[6] Former United States First Lady, Eleanor Roosevelt, spearheaded the inclusion of a non-discrimination clause into the UDHR, a significant achievement at the time.[7] She was however concerned that more specific women's rights violations were not 'universal,' and their inclusion would therefore undermine the UDHR. As a result, human rights violations specific to women are mostly absent from human rights instruments.[8] Human rights instruments appear to envision men as the bearer of human rights. Half of the provisions in the UDHR use male pronouns.[9] In relation to violence, some forms of sexual torture and 'domestic' torture at the hands of one's partner have historically been overlooked.[10] Relatedly, the Human Rights Committee's 2018 General Comment on the right to life focuses on the harm that typically affects men (e.g., arbitrary killings and the death penalty), sporadically mentioning maternal death and gender-based violence.[11] Overall, these instruments fail to include rights that ensure women are free from specific types of violence that are characteristic of human rights violations against women and girls—e.g., dowry-deaths, slow-deaths, domestic violence, forced marriage, sexual slavery, and rape. All these specific types of violence can constitute acts of, or are inherent to, femicide. The absence of provisions relating to violence against women and girls (VAWG), one of the most pervasive human rights issues, is poignant.

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4 E.g., Art. 2 UDHR.

5 Rashida Manjoo, 'Normative Developments on Violence Against Women in the United Nations System' in Jackie Jones and Rashida Manjoo (eds), *The Legal Protection of Women from Violence* (Routledge 2018) 73–106.

6 Nadji (n 3) 34.

7 Ibid.

8 Ibid.

9 Ibid.

10 MacKinnon (n 2) 17.

11 For an in-depth critique of the General Comment, see Fleur van Leeuwen, 'Still the second sex: Some feminist reflections on the new General Comment of the UN Human Rights Committee on the right to life' *OxHRH Blog* (13 May 2019), http://ohrh.law.ox.ac.uk/still-the-second-sex-some-feminist-reflections-on-the-new-general-comment-of-the-un-human-rights-committee-on-the-right-to-life. All online sources were accessed 30 October 2021.

The first 'feminist intervention' in international law, the Convention on the Elimination of Discrimination Against Women (CEDAW), remedies some of these shortcomings.[12] Directed by the United Nations (UN) Commission on the Status of Women (CSW), the premier UN body charged with the promotion of women's rights, the instrumental work on gender equality began before the adoption of CEDAW in 1979.[13] In 1967, the CSW adopted the Declaration on the Elimination of Discrimination Against Women (DEDAW), a non-binding instrument that condemns early or child marriage, and calls on States to address cultural and social patterns underlying discrimination.[14] In the 1970s, when women's rights movements were at their heights of activity across the globe, the CSW drafted CEDAW.[15] Aside from propelling the elimination of discrimination against women, CEDAW has its own Committee charged with monitoring state compliance and allowing individuals to bring complaints.[16] CEDAW marked the first international step toward recognizing women's rights to equal protection before the law. As is evident from its name, however, CEDAW protected individuals from discrimination, only considering violence indirectly. It was not until the 1990s that VAWG was recognized as a violation of human rights.[17]

No universal treaty exists which exclusively deals with VAWG, let alone femicide. However, soft law attempts to recognize VAWG as a human rights issue have been created, such as the UN General Assembly (UNGA)'s resolution on domestic violence in 1985,[18] and the Declaration on the Elimination of Violence against Women (DEVAW) in 1993, a programmatic instrument explicitly addressing violence against women.[19] The DEVAW acknowledged

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[12] Adrien Wing, 'International Law and Feminism' in Robin West and Cynthia Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar 2019) 468.

[13] The Economic and Social Council established the CSW by Council resolution 11(II) of 21 June 1946, https://www.un.org/womenwatch/daw/csw/pdf/CSW_founding_resolution_1946.pdf. Rikki Holmaat, 'The CEDAW: A Holistic Approach to Women's Equality and Freedom' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional, and National Law* (Cambridge University Press 2013) 95–123 and 104.

[14] See Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009) 206.

[15] Ibid., 206–207.

[16] Ibid., 208.

[17] Ibid., 207.

[18] UNGA (29 November 1985) UN Doc A/RES/40/36.

[19] Bejing Platform for Action, Hillary Rodham Clinton (Speech), 'Remarks for the United Nations Fourth World Conference on Women' (5 September 1995), www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950905175653.txt.

VAWG across the board, and brought it into the international arena.[20] The DEVAW defines 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.'[21] It recognizes a plethora of acts which can constitute femicide, such as 'battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.'[22] In 1993, the CEDAW Committee issued General Recommendation No. 19, interpreting CEDAW's scope to include gender-based violence. In 1994, the UN Special Rapporteur on Violence against Women, its Causes and Consequences was appointed and mandated to submit annual reports on measures to eliminate violence against women.[23] As the climax in recognition of violence against women as a human rights violation, the Fourth UN World Conferences' 1995 Beijing Declaration and Platform for Action set the agenda for States to identify and eradicate gender-based violence against women.[24] And yet, these approaches are not legally binding and fail to address the issue of femicide.

Many UN Security Council resolutions on women's rights concern women, peace and security, as well as sexual violence in armed conflict.[25] In April 2019, the UN Security Council adopted SC Resolution 2467 (2019) on sexual violence in armed conflict.[26] The UNGA also issued a resolution on gender-related killings of women and girls, expressing concern about femicide.[27] The International Labor Organization (ILO)'s Violence and Harassment Convention, 2019 (No. 190) on sexual harassment in the workplace is the first binding treaty explicitly addressing violence against women, stating that harassment includes 'a range of unacceptable behaviours and practices or threats whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes

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[20] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law, a Feminist Analysis* (Juris Publishing 2000) 235.

[21] Art. 1 DEVAW.

[22] Preamble and Art. 2 DEVAW.

[23] OHCHR, Resolution XI.-E/CN.4/1994/132, (4 March 1994), paras 6–7.

[24] United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995.

[25] UNSC Res 1325 (2000); UNSC 1820 (2010); UNSC 1960 (2010).

[26] UNSC Res 1467 (23 April 2019) UN Doc S/RES/1467.

[27] UNGA Res 68/119 (18 December 2013) UN Doc A/68/457 68/191.

gender-based violence and harassment.'[28] This Convention is limited to the 'workplace' sphere, constraining its application for femicide.[29]

CEDAW'S RESPONSE TO UNEQUAL SOCIETIES

Established in 1979, CEDAW is an international treaty designed to protect women against discrimination by setting standards to enhance women's position in society and altering its discriminatory structures.[30] The Convention makes no mention of VAWG. When CEDAW was adopted, VAWG (particularly domestic violence) was seen as a private issue—rape in marriage was still permitted in many societies.[31] At the time, no awareness existed that such violence would merit attention in domestic law, let alone at the international plane.[32] In the 1990s, VAWG began to gain attention as a human rights issue.[33] The CEDAW Committee is an independent expert committee and the sole UN treaty body dealing specifically with human rights violations as they relate to women. As it provides the most specific and, arguably, the most progressive analysis concerning women's rights, this chapter centers on the CEDAW Committee's articulation of gender-based violence.

CEDAW could be perceived as an answer to VAWG. The Convention tackles violence against women by means of the discriminatory systemic struc-

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[28] Art. 1(b) ILO Convention concerning the Elimination of Violence and Harassment in the World of Work (adopted 21 June 2019, not yet in force at the time of publishing in 2021) ILO No 190 [Convention on Sexual Harassment].

[29] Arts 2 and 3 ILO Convention on Sexual Harassment. Art. 2 stipulates that this 'Convention protects workers and other persons in the world of work.'

[30] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (opened for signatories 1 March 1980, entered into force 3 September 1981) 27 UST 1909, 1249 UNTS 14. See General Recommendation No 25 (1999) Art. 4(1) on Temporary Special Measures and 4(9).

[31] See Sarah Zearfoss, 'Note, the Convention for the Elimination of All Forms of Discrimination against Women: Radical, Reasonable, or Reactionary' (1991) 12 *Michigan Journal of International Law* 903–942 at 908–909.

[32] Rashida Manjoo, 'Closing the Normative Gap in International Law on Violence against Women: Developments, Initiatives and Possible Options' in Jackie Jones and Rashida Manjoo (eds), *The Legal Protection of Women from Violence* (Routledge 2018) 202; Andrew Byrnes and Eleanor Bath, 'Violence Against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Recent Developments' (2008) 8(3) *Human Rights Law Review* 517–533.

[33] Simmons (n 14) 207.

tures which facilitate and cause gender-based violence.[34] Article 1 CEDAW defines discrimination as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[35]

Article 1 CEDAW revolves around how women and girls are excluded and disadvantaged in all spheres. Under CEDAW, non-discrimination principles apply to the private sphere, where human rights law has usually failed to be applied.[36] At the heart of Article 1 CEDAW lies a promising substantive approach to equality, which contemplates women's distinctive position without comparing similarly situated females and males.[37]

Substantive equality differs from a formal equality approach, which necessitates an 'objective and reasonable criteria,' usually a male comparator, to make a distinction, exclusion or restriction based on sex.[38] Formal equality compares individuals in similar situations, i.e., it draws parallels between the experiences of women and men.[39] A formal equality approach is not palatable when women are specifically targeted, and no male comparators exist.[40] For example, dowry-related killings or female genital mutilation (FGM) cannot easily be compared with men's experiences of harm.[41] As such, violence against women does not call for gender-neutral responses. In this sense, Article 1 CEDAW is an urgent response to the persisting societal and legal inequality which characterizes many places around the world and obviously fuels violence against women.[42] As the CEDAW Committee states in its General Recommendation No. 25, the 'Convention focuses on discrimination against

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[34] See Arts 2 and 5 CEDAW.

[35] Art. 1 CEDAW.

[36] Nadji (n 3) 36.

[37] Holmaat (n 13) 99.

[38] Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press 2011) 142.

[39] Ibid.

[40] African Commission, *Equality Now and Ethiopian Women Lawyers Association v. Federal Republic of Ethiopia*, Communication No 341/2007, 25 February 2016. See also Holmaat (n 13) 102.

[41] In particular with regard to a potential comparison with male circumcision, note that FGM has no health benefits. See Kenya, Constitutional Court, *Tatu Kamau v Attorney General & 2 Others; Equality Now & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae)* [2021] eKLR (17 March 2021), para. 214.

[42] Holmaat (n 13) 102.

women, emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women.'[43] In addressing this inequality, CEDAW embodies three approaches to equality: formal equality; substantive equality; and transformative equality.[44]

Under the formal equality approach, States must ensure equality between men and women before the law, regardless of sex.[45] Under Article 2(a)–(b) CEDAW, States can achieve this by enacting relevant non-discrimination principles in domestic laws.[46] Under the substantive equality approach, States must improve the de facto situation of women 'through concrete and effective policies and programmes' (Articles 3–4 and 24 CEDAW).[47] Transformative equality, which has been interpreted in Articles 2(c) and (f), and 5(a) CEDAW, requires States to change cultural and societal structures and gender stereotypes which underlie and cause gender inequality.[48] The latter requires States to:

> modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[49]

States must transform the traditional roles and patterns ascribed to women and men in society, thereby eradicating structural discrimination.[50] Article 2(f) CEDAW obliges States to eliminate the discriminatory laws, regulations, customs, and practices on which societal and cultural structures rest. Taken together, Articles 2(f) and 5(c) establish that gender stereotypes not only cause discrimination but are discriminatory per se under Article 1 CEDAW.[51]

As a vehicle for cultural change, CEDAW is crucial in combatting VAWG. As seen in femicide cases, state authorities often remain inactive when women or their next of kin report human rights abuses against women. These wrongful perceptions of women's roles and lives in society, such as a presumption that the victim must have dressed inappropriately or have relationship problems to have brought about violence, stem from so-called 'cultural' paradigms and

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43 CEDAW, General Recommendation No 25, para. 5.
44 Holmaat (n 13) 111.
45 Ibid., 106; Edwards (n 38) 158.
46 Holmaat (n 13) 111.
47 General Recommendation No 25, para. 7.
48 Holmaat (n 13) 111. See General Recommendation No 25, para. 10.
49 Art. 5 CEDAW.
50 Holmaat (n 13) 111.
51 Ibid., 109.

may lead to national authorities' failure to investigate crimes against women and girls.[52]

FEMICIDE AS DISCRIMINATION

CEDAW does not explicitly recognize femicide as a human rights violation. This deficiency has only been partially remedied by the Committee's interpretative attempt to include violence in the Convention. The CEDAW Committee introduced VAWG in CEDAW through its General Recommendation No. 19 (1992), supplemented by General Recommendation No. 35 (2017).[53] General Recommendation No. 19 established a correlation between discrimination and gender-based violence: 'the definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.'[54] This approach potentially places the discrimination law framework beyond its agreed bounds, and it may fail to recognize the gravity of gender-based violence as a human rights violation.[55] It is noteworthy that some forms of violence are mentioned in Article 6 CEDAW, namely human trafficking, exploitation and prostitution of women.[56] Forced marriage is also implicitly mentioned as CEDAW speaks of equal rights in contracting marriage and making reproductive choices.[57] However, sexual slavery and enforced prostitution are not identified as forms of VAWG.[58] In an attempt to fill this normative gap relating to violence against women, the CEDAW Committee read VAWG into the Convention.

This definition of gender-based violence has shaped regional human rights bodies' case law, which adopted the definition verbatim.[59] Under the purview

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[52] See Rosa-Linda Fregoso and Cynthia Bejarano, 'Introduction: A Cartography of Femicide in the Americas' in Rosa-Linda Fregoso and Cynthia Bejarano (eds), *Terrorizing Women, Feminicide in the Americas* (Duke University Press 2010); *González et al. v. Mexico (Cotton Field Case)*, Preliminary Objection, Merits, Reparations, and Costs, Inter American Court of Human Rights Series C No 205 (16 November 2009), paras 158–159 and 400–401.

[53] General Recommendation No 19: Violence Against Women, CEDAW/A/47/38 at 1 (1993); General Recommendation No 35: General Recommendation No 35 on Gender-based Violence Against Women, updating General Recommendation No 19, CEDAW/C/GC/35 (2017).

[54] General Recommendation No 19, para. 6.

[55] See Manjoo (n 5) 87.

[56] Ibid.

[57] Art. 16 CEDAW.

[58] See Charlesworth and Chinkin (n 20) 236–237.

[59] E.g., European Court of Human Rights (ECtHR), *Opuz v Turkey*, App No 33401/02 (9 March 2009), paras 185–187; *Maria da Penha v. Brazil* (16 April 2001) Inter-American Commission Case 12.051, Report No 54/01, paras 47 and 50.

of discrimination, General Recommendation No. 19 broadly acknowledges that gender-based violence violates myriad rights, including the right to life; the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; the right to liberty and security of the person; the right to equality in the family and equal protection under the law; the right to the highest standard attainable of physical and mental health; the right to just and favorable conditions of work.[60] More specifically, General Recommendation No. 19 lists 'family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision,'[61] 'compulsory sterilization and abortion,'[62] and 'battering, rape and other forms of sexual assault'[63] as forms of violence against women. In addition to the apparent physical harm, General Recommendation No. 19 also considers mental harm and the mere threat of harm to be sufficient to amount to gender-based violence.

In 2017, the CEDAW Committee issued General Recommendation No. 35 supplementing General Recommendation No. 19.[64] Conceptually, General Recommendation No. 35 does not break any new ground.[65] Through the lens of discrimination, it sees violence as 'a critical obstacle to achieving substantive equality between women and men.'[66] It makes explicit the structural extent to which women are subjected to some forms of violence, as it identifies 'gender-based violence against women' instead of the general 'violence against women' used in General Recommendation No. 19.[67] In this vein, General Recommendation No. 35 considers gender-based violence a 'social, rather than an individual problem' entrenched in societal norms which 'assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour.'[68] The CEDAW Committee considers that the prohibition of gender-based violence rests on solid state practice and opinio juris, thereby constituting CIL—a claim which may arguably be rejected due to lack of state practice.[69] The General Recommendation No. 35 only mentions femicide in the context of data collection, limiting the complex phenomenon to 'gender-based killings of women'.[70]

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60 General Recommendation No 19, para. 7. See also Manjoo (n 5) 88.
61 General Recommendation No 19, para. 11
62 Ibid., para. 22.
63 Ibid., para. 23.
64 'General Recommendation No 35 should be read in conjunction with General Recommendation No 19'. General Recommendation No 35, para. 8.
65 General Recommendation No 19, paras. 1 and 21.
66 General Recommendation No 35, para. 10.
67 Ibid., para. 9.
68 Ibid., para. 19.
69 Ibid., paras 2 and 7.
70 General Recommendation No. 35, para. 34(b).

CEDAW's General Recommendations are the best approach to VAWG on the international plane to date and their capacity to provide some response to femicide must be acknowledged as such. General Recommendation No. 35 recognizes the interplay between many human rights violations in femicide.[71] It finds that 'women's right to a life free from gender-based violence' and that gender-based violence 'is indivisible from and interdependent with other human rights, including the right to life, health, liberty and security of the person, the right to equality and equal protection within the family, freedom from torture, cruel, inhumane or degrading treatment, freedom of expression, movement, participation, assembly and association.'[72] The Committee also pointedly responds to Chinkin's critique on torture, noting that the required purpose under the prohibition of torture can be discrimination and that human rights treaty bodies should be sensitive to gender implications when determining whether VAWG constitutes torture.[73] Besides that, General Recommendation No. 35 progressively recognizes that forced abortion, sterilization, and even criminalization of abortion can violate the right to be free from torture.[74]

At the same time, the CEDAW framework's response to violence must be criticized for its lack of recognition of acts of femicide as serious human rights issues. For example, rape and battery are listed as discrimination in the CEDAW Committee's General Recommendation No. 19, whereas rape has been recognized as a crime against humanity and a war crime in international criminal law.[75] Manjoo considers that the CEDAW Committee uses 'jurisdictional gymnastics' to address VAWG, '[it] has to ask questions such as: Is violence against women discrimination? Is the violence due to stereotyping? Is it due to family relations?'[76] Edwards has similarly stated that '[this] interpretation [of violence into a discrimination framework] is at best a corrective and indirect mechanism to fix the errors of the original human rights framework.'[77] Evidently, it is necessary to identify underlying stereotypes, e.g., when the victim's next of kin is treated poorly by the police. Moreover, discrimination

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71 Manjoo (n 5) 88.

72 General Recommendation No 35, para. 17.

73 Ibid.

74 Ibid., para. 19.

75 Arts 7(1)(g) (rape as a crime against humanity), 8(b)(xxii) (rape as a war crime), and 6(b) (genocide) listing 'serious bodily and mental harm', Statute of the International Criminal Court (Rome Statute) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544.

76 Daniela Nadji, '"Bridging the Divide:" An Interview with Professor Rashida Manjoo, UN Special Rapporteur on Violence Against Women' (2015) 23 *Feminist Legal Studies* 329–347 at 343.

77 Edwards (n 38) 338.

fuels the widespread nature of violence in femicide and vice-versa.[78] However, the severity of physical and mental harm in femicide is likely concealed by an exclusive focus on discrimination, and CEDAW only presents a circuitous answer to femicide.[79]

CEDAW'S PREVENTIVE OBLIGATIONS

CEDAW's achievement lies in its recognition of state responsibility for acts committed by non-state actors, such as rape, forced marriage and other acts of femicide, in the treaty text itself. First and foremost, Article 2 CEDAW requires States to take a clear stand on discrimination against women and communicate their opposition to discrimination to the international community.[80] General Recommendation No. 28 further establishes that the obligation to oppose discrimination is 'an immediate and continuous [one],' and implies the necessity of training State organs to recognize and deal with discrimination.[81] Secondly, Article 2 CEDAW stipulates that States must pursue a policy of eliminating discrimination against women.[82] Although States can design their own policy, the measures taken must be suitable to end discrimination, and must be 'action- and result-oriented.'[83] As such, the policy must include 'benchmarks and timelines, [and] ensure adequate resourcing for all relevant actors.'[84] Another advancement for non-state actor responsibility is that the policy cannot be circumvented by references to limited resources.[85] CEDAW could thus help further women's rights as a priority on policy agendas and bind States which are unwilling to prioritize women's equality.[86]

A paradigm shift is also suggested under CEDAW, which recognizes that preventive duties are as essential as States' traditional negative obligations.[87] Article 2 CEDAW lists positive obligations;[88] General Recommendation No. 28 specifies that States should 'react actively against discrimination against women, regardless of whether such acts or omissions are perpetrated by the

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78 Manjoo (n 5) 85.
79 Nadji (n 76) 343.
80 General Recommendation No 28, para. 15.
81 Ibid., paras 15 and 18.
82 Art. 2(1) CEDAW.
83 General Recommendation No 28, para. 28.
84 Ibid.
85 Ibid., para. 29.
86 See ibid.
87 See Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal* 87–125 at 98.
88 General Recommendation No 35, para. 22.

State or by private actors.'[89] Therefore, States must prevent acts of non-state actors by acting with due diligence.[90]

The test to consider at which stage States' responsibility is engaged, is a slightly adapted version of *Osman v. UK,* originally adopted by the European Court of Human Rights.[91] Under the CEDAW Committee's General Recommendation, States' responsibility is engaged when they:

> know or should know of the danger of violence, or a failure to take all appropriate measures to prevent acts of gender-based violence against women, or a failure to investigate, prosecute and punish, and to provide reparation to victims/survivors of such acts, provides tacit permission or encouragement to acts of gender-based violence against women.[92]

Accordingly, States must act with due diligence: not only prevent violations of rights but also investigate and punish acts of violence, and provide redress.[93] These preventive duties provide the basis for discussing whether States have undertaken the necessary measures to comply with their obligations to prevent femicide.

SELECT CEDAW CASES

CEDAW has its own Committee charged with monitoring State compliance which allows individuals to bring complaints about alleged Convention violations.[94] The legal nature of such observations has been extensively debated:[95] I consider that the CEDAW Committee's views (termed 'Concluding Observations') should be considered compelling in setting standards for States

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89 Art. 2(e) CEDAW; General Recommendation No 28, para. 10.

90 General Recommendation No 35, para. 24(a).

91 ECtHR, *Osman v. UK*, App No 23452/94 (28 October 1998), para. 116.

92 General Recommendation No 35, para. 24(b); General Recommendation No 19, para. 9. See also General Recommendation No 28, para. 19.

93 General Recommendation No 35, para. 24(b).

94 Art. 10 CEDAW Optional Protocol; Arts 2 and 7 Optional Protocol.

95 O'Flaherty and Mechlem argue that 'Concluding Observations' are only observations, thereby lacking legal value, as they emerge from a dialogue between the State and the Committee. Conversely, Buergenthal convincingly describes Concluding Observations 'as a type of Committee "jurisprudence"' which is the result of a formal and careful procedure'. Thomas Buergenthal, 'The UN Human Rights Committee' (2001) 5 *Max Planck Yearbook of United Nations Law* 341–398. Michael O'Flaherty, 'The Concluding Observations of United Nations Human Rights Treaty Bodies' (2006) 6 *Human Rights Law Review* 27–52 at 27 and 33; Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 *Vanderbilt Journal of Transnational Law* 905–947 at 923.

and non-governmental organization (NGO)'s to implement human rights.[96] In *Angela Gonzalez Carreño*, a domestic violence case, the Spanish Supreme Court clarified that the Committee's views are binding on Spain.[97]

A snapshot of the CEDAW Committee's approach to domestic and sexual violence brings to light the relevant factual circumstances of femicide and its legal response.[98] This analysis reveals that the right to life, the prohibition of torture and access to justice issues are often at stake in femicide. Furthermore, some characteristics of femicide, such as the continuous nature of gender-based acts and state responsibility, are further clarified.

***Goekce et al. v. Austria* (2007)**

For several years, Ms Şahide Goekce, of Turkish descent, had been abused by her husband who repeatedly threatened to kill her, sometimes in front of their children. After her husband tried to strangle her in 1999, she reported his violent acts to the police.[99] The police requested that her abusive husband be detained on two occasions. However, since Ms Goekce did not file charges against her husband for death threats against her, as required under Austrian law, the authorities did not charge or arrest him.[100] A court issued an injunction against her husband to ban him from their shared home. He continued to live there in violation of the order.[101] Ms Goekce's father and brother informed the police that Ms Goekce's husband owned a handgun and continued to threaten her. The police still failed to investigate their claims adequately.[102] The perpetrator once again attacked his wife. She called the police but they never arrived. Hours later, he killed his wife in the presence of their two daughters.[103]

The CEDAW Committee found Austria responsible for failing to protect Ms Goekce and ordered measures to implement the domestic violence law as well as policy measures.[104] The Committee recommended Austria '[v]igilantly

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[96] Manjoo (n 5) 87.

[97] Spanish Supreme Court (Sala de lo Contencioso-Administrativo Sección Cuarta Sentencia) No 1263/2018 (17 July 2018).

[98] See Marie Ashe, 'Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law' in Kelly Weisberg (ed), *Feminist Legal Theory, Foundations* (Pennsylvania University Press 1993) 582–593; Katharine Bartlett, 'Feminist Legal Methods' (1990) 104(4) *Harvard Law Review* 828–888 at 864.

[99] *Goekce et al. v. Austria*, Communication No 25/2005, CEDAW/C/39/D/5/2005, 6 August 2007, paras 2.1–2.3.

[100] Ibid., para. 2.3.

[101] Ibid., paras 2.7–2.8.

[102] Ibid., para. 2.9.

[103] Ibid., paras 2.9–2.11.

[104] Ibid., para. 12.3.

and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence.'[105] The Committee also recommended that Austria train its state agents, including the police, prosecutors, and judges, thereby centering on societal impact of VAWG.[106] In General Recommendation No. 19, the Committee considered domestic violence as gender-based under the purview of Article 1 CEDAW. Accordingly, the Committee noted that States' responsibility is engaged for acts committed by private individuals should States fail to prevent violations of non-discrimination provisions.[107] It was not enough that Austria had adopted comprehensive measures, including domestic violence legislation, policy efforts, and victim support.[108] An additional obligation had arisen for Austria to implement this framework, regardless of Ms Goekce's attempts to modify her complaint or refusal to authorize the perpetrator's arrest.[109] Applying the *Osman* test, as included in General Recommendation No. 35,[110] the Committee recognized that the State knew of the violence against Ms Goekce, especially because she had called the police hours before her death.[111] Moreover, the State had known of the perpetrator's violent behavior towards her for several years, and that he owned a gun, so the State should have issued an arrest warrant much earlier.[112] Having knowledge of the risk to which Ms Goekce was exposed, state authorities should have swiftly come to her rescue.[113] By failing to protect Ms Goekce's life and physical and mental integrity, Austria violated its responsibility under CEDAW in conjunction with General Recommendation No. 19.[114]

Vertido v. The Philippines (2010)

Ms Karen Vertido's boss offered to drive her home after a late work meeting. He proceeded to sexually assault Ms Vertido in the car, and subsequently drove her to a motel where he raped her. He told Ms Vertido 'that he knew many people who could help her advance in her career' and that 'he would take

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105 Ibid., para. 12.3.b.
106 Ibid., para. 12.3.
107 Ibid., para. 12.1.1.
108 Ibid., para. 12.1.2.
109 Ibid.
110 General Recommendation No 35, para. 24(b).
111 *Goekce et al. v. Austria* (n 99) para. 9.10.
112 Ibid., para. 12.1.4.
113 Ibid.
114 Ibid., para. 12.3.

care of her.'[115] Afterwards, she ran to his car to try to escape. Her boss told her to 'calm down' and drove her home.[116] The next day, she obtained a medical certificate attesting to her rape and filed a complaint with the domestic authorities.[117] However, her case was dismissed on the grounds that her claims were not credible.[118]

The CEDAW Committee held the Philippines responsible for failing to protect Ms Vertido from rape. It instructed the State to reform its rape law. According to the Committee, the Philippines should place lack of consent at the center of its rape definition and either (1) define rape in terms of the victim's agency, even requiring the perpetrator prove that the victim consented, or (2) require that the act of rape take place in broadly defined 'coercive circumstances.'[119] The latter of the two definitions is particularly relevant in the light of the coercive circumstances characterizing femicide, and in line with the discussion on rape in international criminal law. The Committee further held that the Philippines had relied on rape myths in acquitting the perpetrator by relying on discriminatory customs and practices.[120] According to the (female) domestic judge, Ms Vertido should have called for help and physically resisted. The judge relied on the Philippines' criminal code requiring force or use of force as an element of rape, and also on a guideline stating that 'an accusation for rape can be made with facility,' which 'reveals in itself a gender bias.' Other guidelines, which did not regard physical force as an element of rape, were ignored.[121]

The Committee was concerned about the domestic court's gender stereotyping which could affect rape victims' fair trial rights,[122] stressing that 'the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape.'[123] In this regard, similar to *Goekce*, the Committee required that state officials be trained to deal with rape cases 'in a gender-sensitive manner.'[124] Unequivocally rejecting rape definitions which require physical resistance, the Committee held that consent cannot derive from lack of resistance, and that the Philippines had failed to eliminate harmful cultural practices and

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[115] *Vertido v. the Philippines*, Communication No 18/2008, CEDAW/C/46/D/18/2008, 16 July 2010, para. 2.2.
[116] Ibid.
[117] Ibid., paras 2.3–2.4.
[118] Ibid., paras 2.8–2.9.
[119] Ibid., para. 8.9.
[120] Ibid.
[121] Ibid., para. 8.5.
[122] Ibid., para. 8.4.
[123] Ibid.
[124] Ibid., paras 8.4 and 8.9.

legislation contrary to Articles 2(f) and 5(a) CEDAW.[125] The Committee's decision rightly clarified that non-consent must be at the center of any rape definition. At the same time, it did not consider the unequal relations between Ms Vertido and the alleged perpetrator, her employer, within its discussion on non-consent. The Committee could have elaborated on the coercive circumstances, and how these may have influenced the ways in which she resisted her boss's advances, in line with *Kunarac*.

Angela Gonzalez Carreño v. Spain (2015)

Angela Gonzalez Carreño was threatened with a knife by her husband. She left him after several years of abuse.[126] Her ex-husband was granted visitation rights to see his three-year-old daughter Andrea. Having witnessed episodes of domestic violence, Andrea was frightened of her father and refused to see him.[127] Ms Gonzalez Carreño and her daughter were repeatedly threatened by her ex-husband. Once, he tried to pull Andrea away in the presence of police officers. In response to his threats and harassment, Ms Gonzalez Carreño filed over 30 complaints against her ex-husband and sought protection orders to no avail.[128] During one of his visits, Ms Gonzalez Carreño's ex-husband shot Andrea, and then committed suicide. The Spanish authorities closed the case, considering his criminal liability exhausted.[129] Ms Gonzalez Carreño filed an unsuccessful complaint with Spanish domestic courts about Spain's failure to protect her daughter's life.[130]

The CEDAW Committee held that Andrea's murder was gender-based.[131] Furthermore, the Committee outlined the State's obligation to prevent violence against women under Article 2(e) CEDAW, which stipulates that States should 'take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.'[132] The Committee held Spain responsible for failing to protect Andrea's life and issued several comprehensive measures, including on mandatory training for those involved in the administration of justice. It ordered Spain to ensure that decisions about visitation rights and

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[125] Ibid.
[126] *Angela Gonzalez Carreño v. Spain*, Communication No 47/2012, CEDAW/C/58/D/47/2012, 16 July 2014, para. 2.2.
[127] Ibid., para. 2.4.
[128] Ibid., paras 2.7–2.8.
[129] Ibid., para. 2.17.
[130] Ibid., paras 2.18–2.19.
[131] Ibid., para. 9.6.
[132] Ibid.

custody consider whether a partner had a history of violence against the other partner.[133]

Applying the *Osman* test, the Committee held that Spain had failed to act with due diligence when Andrea's life was at risk, thereby engaging its international responsibility by omission. Spain had argued that it could not have foreseen the lethal attack on Andrea, since no prior suspicion of risk had existed, a typical and unfortunate state defense in domestic violence cases. The CEDAW Committee answered that Andrea was killed in a 'context of domestic violence which continued for several years,' thereby recognizing the continuous nature of domestic violence.[134] Spain knew of the violence and threat,[135] as it was aware of psychological reports attesting to the perpetrator's 'obsessive-compulsive disorder with aspects of pathological jealousy and a tendency to distort reality.'[136] Moreover, Spanish courts had prioritized the father's visiting rights over Andrea and Ms Gonzalez Carreño's safety by allowing unsupervised visits.[137] The Committee pertinently concluded that these elements 'reflect[ed] a pattern of action which responds to a stereotyped conception of visiting rights based on formal equality.'[138] The Committee's recognition of ongoing risks meeting the 'immediacy' standard to engage state responsibility in the *Osman* test is ground-breaking for the protection of women and girls from femicide, where States are aware of serious and widespread human rights violations against women even without a recent complaint.[139]

O.G. v. Russia (2017)

O.G. had terminated her relationship with her ex-partner owing to his drug abuse, gambling problems, and insults against her.[140] She started to date another man with whom she decided to cohabit. Her ex-partner immediately started harassing her by sending her offensive text messages, staking out her apartment, and demanding that she let him inside.[141] On one occasion, he

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[133] Ibid., para. 11.
[134] Ibid., para. 9.2.
[135] Ibid.
[136] Ibid., para. 9.3.
[137] Ibid.
[138] Ibid., para. 9.4.
[139] Ibid., para. 9.7; Gema Fernández Rodríguez de Liévana, 'CEDAW issues a Historic Ruling in a Gender Violence Case' *OxHRH Blog* (28 August 2014), https://ohrh.law.ox.ac.uk/cedaw-issues-a-historic-ruling-in-a-gender-violence-case/.
[140] *O.G. v. Russia*, Communication No 91/2015, CEDAW/C/68/D/91/2015, 20 November 2017, para. 2.1.
[141] Ibid.

hit her in the face in front of her son.[142] O.G. filed a complaint against her ex-partner. The court issued a suspended sentence against him. He continued to harass her, issuing death threats against her and her partner.[143] When O.G. complained again, the police did not initiate proceedings because he had issued threats but, 'because he was not backing up his threats with action, [her] life was not in danger.'[144] Over a period of three years, O.G. filed seven unsuccessful complaints with the Russian police.[145]

The CEDAW Committee held that Russia had failed to protect her from violence.[146] An important aspect is that any violence which arose from a relationship, is considered domestic violence, as the Committee confirmed by reference to Article 3(b) Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).[147] The Committee found that the state authorities stereotyped against O.G. by failing to investigate the death threats, which in turn impeded her fair trial rights.[148] The Committee held that 'by failing to investigate [her] complaint about death threats and threats of violence promptly, adequately and effectively, and by failing to address her case in a gender-sensitive manner, the authorities allowed their reasoning to be influenced by stereotypes.'[149] However, the Committee did not delve into the reasons why it mattered that the authorities stereotyped against her. In order to create clarity, the Committee ought to have explained that the state inaction was a sign that the authorities considered violence and death threats against women a trivial matter which did not merit investigation.

Finally, the Committee scolded Russia for failing to define domestic violence in its domestic laws, and decriminalizing battery, an offense which had been used to bring domestic violence cases before Russian courts.[150] O.G.'s right to access of justice was violated due to the lack of effective legislation preventing domestic violence,[151] in addition to Russia's failure to prevent violence and threats against her despite knowledge of the events.[152] The Committee recommended that the State adopt legislation on violence against women and ratify the Istanbul Convention. On a policy level, the Committee

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142 Ibid., para. 2.2.
143 Ibid., para. 2.3.
144 Ibid., paras 2.4–2.5 and 2.8.
145 Ibid.
146 Ibid., para. 7.3.
147 Ibid., para. 7.4.
148 Ibid., para. 7.5.
149 Ibid., para. 7.6.
150 Ibid., para. 7.7.
151 Ibid.
152 Ibid., paras 7.8–7.9.

recommended that Russia train its state officials to adopt relevant protocols for gender-sensitive responses to domestic violence cases.[153]

CONCLUDING REMARKS

The journey towards recognition of femicide is arduous since women's rights were historically seen as private or beyond state responsibility. And yet, gender-based violence is one of the most pervasive human rights violations.[154] The UN has highlighted gender-based violence as a key issue to be addressed in its 2030 development goals; many soft law declarations, such as DEVAW, advance tangible standards on gender-based violence.[155] Following the 1995 Beijing Platform for Action, the contemporary narrative now considers gender-based violence as a human rights issue. Nevertheless, these soft law instruments are not binding and accordingly, there is a lack of enforceable norms relevant to femicide at the international level.

Against this backdrop, CEDAW attempts to rectify the absence of a global treaty on VAWG. However, the Convention's focus is on eliminating discrimination, rarely addressing violence and, if so, only in indirect terms.[156] Generally, the Committee tackles acts of femicide—i.e., rape and domestic violence—under Article 1 CEDAW, with a subsequent finding that such violence is gender-based under General Recommendations Nos. 19 and 35.[157] Such an indirect approach is inadequate to address femicide on three counts. First, the discrimination principle is not suitable as it does not recognize the dangerous nature of femicide. Of course, discrimination is part of femicide but other human rights violations, such as domestic violence and rape, should be foregrounded—just like violence against men and boys is not chiefly framed as discrimination. Second, discrimination norms lack specificity to hold perpetrators accountable. As many as possible human rights violations which are inherent in femicide, should be specifically named, rather than disguised under the umbrella of broad discrimination principles. Third, General Recommendations on gender-based violence stretch CEDAW to include violence provisions which States may object to since they did not ratify these recommendations.

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[153] Ibid., para. 9.

[154] Rashida Manjoo, 'State Responsibility to Act with Due Diligence in the Elimination of Violence Against Women' (2013) 2(2) *International Human Rights Law Review* 240–265 at 253.

[155] See UN Sustainable Development Goals, '#Envision2030 Goal 5: Gender Equality', www.un.org/development/desa/disabilities/envision2030-goal5.html.

[156] See Arts 6 and 16 CEDAW; Nadji (n 76).

[157] *Goekce et al. v. Austria* (n 99) para. 12.1.1; *Gonzalez Carreño v. Spain* (n 126) para. 9.6; *O.G. v. Russia* (n 140) para. 7.3.

For now, the CEDAW provides the only global means to address violence in international human rights law.[158] Ideally, a treaty on VAWG or femicide could be drafted to respond to these issues.

CEDAW's most notable contribution with regard to femicide is its recognition, enshrined in the treaty text, that state responsibility extends to the private sphere. Of particular relevance is Article 2 CEDAW, which instructs States to take swift action in law and policy to comply with their duty to prevent discrimination against women. The Committee has combined Articles 2(f) and 5(a) CEDAW to attempt to change underlying discriminatory cultures.[159] Moreover, the CEDAW Committee has laudably recognized that recurring human rights risks against women and girls can be covered under the *Osman* test, which engages state responsibility for their failure to protect women and girls from violence, and is crucial to determine state responsibility for femicide.[160]

[158] Manjoo (n 32) 87.
[159] *Vertido v. the Philippines* (n 115) para. 8.9.
[160] *Gonzalez Carreño v. Spain* (n 126) para. 9.2.

6. Femicide and the European human rights system

INTRODUCTION

Established in 1953, the European Convention on Human Rights (ECHR) is a regional human rights treaty with a focus on civil and political rights and freedoms.[1] The European Court of Human Rights (ECtHR), created by the Council of Europe (CoE) in 1959, oversees the protection of human rights in Europe and enforces the ECHR.[2] Complaints based on violations of rights enshrined in the ECHR can be brought by individuals against States and by States against other States; the highest domestic courts can request non-binding advisory opinions from the ECtHR.[3] The most prevalent gendered harm in the ECtHR's case law is domestic violence; domestic violence characterizes European femicides.[4] Domestic violence is qualified as a human rights issue in the Istanbul Convention, the CoE's regional human rights treaty on violence against women. Many sexual violence and rape cases have also been brought before the ECtHR. They are noticeably treated differently depending on whether the victim was raped in police custody or in private.

A case-by-case analysis on the ECtHR's approach to domestic violence and sexual violence exposes gendered aspects of the violence which women

[1] European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) ETS 5; Susan Deller Ross, *Women's Human Rights: The International and Comparative Law Casebook* (University of Pennsylvania Press 2013) 199.

[2] The Commission has ceased its function in 1998 after entry into force of Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established thereby (11 May 1994) ETS 155.

[3] Arts 33 (inter-state complaints) and 34 (individual complaint) ECHR. Protocol No 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (2 October 2014) ETS 214 (Advisory Opinion).

[4] Jackie Jones, 'The European Convention on Human Rights (ECHR) and the Council of Europe Convention on Violence Against Women and Domestic Violence (Istanbul Convention)' in Jackie Jones and Rashida Manjoo (eds), *The Legal Protection of Women from Violence* (Routledge 2018) 158.

and girls experience, which may have been overlooked by the Court. Relevant facts, such as authorities stereotyping women, are unearthed which the Court did not deal with or neglected in its legal analysis. This approach is crucial to critically assess the discrepancy between the factual situation and the Court's response. The case law section tells different women's personal and societal stories, thereby engaging in the consciousness-raising method by which a collective experience is created.[5] Finally, it reveals the many compounded human rights violations, such as the right to life, the prohibition of torture and other ill-treatment, and non-discrimination inherent in femicide.

THE ISTANBUL CONVENTION

The Istanbul Convention entered into force in 2014. It is the most recent regional treaty for the protection of women's rights, whose purposes are to prevent violence and discrimination against women, to establish a comprehensive policy framework, to promote international cooperation in combatting domestic violence, and to assist law enforcement agencies in implementing protective measures.[6] The European Union signed the Istanbul Convention in 2017. Up until 2021, 34 States have ratified the Convention, while 11 States have signed it.[7]

Praised as 'the most comprehensive victim supporting regional treaty that currently exists,'[8] the Istanbul Convention recognizes many acts of femicide. It requires States to criminalize forms of psychological and physical violence, forced marriage, female genital mutilation, forced abortion, sterilization, sexual harassment, stalking, and rape. The Convention also defines rape as 'engaging in nonconsensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object,' similar to the international criminal law approach in *Furundžija*.[9]

However, the Istanbul Convention's approach to domestic violence is ambivalent: it views domestic violence as gender-neutral on the one hand, and as committed against women and girls specifically on the other. That violence

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[5] Nancy Levit and Robert R. M. Verchick, *Feminist Legal Theory: A Primer* (New York University Press 2006) 25.

[6] Art. 1(a) Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (adopted 7 April 2011, entered into force 1 August 2014).

[7] CoE, Chart of Signatures and Ratifications of Treaty, www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures. All online sources were accessed 30 October 2021.

[8] Jones (n 4) 140. See Art. 7 Istanbul Convention.

[9] See Art. 36(2) Istanbul Convention.

is systemic is recognized in the Preamble as 'a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.' The Convention also defines 'violence against women' broadly as '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.'[10] The systemic context, which makes domestic violence so common for women and girls, whereas men and boys are sporadically affected, appears to be masked by the Convention's gender-neutral definition of domestic violence.[11] The Convention defines domestic violence as 'physical, sexual, psychological or economic violence that occur[s] within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim.' The Istanbul approach to domestic violence also appears to contrast with the Convention on the Elimination of Discrimination Against Women (CEDAW) Committee's understanding of domestic violence as gender-based.[12] Gender-neutral terms may have the potential to call into question the treaty's aim of protecting women and girls from violence as envisioned in its Article 1.[13] An undesired effect of gender-neutral approaches may be the legitimization of budget allocations in equal shares to projects aimed at men, where such a budget is needed to protect women and girls.[14]

The Istanbul Convention's domestic violence definition does not easily enable the Court to identify domestic violence as gender based. For example, the Grand Chamber in *Kurt v. Austria*, the first domestic violence case examined by a panel of 17 judges, only referred to 'domestic and gender-based violence,' thereby using a cautious approach to the term.[15] Nevertheless, the Court can tackle domestic violence by reinterpreting Convention rights adjusted to a contemporary context, and consider comprehensive approaches to domestic violence, such as those set out in the Convention's Preamble.[16] Although there

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[10] Art. 3(a) Istanbul Convention.

[11] Jones (n 4) 141.

[12] CEDAW, General Recommendation No 19, para. 23; Jones (n 4) 141.

[13] Jones (n 4) 142.

[14] Art. 1(d) Istanbul Convention; see Jones (n 4) 144; UNGA, 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences', UN Doc A/HRC/26/38 (28 May 2014), para. 62.

[15] ECtHR, *Kurt v. Austria* [GC], App No 62903/15 (15 June 2021), para. 161.

[16] Maria Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (Brill 2017) 18.

is no possibility for victims to lodge complaints about violations of the Istanbul Convention directly with the ECtHR, they can use the Convention to substantiate claims under ECHR provisions and the Court can reference the Istanbul Convention.[17] Most notably, the Grand Chamber systematically referenced the Istanbul Convention in *Kurt v. Austria* to outline the risk assessment in domestic violence cases, the need to train law officials, the treatment of perpetrators and checks for weapons.[18] Based on the Court's courageous use of this Convention, it seems that its relevance before it is increasing—notwithstanding the withdrawal from the Convention or threat thereof by some Member States.[19] The Convention's own treaty implementation mechanism, the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), is not an individual complaint mechanism, but it provides important recommendations and country reports, in which attention could be drawn to situations of femicide.[20]

FEMICIDE UNDER THE ECHR

The ECtHR has mainly examined cases of domestic violence, sexual violence, rape, forced nudity, forced sterilization, acid burnings, and human trafficking.[21] As applied by the Court, the main provisions relevant to femicide are the right to life (Art. 2 ECHR), the right to be free from degrading and inhuman treatment and the prohibition of torture (Art. 3 ECHR), the right to private and family life (Art. 8 ECHR), as well as the principle of non-discrimination (Art. 14 ECHR).[22]

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[17] European Court of Human Rights (EctHR), *Talpis v. Italy*, App No 41237/14 (2 March 2017), para. 129.

[18] *Kurt v. Austria* [GC] (n 15) paras 167, 172 and 175.

[19] On 20 March 2021, Turkey announced its withdrawal from the Convention. Başak Çali, 'Withdrawal from the Istanbul Convention by Turkey: A Testing Problem for the Council of Europe' *Ejil Talk!* (22 March 2021), www.ejiltalk.org/withdrawal-from-the-istanbul-convention-by-turkey-a-testing-problem-for-the-council-of-europe/ Turkey's withdrawal took effect on 1 July 2021.

[20] See Art. 1(2) Istanbul Convention.

[21] ECtHR, *Opuz v. Turkey*, App No 33401/02 (9 March 2009) (domestic violence); ECtHR, *Aydin v. Turkey*, App No 57/1996/676/866 (25 September 1997) (forced nudity; rape); ECtHR, *Chowdury and Others v. Greece*, App No 21884/15 (30 March 2017) (human trafficking); ECtHR, *Ebcin v. Turkey*, App No 19506/05 (11 May 2001) (acid burnings). See for discussion of relevant case law, Sjöholm (n 16) 350.

[22] The ECtHR does not usually analyze Arts 6 and 13 ECHR in domestic violence cases after finding violations of other rights. See e.g., ECtHR, *Muntenau v. Romania,* App No 34168/11 (26 May 2020), para. 85; *Levchuk v. Ukraine*, App No 17496/19 (3 March 2020), paras 92–93, referring to ECtHR, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], App No 47848/08 (14 July 2014), para. 156.

In its early case law, the ECtHR frequently considered rape and sexual violence as issues concerning the right to private life. Claims raised under the right to life, the right to be free from inhuman and degrading treatment, and the principle of non-discrimination were generally dismissed.[23] The private life perspective could convey the message that domestic violence, and inevitably rape, remain issues of private concern, with which the State should not interfere. The Court could avoid this misconception by viewing such violence as degrading or inhuman treatment, if not torture. Although the Court has not yet abandoned its Article 8 ECHR approach to violence against women and girls (VAWG) entirely, the case law has moved away from exclusively relying on the right to private life for rape cases, with the Court now typically combining Articles 3 and 8 ECHR.[24] The Court has still failed to clarify what form of treatment (degrading, inhuman or torture) is at stake in most rape and domestic violence cases under Article 3 ECHR.

Gender-based Violence

Femicide is characterized by discriminatory societal structures and gender-stereotyping of the victim. The ECtHR considers inequality based on sex under Article 14 of the Convention, stipulating that 'the enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex.' As an 'accessory' provision, Article 14 ECHR can only be invoked in combination with other Convention rights, although no other rights are required to have been violated.[25] The Court has

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[23] See *Kalucza v. Hungary*, where the applicant invoked Arts 2, 3, and 8 ECHR, but the Court only considered Art. 8. See also *Bevacqua and S. v. Bulgaria,* App No 71127/01 (12 June 2008); ECtHR, *Kalucza v. Hungary*, App No 57693/10 (24 April 2012), para. 73; ECtHR, *Hajduová v. Slovakia*, App No 2660/03 (30 November 2010) paras 10–12, 42 and 50.

[24] Rape: ECtHR, *M.C. v. Bulgaria*, App No 39272/98 (4 December 2003), paras 150–152 and 185 (Arts 8 and 3); ECtHR, *X and Y v. the Netherlands*, App No 8978/80 (26 March 1985), para. 27; ECtHR, *M. and Others v. Bulgaria*, App No 22457/08 (15 February 2012), paras 109–110. Domestic violence: *Bevacqua and S. v. Bulgaria* (n 23); ECtHR, *A. and Others v. Croati*a, App No 55164/08 (14 October 2010); *Hajduová v. Slovakia* (n 23); *Kalucza v. Hungary* (n 23).

[25] Samantha Besson, 'Gender-Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' (2008) 8(4) *Human Rights Law Review* 647–682 at 657. In 2005, the CoE's Protocol No. 12 entered into force, which established a principle/right of non-discrimination, no longer necessitating a connection to another right set forth in the Convention. The application of Art. 1 Protocol 12 is restricted, insofar it only applies to States which have ratified this Protocol. Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, NO 177, 4X 2000.

ideally captured domestic violence under Article 14 ECHR and thus qualified it as gender-based violence.[26]

However, the Court's use of the principle of non-discrimination must be criticized on three fronts. First, the conception of the non-discrimination principle under Article 14 ECHR is not ideal for reasons of imposing an undue burden on victims to demonstrate that domestic violence has a disproportionate impact. As domestic violence victims are generally reluctant to report their harm, this requirement may be difficult to meet when statistics on domestic violence are inexistent or incomplete.[27] Second, the ECtHR is still reluctant to apply Article 14 ECHR in connection with domestic violence.[28] After *Opuz*, the ECtHR's landmark case on domestic violence, the Court remained ambivalent about whether domestic violence is gender-based and has failed to consider it under Article 14 ECHR, most prominently in *Kurt v. Austria*, its Grand Chamber case on domestic violence.[29] Article 14 ECHR requires a high threshold, i.e., 'clear inequality of treatment' in relation to another right.[30] Third, the Court also neglects to apply Article 14 ECHR to rape cases which are unrelated to domestic violence.

Since the ECtHR does not have direct jurisdiction over the Istanbul Convention, Article 14 ECHR is the Court's most progressive and comprehensive device to deal with acts of femicide. The ECtHR has developed several criteria to trigger Article 14 ECHR: (1) unfavorable treatment in comparable cases; (2) based on sex; (3) which the State cannot objectively justify. The Court's discrimination approach includes a problematic formal equality aspect. Comparing women and girls to men and boys means that the treatment of women is only unequal to the extent that their rights are violated in the same way as men's are.[31] The act of taking men's experiences as the standard may also imply that women and girls are seen as inferior, keeping the problematic lower hierarchical status intact.[32]

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[26] *Muntenau v. Romania* (n 22) paras 47–83.

[27] See Daniela Bandelli, *Femicide, Gender and Violence: Discourses and Counterdiscourses in Italy* (Palgrave Macmillan 2017) 43.

[28] See ECtHR, *Kontrova v Slovakia*, App No 7510/04 (31 May 2007); ECtHR, *Branko Tomašić and Others v. Croatia,* App No 46598/06 (15 January 2009); *A. and Others v. Croatia* (n 24).

[29] *Kurt v. Austria* [GC] (n 15) paras 214–215.

[30] Besson (n 25) 655; *Kontrova v. Slovakia* (n 28); *Branko Tomašić v. Croatia* (n 28).

[31] Sandra Fredman, 'Engendering Socio-Economic Rights' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional, and National Law* (Cambridge University Press 2013) 223–224.

[32] Sandra Fredman, *Discrimination Law* (Oxford University Press 2001) 2.

Article 14 ECHR requires the existence of unequal treatment based on sex. The applicant must produce prima facie evidence that a rule couched in seemingly neutral terms has led to mistreatment based on sex.[33] Furthermore, she has to demonstrate that the State failed to protect women and girls from domestic violence and that this breached her right to equal protection by the law.[34] The burden of proof can be shifted 'where the events lie with the exclusive knowledge of the authorities the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.'[35] The required evidence includes statistics and reports on the prevalence of gender-based violence.[36]

These numerical requirements impose an undue burden on the victim. In *Kalucza v. Hungary*, the Court found that the victim did not provide enough statistics and reports, and failed to demonstrate 'that she was treated differently compared to other persons in analogous situations.'[37] Similarly, in *A. v. Croatia*, the Court dismissed the applicant's Article 14 ECHR claim and the statistical evidence adduced, in a narrow sense focusing on whether the police had tried to act as a mediator, as had been the case in *Opuz v. Turkey*.[38] Conversely, in *Mudric v. Moldova*, the ECtHR abandoned the statistical evidence and disproportionate impact requirements. Examining Ms Mudric's situation as a woman, the Court considered that the authorities had lacked interest in investigating violence against her and in enforcing her protection order, and therefore discriminated against her.[39] The ECtHR held that the States' inaction with regard to domestic violence amounted to 'repeatedly condoning such violence and reflect[ed] a discriminatory attitude against her as a woman.'[40] The Court cited the Special Rapporteur on Violence against Women, corroborating the conclusion that 'the authorities do not fully appreciate the seriousness and the extent of the problem of domestic violence and its discriminatory effect on women.'[41]

In order to prevent these evidentiary problems, the ECtHR could rely on the police's passivity in a domestic violence case based on gender stereotypes, which would require the Court to examine the case with gender-sensitivity.[42]

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[33] *Opuz v. Turkey* (n 21) para. 183.
[34] Ibid., paras 184–191.
[35] Ibid.
[36] ECtHR, *Volodina v. Russia*, App No 41261/17 (9 July 2019), paras 112–113.
[37] *Kalucza v. Hungary* (n 23) para. 75.
[38] *A. and Others v. Croati*a (n 24) paras 92–98.
[39] *Mudric v. Moldova*, App No 74839/10 (16 July 2013), para. 62.
[40] Ibid., para. 63.
[41] Ibid.
[42] See *Volodina v. Russia* (n 36) para. 111.

Another way to avoid this burden is that the Court examines official statistics and Article 14 even in the absence of concrete submissions by the applicants. In *Balsan v. Romania*, the ECtHR found a violation of Article 14 in conjunction with Article 3 on its own motion, even though Ms Balsan had not invoked the former herself.[43] In this respect, the Court considered that 'the type of violence is tolerated and perceived as normal by a majority of people and that a rather small number of reported incidents are followed by criminal investigations.'[44] The ECtHR noted that insufficient shelters existed, that most women were unaware of the existence of measures to combat domestic violence, and that the number of domestic violence cases was rising.[45] The Court concluded that domestic violence disproportionately affected women in Romania, and was therefore gender-based.[46] As the ECtHR is far removed from the facts of a case, it may ask the State to collaborate and provide statistics on the levels of domestic violence, for example.[47] Consequently, where the Court recognizes systemic violence, e.g., based on the United Kingdom's femicide census,[48] or data on femicides in Switzerland collected by non-state actors[49] the state authorities could also be expected to know about such widespread domestic violence, and the burden of proof for Article 14 should be shifted onto the government. While the Court recognizes that domestic violence is not an isolated phenomenon, it has yet to consider the legal consequences and state responsibility linked with this context.

Once this prima facie evidence has established that a specific rule targets a higher percentage of women than men, the government must show that this difference results from objective factors.[50] Article 14 ECHR does not list any legitimate aims to justify unequal treatment, unlike those enumerated in Articles 8–11 ECHR. When assessing the States' alleged objective, the ECtHR awards States a wide margin of appreciation, also known as discretion, to decide about the purpose and proportionality of the aim.[51] However, at the

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[43] *Balsan v. Romania,* App No 49645/09 (23 May 2017), paras 72 and 80–82.

[44] Ibid., para. 83.

[45] Ibid.

[46] Ibid., paras 78–79.

[47] See for states' duty to collaborate with the Court, Art. 38 ECHR.

[48] Femicide Census, 'UK Femicides 2009–2018' (November 2020), https://www.femicidecensus.org/wp-content/uploads/2020/11/Femicide-Census-10-year-report.pdf.

[49] StopFemizid, 'Femizide in der Schweiz,' https://www.stopfemizid.ch/deutsch#de1.

[50] *Opuz v. Turkey* (n 21) paras 183–184.

[51] See Christoph Grabenwarther, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Beck 2014) 349–352; *Hajduová v. Slovakia* (n 23), para. 47.

same time, the Court finds that the State must have 'very weighty reasons' or 'compelling reasons' to justify discrimination based on sex.[52] The most contentious issue in domestic violence cases is whether a woman was discriminated against based on her sex, rather than whether such an objective ground existed to justify discrimination. Besides, a State's attempted justification of violent treatment may raise moral and legal concerns.[53]

That the Court has applied Article 14 ECHR to domestic violence cases is a step in the right direction. However, the ECtHR does not apply Article 14 ECHR to rape cases, and consequently has not yet recognized that rape is gender-based. As rape may be directed at women based on their sex, the required purpose under the prohibition of torture would be met. Taking into account the gender-based nature of many rapes would let the Court identify discrimination as the prohibited aim in torture, and adjudicate rape as torture. A more enthusiastic application of Article 14 ECHR on the part of the ECtHR would help properly recognize gendered harm. Based on the principle of iura novit curia, the Court itself can requalify domestic violence claims, adapting its interpretation to the contemporary context, and therefore adjudicate them under the prohibition of torture. Finally, the ECtHR's human rights approach to femicide under Article 14 can be supplemented by the Istanbul Convention.[54]

Severe Violence

The most promising provision to address femicide in the European human rights system is Article 3 ECHR as it covers severe violence. Under Article 3 ECHR, '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Since this provision is silent on what type of harsh treatment is inhuman or degrading, or torture, the ECtHR has developed the scope of each of these treatments in its case law.[55] To fall within the ambit of Article 3 ECHR, ill-treatment must attain a 'minimum level of severity,' a threshold which is relative and depends on '[factors] such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim, etc.'[56] The Court has specified that the sever-

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[52] ECtHR, *J.D. and A. v. the United Kingdom*, App. Nos. 32949/17 and 34614/17 (24 October 2019), paras 96–100 and 103–105. See also Grabenwarther, ibid., 353.

[53] See ibid.

[54] *Balsan v. Romania* (n 43) paras 72 and 80–82. The Court explains the extent to which it takes account of other international treaties in *Demir and Baykara v. Turkey*, App No 34503/97 (12 November 2008), paras 65–68.

[55] See also Fanny De Weck, *Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture* (Brill 2017) 138.

[56] ECtHR, *Ireland v. UK*, App No 5310/71 (18 January 1978), para. 162.

ity 'depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner, and method of its execution.'[57]

The ECtHR considers degrading treatment to be conduct which causes 'feelings of fear, anguish and inferiority, capable of humiliating [the victim]' and debases the victim or negatively affects the person's personality, as well as physical or moral resistance.[58] Inhuman treatment is more severe than degrading treatment, as noted in the *Greek* case: '[T]he notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable.'[59] Torture is the most intense ill-treatment under Article 3 ECHR,[60] to which a special stigma is attached, and the prohibition of which is 'one of the most fundamental values of democratic society' from which no derogation is permitted. Therefore, the notion of torture is most suitable for adjudicating extreme forms of violence in femicide.[61] As 'an aggravated form of inhuman treatment,' torture has long been thought to be used for 'obtaining information, inflicting punishment or intimidation,' but the cases brought suggest that discrimination can also be an intended aim of torture.[62] Since Article 3 ECHR does not define torture, the ECtHR's analysis is loosely based on Article 1 Convention Against Torture (CAT):[63]

> The term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[64]

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[57] ECtHR, *Soering v. UK*, App No 14038/88 (7 July 1989), paras 100–101.

[58] ECtHR, *Raninen v. Finland*, App No 20972/92 (16 December 1997), paras 21–22 and 55.

[59] European Commission, *Greek Case*, Judgment of 18 November 1969; *Jalloh v. Germany* [GC], App No 54810/00 (11 July 2006), para. 68.

[60] De Weck (n 55) 141.

[61] *Aydin v. Turkey* (n 21) paras 81–82.

[62] See for the previous approach, *Greek Case* (n 59); ECtHR, *Ilhan v. Turkey*, App No 22277/93 (27 June 2000), para. 87 (deviating from the purpose requirement); De Weck (n 55) 141.

[63] See Sjöholm (n 16) 56.

[64] Art. 1 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), UNGA Res 39/46 (adopted 10 December 1984, entered into force 26 June 1987) UN Doc A/39/51, 1465.

In line with CAT's definition, the ECtHR requires (1) intentionality, i.e., a certain amount of preparation and exertion; (2) infliction of severe mental or physical pain; and (3) a prohibited purpose.[65] Apart from these strict criteria, the Court recognizes that the scope of the prohibition of torture can evolve over time as the ECHR is a 'living instrument' susceptible to changing circumstances.[66] Hence, even though the Court now sees VAWG as inhuman and degrading treatment, such treatment could be perceived as torture in the future.[67]

The ECtHR examines instances of rape and domestic violence under Article 3 ECHR when women and girls are attacked, harassed, sexually abused, and forcibly sterilized.[68] However, only where state actors rape women has the Court unequivocally classified rape as torture.[69] When rape is committed by private persons, the Court cursorily states that the rape falls within the ambit of Article 3 ECHR but rarely identifies the relevant ill-treatment.[70] This approach fails to clarify the scope and legal implications of VAWG. The differentiation between the exact same act being classified as torture when committed by a police officer or a prison guard but another form of ill-treatment when a private individual is the perpetrator, makes no sense.[71] Moreover, this would create a hierarchy of what type of rape ought to be considered serious and what type of rape is less severe because it happens in daily life.[72] The ECtHR ought to delve into how rape affects women and why it is committed.

'Private' Life

The ECtHR has previously resorted to Article 8 ECHR, 'the right to respect his private life,' to classify acts of VAWG. This Article broadly includes a person's right to privacy and identity, extending to the relationship between private individuals and allows individuals to enter into and develop relation-

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[65] ECtHR, *Selmouni v. France*, App No 25803/94 (29 July 1988), paras 97–98 (referring to CAT).

[66] Ibid., para. 101.

[67] Ibid.

[68] *Mudric v. Moldova* (n 39) paras 64–65; ECtHR, *Valiulienė v. Lithuania*, App No 33234/07 (26 March 2013), para. 87.

[69] E.g., ECtHR, *Aydin v. Turkey* (n 21); ECtHR, *Maslova and Nalbandov v. Russia*, App No 839/02 (24 January 2008).

[70] E.g., *M.C. v. Bulgaria* (n 24); Sjöholm (n 16) 406.

[71] Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill Law Journal* 217–240 at 239.

[72] Ibid.

ships with each other.[73] The physical and moral integrity protected by Article 8 ECHR covers rape and sexual violence, forced gynaecological examination, and episodes of domestic violence.[74]

At times, the Court's reason for centering on Article 8 ECHR was to circumvent quantifying the particular treatment under Article 3.[75] As was explained in *A. v. Croatia*, 'in order to avoid further analysis as to whether [the physical acts meet] the threshold for the purposes of Article 3 of the Convention, the Court will analyze the circumstances of the present case from the standpoint of Article 8.'[76] In *Kalucza v. Hungary*, the ECtHR considered the death threats against Ms Kalucza under Article 8 ECHR, despite claims raised under Articles 2, 3 and 13 ECHR.[77] The Court declared these complaints admissible but did not discuss their merits, 'their essence having already been dealt with in the context of Article 8.'[78] This suggests that the Court deems the application of Article 3 ECHR only pertinent when actual physical harm is used.[79] In *Levchuk v. Ukraine*, the applicant had only complained before the ECtHR about the domestic authorities' failure to evict her violent ex-partner under Article 8 ECHR, as result of which the Court examined that provision.[80] Had the Court asked the 'woman question,' however, it might have requalified her complaint, as her exposure to 'physical assaults, intimidation and threats' not merely interfered with her private life, but constituted serious violence under Article 3 ECHR.[81] The Article 8 ECHR approach to violence should be abandoned as it conveys the message that physical and psychological violence is not severe, and the private/public divide is reinforced by the application of the right to private life to cases of femicide.

Most rape cases are now decided under Articles 3 and 8 ECHR combined, or only under Article 3 ECHR. Of course, whether the applicants properly claim

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[73] *X and Y v. the Netherlands* (n 24), paras 23–24; *A. and Others v. Croati*a (n 24), para. 59; *Kalucza v. Hungary* (n 23) paras 58–59.

[74] *X and Y v. the Netherlands* (n 24), para. 22; ECtHR, *Jankovich v. Croatia,* App No 38478/05 (5 March 2009), para. 59.45 (episodes of kicking, hitting, throwing the applicant down some stairs, and other forms of domestic violence); ECtHR, *Kowal v. Poland*, App No 21913/05 (2 October 2012), paras 45–46 (forced gynaecological examination and threats of rape while in police custody).

[75] Sjöholm (n 16) 406.

[76] *A. and Others v. Croati*a (n 24), para. 57.

[77] *Hajduová v. Slovakia* (n 23), paras 6.11–13 and 48.

[78] *Kalucza v. Hungary* (n 23) para. 73.

[79] See Patricia Londono, 'Recent Developments, Human Rights, Positive Obligations and Domestic Violence: Kalucza v Hungary in the European Court of Human Rights' (2012) 1(2) *International Human Rights Law Review* 339–348 at 346.

[80] *Levchuk v. Ukraine* (n 22) para. 77.

[81] See ibid., para. 81.

Article 8 and/or 3 ECHR may impact the Court's willingness to adjudicate such harm.[82] Most domestic violence and rape cases should be decided under Article 3 ECHR for three reasons. First, the application of Article 3 ECHR classifies domestic violence as serious harm. As ongoing and recurring human rights violations, most domestic violence and rape cases would meet the required 'minimum level of severity' standard to trigger application of Article 3 EHCR, and thereby convey legal certainty about the type and nature of the ill-treatment. Conflating Articles 3 and 8 ECHR also blurs the line between conduct which falls short of the Article 3 ECHR threshold and that which constitutes degrading or inhuman treatment, or torture.[83] The ECtHR's failure to examine the harm at stake opens the door for regressive case law which considers rape solely under Article 8 EHCR. For example, in *Valiulienė v. Lithuania*, the dissenting judge argued that the Court should have applied Article 8 ECHR to a domestic violence case, stating that the treatment at issue did not rise to the threshold required for Article 3 ECHR.[84] In the interest of legal certainty and recognition of domestic violence, the ECtHR ought to consistently apply the latter Article to domestic violence.[85] Framing domestic violence and sexual violence as Article 3 ECHR issues also helps to move domestic violence and other acts against women into the 'public' realm. In *Bevacqua and S. v. Bulgaria*, the police had failed to intervene because the violence against Ms Bevacqua concerned a private matter, an aspect paradoxically emphasized by the Court.[86] In this sense, an Article 8 ECHR analysis could propagate a message that VAWG is a 'trivial' matter in the domestic sphere, where the State ought not to interfere.[87]

An approach with Article 3 ECHR takes account of the continuous nature of domestic violence as ill-treatment. As Judge Albuquerque noted in his dissent in *Valiulienė*, 'repeated verbal abuse like insults' is enough to meet the threshold of Article 3 ECHR. He rightly indicated the effect of such abuse, since 'a kick, a slap or a spit is also aimed at belittling the dignity of the partner, conveying a message of humiliation and degradation.'[88] Albuquerque stressed that domestic violence is a recurrent human rights violation and that it must be considered holistically. By contrast, the Court's viewpoint under Article 8 ECHR is focused on a single instance of verbal abuse or maltreatment. As

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[82] See *Ebcin v. Turkey* (n 21); *M.C. v. Bulgaria* (n 24); ECtHR, *E.B. v. Romania*, App No 49089/10 (19 March 2019).

[83] See Londono (n 79) 339–348.

[84] *Valiulienė v. Lithuania* (n 68), Dissenting opinion of Judge Jociene, para. 10.

[85] *E.B. v. Romania* (n 82) para. 44.

[86] *Bevacqua and S. v. Bulgaria* (n 23) para. 83.

[87] See *Valiulienė v. Lithuania* (n 68) paras 55 and 73.

[88] Ibid., concurring opinion of Judge Pinto de Albuquerque.

a result, the application of said Article 'would fall short of the real and full meaning of violence in the domestic context and would thus fail to qualify as a "gendered understanding of violence."'[89] The ECtHR ought to inquire into domestic violence as a whole and consider whether the violence at issue is repeated over time to bring to light continuous harm. This means that most psychological harm committed over time in the context of domestic violence would meet the Article 3 ECHR threshold, as ill-treatment can be inflicted through mental harm.[90] On purely normative grounds, adjudication of the facts under Article 8 ECHR would become obsolete should Article 3 ECHR become the baseline for measuring domestic violence. However, from a practical perspective, combining Articles 3 and 8 ECHR may increase the just satisfaction awarded to victims under Article 41 ECHR.[91] Therefore, the violence in femicide should attract application of Article 3 ECHR and could be supplemented by Article 8 ECHR for reasons relating to pecuniary damages.

'Private' Murders

Many femicide cases in Europe are characterized by the victim or her children's private murder, a breach of their right to life. The right to life is embodied in Article 2 ECHR, which provides that '[e]veryone's right to life shall be protected by law.'[92] As one of the most fundamental rights in the ECtHR's case law, it is vital that States take measures to prevent violations of Article 2 ECHR, an issue which the Court has considered in outlining states' positive obligations.[93] In addition to the State's duty not to take someone's life, it also has a positive obligation to 'safeguard the lives of those within its jurisdiction,' such as preventing the murders of women and children by private actors.[94] To this effect, a State must (1) 'put in place effective-criminal-law provisions to prevent the commission of crimes,' and (2) establish an adequate 'law-enforcement machinery for the prevention, suppression, and punishment of breaches of such provisions.'[95] Given 'the unpredictability of human conduct and the operational choices,' the State cannot be held responsible

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[89] Ibid.

[90] *Volodina v. Russia* (n 36) para. 81. See also Ronagh McQuigg, 'The European Court of Human Rights and Domestic Violence: Volodina v. Russia' (2021) 10(1) *International Human Rights Law Review* 155–167 at 159 and 161.

[91] All ill-treatment under Art. 3 ECHR triggers central non-refoulement obligations in the European human rights system. De Weck (n 55) 140.

[92] Art. 2(1) ECHR.

[93] E.g., *Talpis v. Italy* (n 17) paras 98–100.

[94] *Valiulienė v. Lithuania* (n 68) para. 49.

[95] Ibid.

for every human rights violation.[96] The ECtHR uses the criteria developed in *Osman*, requiring the State to act when:

> [state authorities] knew or ought to have known of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[97]

The ECtHR finds violations of the states' positive obligations to protect the right to life when various acts of domestic violence against the victim culminate in murder, often after a woman has endured consistent abuse over a long period of time. However, the cases are often left to be dealt with, if at all, under the procedural limb of Article 2, and/or Articles 6 and 13 ECHR (fair trial and effective remedy), limiting the Court's analysis on whether the investigation was effective. In *Durmaz v. Turkey*, Ms Durmaz' daughter died after having been hospitalized for a medication overdose, presumably due to the victim's father's violent attacks. Turkish authorities had conducted an ineffective investigation into the circumstances of her death, thereby violating Article 2 ECHR. Arguably, the case was only decided under the procedural limb as the applicants had failed to raise a substantive complaint.[98] Domestic violence also implicates harm to other family members, raising questions on how to effectively deal with such acts, especially when the perpetrator subsequently commits suicide.[99]

The ECtHR has recognized substantive violations in many cases. In *Branko Tomašić v. Croatia,* the perpetrator threatened to kill his wife and infant in the presence of police officers, before committing suicide.[100] In *Kontrava v. Slovakia*, Ms Kontrova's husband repeatedly threatened her and their two children, eventually killing their children and committing suicide.[101] In *Civek v. Turkey*, an abused woman had fled to a shelter. She tried to divorce her husband, but then withdrew the application due to death threats from her husband. He was briefly imprisoned, but sometime after his release, he killed his wife and their daughter before committing suicide.[102] In *Talpis v. Italy*, the perpetrator killed the couple's son and then committed suicide.[103] These suicides in domestic violence cases leave the victims who may have survived,

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96 Ibid., para. 50.
97 ECtHR, *Osman v. UK*, App No 23452/94 (28 October 1998), para. 116.
98 ECtHR, *Durmaz v. Turkey*, App No 3621/07 (13 November 2014), paras 66–67.
99 See *Kurt v. Austria* [GC] (n 15).
100 *Branko Tomašić v. Croatia* (n 28) paras 50–51, 61 and 65.
101 *Kontrova v. Slovakia* (n 28) paras 50–53.
102 ECtHR, *Civek v. Turkey*, App No 55354/11 (23 February 2016), paras 65–66.
103 *Talpis v. Italy* (n 17) paras 42 and 125.

or their relatives, without justice.[104] In such circumstances, the Court's discussion of the substantive violation of Article 2 ECHR is very important to raise awareness about states' preventive obligations.

The ECtHR also examines death threats under Article 2 ECHR. In *A. v. Croatia*, the Court wanted to 'avoid further analysis as to whether the death threats against the applicant engaged the State's positive obligation under Article 2,' and left the question of whether death threats fall within the ambit of Article 2 ECHR unanswered.[105] In *Talpis*, Ms Talpis was subjected to 'inherently life-endangering conduct even though she ultimately survived her injuries,' which triggered Article 2 ECHR.[106] However, in order to qualify an attack as gender-based, the Court must combine its analysis of Article 2 with Article 14 ECHR.

DOMESTIC VIOLENCE

The ECtHR has repeatedly decided cases on domestic violence, 'a general problem which affects, to a varying degree, all member States.'[107] Perhaps due to the term domestic violence not having been defined in the ECHR text, the Court initially struggled with understanding that domestic violence can entail many episodes of violence and various forms 'ranging from physical assault to sexual, economic, emotional or verbal abuse—but has become aware of this.[108] The Court has recognized and advanced State responsibility in relation to domestic violence under Article 14 of the Convention coupled with Article 3 ECHR in its ground-breaking *Opuz* judgment, advanced in *Talpis*, and confirmed in *Mantenau* and *Volodina*.[109] In the same vein, these cases recognized the continuous nature and slow-death potential of domestic violence, as it places women and girls at a 'constant risk' of violence.[110] The Grand Chamber case of *Kurt* disregarded Article 14 ECHR, a case that ultimately resulted in a rejection of the right to life claim. Even so, it advanced important standards on State responsibility for femicide.[111]

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[104] E.g., *Branko Tomašić v. Croatia* (n 28) para. 63.
[105] *A. and Others v. Croati*a (n 24) para. 57.
[106] *Talpis v. Italy* (n 17) para. 110.
[107] *Levchuk v. Ukraine* (n 22) para. 78.
[108] Ibid. See also Bonita Meyersfeld, *Domestic Violence and International Law* (Hart 2011) 111 and 123–124.
[109] *Muntenau v. Romania* (n 22) paras 47–83.
[110] Ibid., para. 73. See also *Volodina v. Russia* (n 36) para. 86; *Talpis v. Italy* (n 17) para. 122.
[111] *Kurt v. Austria* [GC] (n 15).

Opuz v. Turkey **(2009)**

Over a timespan of six years, H.O. had repeatedly harassed, beaten, and threatened to kill his wife, Nahide Opuz, and her mother. Their injuries were confirmed by medical reports.[112] In one instance, the injuries inflicted on Ms Opuz were serious enough to endanger her life.[113] As the threats intensified, Ms Opuz and her mother filed several criminal complaints, some of which they withdrew under pressure from H.O.[114] Considering the matter to be a 'domestic issue,' the police limited its actions to taking statements from the perpetrator, performing some medical examinations, and temporarily detaining H.O. When Ms Opuz and her mother tried to move away, H.O. killed her mother. He was convicted for murder and sentenced to life imprisonment. Released pending appeal, he continued to harass his wife.[115] The Court found violations of the right to life (Art. 2 ECHR), the right to humane treatment (Art. 3 ECHR) and, for the first time in a domestic violence case, the principle of non-discrimination (Art. 14 ECHR).

Opuz is the ECtHR's landmark case on domestic violence and set standards on which the Court's recent case law on domestic violence builds.[116] The Court found that Turkey failed to protect Ms Opuz's mother and violated her right to life.[117] Consistent with its case law, the ECtHR required that States secure the right to life in domestic violence cases by establishing both adequate criminal-law provisions to deter the commission of offences against the person and law-enforcement machinery to implement these provisions.[118] The Court particularly criticized the Turkish legal framework for the punishment of domestic violence, which required Ms Opuz to pursue a criminal investigation,[119] holding that a criminal system could not adequately prevent violent crimes if dependent on victims' actions.[120] The authorities should have pursued the case as a matter of public interest despite the withdrawal of a formal complaint, considering that the violence was of an especially serious and continuous nature, including life-threatening injuries, and the risk of further offenses.[121] Turkey's obligation to apply operational measures was triggered

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[112] *Opuz v. Turkey* (n 21) paras 9–52.
[113] Ibid., para. 13.
[114] Ibid., para. 11.
[115] Ibid., para. 133.
[116] See also Ronagh McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights* (Routledge 2017) 64.
[117] *Opuz v. Turkey* (n 21) para. 153.
[118] Ibid., para. 128.
[119] Ibid., para. 145.
[120] Ibid., para. 149.
[121] Ibid., paras 138, 143 and 148.

in this case as the State knew of a real and immediate risk to Ms Opuz and her mother on the basis of various criminal complaints.[122] H.O. carried lethal weapons and frequently approached Ms Opuz and her mother until he finally killed Ms Opuz's mother.[123] Accordingly, the Court held that the authorities had failed to take reasonable measures to protect Ms Opuz's mother whose life was at risk from the criminal acts committed by H.O.[124]

In addition to breaches of Articles 2 and 3 ECHR, the ECtHR found a violation of Article 14 ECHR based on Ms Opuz and her mother's sex in a context where the police structurally remained inactive in cases of domestic violence perpetrated against women.[125] In particular, the police and judicial authorities acted as mediators in family matters, unreasonably delaying injunctions, and mitigating sentences.[126] The Court considered that 'a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory, notwithstanding that it is not specifically aimed at that group.'[127] Ms Opuz demonstrated that the highest reported number of domestic violence victims in Turkey occurred in the region where she lived, with the victims being mainly illiterate Kurdish women.[128] The ECtHR noted that the violence she suffered, the threats from her husband after his release from prison, and her social background—'namely the vulnerable situation of women in southeast Turkey'[129]—led to physical injury and psychological pressure 'sufficiently serious to amount to ill-treatment' under Article 3 ECHR.[130]

Shortly before *Opuz* was decided, the CEDAW Committee had also expressed concern on VAWG in Turkey and had asked the State to prevent and combat such violence, which may have made the applicant's discrimination claim more tangible.[131] The Court emphasized that a limited group of women in a specific context was persecuted, not the female population in Turkey as such:[132] an important criteria to identify the protected female group (see Chapter 9). The distinct treatment these women and girls suffered, their complaints about domestic violence being left unanswered, was attributable

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[122] Ibid., paras 115 and 129–139. See *Osman v. UK* (n 97) para. 116; *Kontrova v. Slovakia* (n 28) para. 50.
[123] *Opuz v. Turkey* (n 21) para. 143.
[124] Ibid., paras 116 and 130. See *Kontrova v. Slovakia* (n 28) para. 50.
[125] *Opuz v. Turkey* (n 21) para. 183.
[126] Ibid., paras 192 and 195–196.
[127] Ibid.
[128] Ibid, para. 194.
[129] Ibid., paras 160–161.
[130] Ibid., para. 161. See also McQuigg (n 116) 65.
[131] *Opuz v. Turkey* (n 21) para. 197.
[132] Sjöholm (n 16) 401.

to their sex in the eyes of the Court.[133] The ECtHR noted that, in the context of discrimination, the 'lower status of women in society [is] exacerbated by the obstacles women often face in seeking remedies from the State.'[134] The State's failure to protect women against domestic violence was considered to breach women's right to equal protection of the law, a failure which does not need to be intentional. The Court held that the violence against Ms Opuz and her mother, inhuman and degrading treatment under Article 3 ECHR, was gender-based.[135] Since acts of gender-based violence are legal elements of femicide, *Opuz* paves the way for adjudicating femicide under IHR.

Moreover, *Opuz* sheds light on the ECtHR's response to acts of violence against women committed by non-state actors in the private sphere and the *Osman* test as it was applied to risk assessments in domestic violence cases.[136] It was evident in this case that the domestic authorities had been aware of the threats and violence against the applicant. The question was whether the authorities had done enough to prevent further violence. The Court awards discretion to the authorities to decide which measures to take.[137] The Turkish authorities took Ms Opuz for medical exams, questioned her husband, and placed him in detention twice. Yet, none of these measures stopped H.O. from committing further unlawful acts.[138] After the first death threats and beatings, the authorities discontinued the proceedings against H.O as the applicant's injuries had healed.[139] Since H.O. had received a lenient sentence and punishment for his severely violent acts—25 days in prison for running over his mother-in-law and a small fine for stabbing Ms Opuz seven times—[140] the Court concluded that the perpetrator acted with impunity.[141] The Court found that the criminal law system should have functioned despite the withdrawal of complaints given the constant threat to the applicant's physical integrity and the seriousness of the crimes. The inactivity of the domestic authorities and the resulting impunity for the perpetrator resulted in a violation of Articles 2, 3 and 14 ECHR.[142]

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133 *Opuz v. Turkey* (n 21) para. 197.
134 Ibid., para. 188.
135 Ibid., para. 191.
136 Ibid., para. 145.
137 Ibid., para. 165.
138 Ibid., para. 16.
139 Ibid., paras 9–10 and 169.
140 Ibid., para. 169.
141 Ibid., para. 170.
142 Ibid., paras 199–202.

A. and Others v. Croatia (2010)

Ms A.'s husband punched, kicked and threatened her, even in front of their daughter.[143] She complained to the national authorities, but the proceedings against her husband were lengthy, and fines remained unenforced.[144] Her husband was eventually ordered to undergo compulsory psychiatric treatment. He had suffered from post-traumatic stress disorder on account of having been interned in a concentration camp during the war in the former Yugoslavia—the roots of his behavior being in a context of armed conflict.[145] For short periods of time, he was admitted to a psychiatric clinic, but upon each release, he continued to harass and threaten Ms A. A judge he had threatened recused herself from the case.[146] Ms A. sought protective measures for herself and her daughter, but the authorities said there was no 'immediate risk to her life.'[147] Ms A. and her daughter fled to a women's shelter. Then, they moved to a secret address. Her husband located her through a detective and abused her.[148]

The ECtHR found that Croatia had violated her right to private life under Article 8 ECHR but declared the complaint with respect to the principle of non-discrimination under Article 14 inadmissible. The Court simply held that Article 8 ECHR covers attacks on a person's 'physical and moral integrity,' and extends to the relationship between private individuals.[149] Instead, the ECtHR noted that 'issues pertinent to the threshold for the purposes of Article 3 of the Convention,' prevented it from applying that provision.[150] Sjöholm argues that 'the focus on Article 8 was a choice based on legal convenience.'[151] To make the seriousness of the harm inflicted visible—'verbal, including serious death threats, and physical, including hitting and kicking the applicant in the head, face and body, causing her injuries'—the Court should have applied Article 3 ECHR to the domestic violence.[152]

The ECtHR considered Croatia's international responsibility for Ms A.'s abuse. It criticized the authorities for inadequately implementing measures to protect victims, thereby failing to satisfy the State's positive obligations under Article 8 ECHR. Croatian authorities had taken various measures to imple-

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[143] *A. and Others v. Croati*a (n 24), paras 7–8 and 19.
[144] Ibid., paras 24, 28 and 32–35.
[145] Ibid., para. 6.
[146] Ibid., para. 16.
[147] Ibid., para. 35.
[148] Ibid., paras 35–36.
[149] Ibid., paras 58–59.
[150] Ibid., para. 66.
[151] Sjöholm (n 16) 406.
[152] *A. and Others v. Croati*a (n 24) para. 55.

ment the existing criminal law framework to protect Ms A. However, many protection measures, including psychiatric treatment remained unenforced.[153] The State had failed to consider the situation holistically by instigating many minor criminal proceedings relating to the same facts.[154] Evidently, the Court recognized here that if each instance of abuse is only viewed as a singular occurrence, the insidious domestic violence, recurring over months, could be wrongfully considered as unrelated, spontaneous acts.

Regrettably, her Article 14 claim was declared inadmissible, since she had not shown that the effect of the violence was discriminatory.[155] The ECtHR distinguished *A. and Others* from *Opuz* on two essential points. First, it noted that the situation in Turkey was systemic, as one of 'general and discriminatory judicial passivity.'[156] In *A. and Others*, the Court found that the qualification of violence as 'minor offences' and the inadequate implementation of measures and sanctions were not discriminatory.[157] Second, it considered the particular treatment of women by Turkish authorities, with police acting as mediators convincing or helping victims to drop complaints, different from the 'mere' inaction in *A. and Others*. However, the Court should have asked the woman question to inquire how the State's actions affected Ms A. By remaining inactive, the authorities conveyed that the violence against her was trivial and unnecessary to investigate, and thus discriminated against her.[158]

Talpis v. Italy **(2017)**

Ms Talpis had been bruised, scratched, and 'bitten in the face,' and her daughter who had tried to protect her mother, had also sustained bruising.[159] Ms Talpis called the police for help but was not informed that she could file a criminal complaint against her husband.[160] Later, her husband attacked Ms Talpis again with a knife. Intercepted by a police patrol, his knife was seized.[161] Ms Talpis went to the hospital, where doctors confirmed that she had 'suffered from cranial trauma, a head injury, multiple abrasions to her body and a bruise on her chest.'[162] She then filed charges against her husband and temporarily

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153 Ibid., paras 68–69, 73 and 78–79.
154 Ibid., para. 76.
155 Ibid., para. 104.
156 Ibid., para. 95.
157 Ibid., paras 96–103.
158 *Balsan v. Romania* (n 43) paras 80–82.
159 *Talpis v. Italy* (n 17) para. 10.
160 Ibid., paras 9–11.
161 Ibid., paras 13–15.
162 Ibid., para. 17.

lived in a safe house. After she returned home, her husband attacked her again with a kitchen knife, killing their son who had tried to protect his mother.[163] Ms Talpis escaped with several chest wounds. The domestic courts sentenced her husband to life imprisonment for the murder of his son.[164]

The ECtHR found violations of Articles 2, 3, and 14 ECHR, since Italy had failed to comply with its positive obligations to protect Ms Talpis and her son from domestic violence. In relation to Article 2 ECHR, the Court found that Ms Talpis' son's right to life was violated, but also found that Ms Talpis' right to life had been at risk and Article 2 ECHR had been breached, even though she had remained alive.[165] From the moment that Ms Talpis had filed a criminal complaint, the authorities knew of the danger to her life.[166] Yet, they took seven months to hear Ms Talpis' claim and thereby 'deprived the complaint of any effectiveness, creating a situation of impunity conducive to the recurrence of [the husband's] acts of violence against his wife and family.'[167] The *Opuz* test was modified to the specific circumstances of domestic violence by *Talpis*:

> [T]he risk of a real and immediate threat […] must be assessed taking due account of the particular context of domestic violence. In such a situation it is not only a question of an obligation to afford general protection to society, but above all to take account of the recurrence of successive episodes of violence within the family unit.[168]

This test recognizes the continuous nature of domestic and sexual violence, as opposed to instant killings, so crucial for understanding state responsibility of femicide. It also considers, albeit implicitly, the widespread situation of domestic violence in Europe, and the systemic context of femicide.

Applying this standard, the ECtHR found Ms Talpis' Article 3 ECHR rights to be infringed, emphasizing that 'special diligence is required in dealing with domestic violence.'[169] Citing the Istanbul Convention, the Court considered that States have a duty to take 'the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of [the Istanbul] Convention are carried out without undue delay.'[170] Even though States can decide which measures to take to protect women, they must take time-sensitive and result-oriented meas-

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[163] Ibid., paras 36–42.
[164] Ibid., para. 46.
[165] Ibid., para. 110.
[166] Ibid., para. 111.
[167] Ibid., para. 117.
[168] Ibid., para. 122.
[169] Ibid., para. 129.
[170] Ibid.

ures.[171] The Court further stressed that, in cases of domestic violence, authorities must assess the victim's 'situation of extreme psychological, physical and material insecurity and vulnerability and, with the utmost expedition.'[172] Only half-heartedly the police reacted to Ms Talpis' complaint on the night of her son's death.[173] Seven months after her initial complaint, the authorities had started criminal proceedings, which lasted over three years, during which period Ms Talpis was further at risk contrary to Article 3 ECHR.[174]

Finally, *Talpis* once more advanced the ECtHR's case law as it directly referred to the Istanbul Convention. Moreover, it highlighted the systemic context of widespread violence present in femicide, as it considered the impunity in question, that 'by underestimating, through their complacency, the seriousness of the violent acts in question, the Italian authorities in effect condoned them.'[175] The Court thus seemingly contested the subtle underlying assumptions or stereotypes that crimes against women are somehow less important—seeing women and girls as second-class citizens. This progress should be taken with caution, as Judges Eicke and Spano objected to the classification of the domestic violence situation as widespread by the majority judges.[176] They referred to *Rumor v. Italy*, decided three years earlier, where the Court had endorsed Italy's domestic violence framework.[177] They argued that the situation in Italy had remained the same, and therefore, no systemic gender-based violence could exist.[178] While Judge Eicke may have been correct in stating that (evidence on) the prevalence of domestic violence did not change substantially between 2014 and 2017,[179] this discrepancy may be due to the well substantiated claim in *Talpis*, the composition of the *Talpis* Chamber and the Court's increased sensitivity to gender equality. Nevertheless, the ECtHR's first and only reference of the term 'femicide,' in the sense of 'a large number of women [being] murdered by their partners or former partners,' shows sensitivity towards and potential for recognizing femicide in the future.[180]

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171 Ibid., para. 101.
172 Ibid., para. 130.
173 Ibid., paras 122–125.
174 Ibid., para. 129.
175 Ibid., para. 145.
176 Ibid., Judge Eicke Dissent, para. 19.b; Judge Spano Dissent, para. 18.
177 Ibid., Judge Eicke Dissent, para. 22; Judge Spano Dissent, para. 18, referring to ECtHR, *Rumor v. Italy,* App No 72964/1024 (May 2014).
178 *Talpis v. Italy* (n 17), Judge Eicke Dissent, para. 19; Judge Spano Dissent, para. 18.
179 See ibid., Judge Eicke Dissent, paras 2 and 22.
180 Ibid., para. 145.

***Kurt v. Austria* [GC] (2021)**

Ms Kurt had been beaten and raped by her husband for years. She had paid his debts resulting from gambling, but once she lost her job, she could no longer do so. In 2010, she obtained a barring order against her husband, extending to her own home and that of her parents. He was convicted for bodily harm and making dangerous threats, and sentenced to three months' imprisonment (suspended for three years) in 2011.[181] Ms Kurt filed for divorce in 2012. Her husband threatened to take their children to Turkey. He also called her a 'whore' and said he had the right to have sex with her, because she was a woman. After he raped her, she went to the pharmacy to obtain contraception as she was afraid of getting pregnant again. Ms Kurt and her children were continuously beaten and threatened by her husband.[182] His threats included some of these phrases: 'I will kill you,' 'I will kill our children in front of you,' 'I will hurt your brother's children if I am expelled to Turkey,' and 'I will hang myself in front of your parents' door.'[183] She lodged another criminal complaint against him, as a result of which criminal proceedings were initiated against him and another protection order was issued.[184] However, this protection order did not extend to her children's school. The police officers found no record of her husband possessing a weapon. The specialized police officers who had taken her statements noted an increased risk of violence, based on (a) known reported/unreported violent acts (not only currently, but also previous incidents); (b) escalation (increase in the occurrence and seriousness of violence); (c) current stress factors (such as unemployment, divorce, separation from partner/children, and so on); and (d) a strong tendency to trivialize/deny violence (violence seen as a legitimate means).[185] When questioned by the police, her children, confirmed being slapped by their father. Ms Kurt's husband inquired with the police whether he could contact his children; upon questioning he admitted having slapped them occasionally as an 'educational measure.' The police noted in their report that he did not show any signs of potential for aggression.[186] Some days later, Ms Kurt's husband went to her children's school and asked the teacher to speak with his eight-year-old son. He shot and killed his son in the school's basement; his daughter witnessed the crime, but was left physically unharmed. The perpetrator left the school and was found dead. A suicide note read that he loved his family and could not

[181] *Kurt v. Austria* [GC] (n 15) paras 12–15.
[182] Ibid., paras 16–20.
[183] Ibid., para. 19.
[184] Ibid., paras 27–30.
[185] Ibid., para. 27.
[186] Ibid., paras 33–34.

live without them.[187] Another parent, the teacher and a social worker had never thought he would be capable of harming his children; they described him as 'calm and polite' and 'friendly and courteous.'[188]

The case incited much international attention as the first Grand Chamber [GC] case on domestic violence. While the facts of the case do not concern a 'terrible family drama,'[189] which would severely undermine the systemic aspect of femicide, the characterizing impunity was less pronounced in *Kurt*, as the authorities had reacted promptly to her criminal complaints. From a strategic litigation point of view, another more clear-cut case might have led to a better result for the recognition of domestic violence as a human rights violation. *Kurt* is nevertheless noteworthy for its explicit reference to many provisions of the Istanbul Convention, it being the first time the Court relied so heavily on these standards. However, as I will explain, despite the Court's gender sensitivity in outlining the novel domestic violence standards, it can still advance the recognition of femicide by (1) developing the role of 'secondary' victims, often family members, (2) its understanding of domestic violence as gendered by considering this violence under the non-discrimination provision, and (3) specifically requiring CoE Member States to adopt standardized risk assessment tools, which take account of intersectional discrimination and socio-economic circumstances, for example.

Ms Kurt argued that her husband should have been taken into pre-trial detention as she had specifically mentioned that their children were at risk. She also considered Austria's domestic law framework insufficient, as the barring orders could not be extended to the school.[190] However, the majority of ten out of 17 judges rejected this claim, considering that the domestic authorities had done enough to protect Ms Kurt's son's right to life. They had reacted immediately to her complaints and had conducted a comprehensive risk assessment against the background of the dynamics of domestic violence. They had examined his previous convictions, protection orders, records of firearms, stress factors, domestic violence history, etc.[191] The majority concluded that no risk for her children could have been discerned, 'let alone a lethality risk' at the school, even in the opinion of the applicant, as the majority stressed.[192] The Court admitted that the violence and death threats against the children had

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[187] Ibid., paras 35–39.

[188] Ibid.

[189] Stephanos Stavros, 'Kurt v Austria: ECHR Positive Obligations Without a Coercive Sting?' *OxHRH Blog* (5 August 2021), https://ohrh.law.ox.ac.uk/kurt-v-austria-echr-positive-obligations-without-a-coercive-sting/.

[190] *Kurt v. Austria* [GC] (n 15) paras 102–103.

[191] Ibid., paras 195–202.

[192] Ibid., para. 206.

been known to the State, and the risk for the children had not been evaluated. However, the main target was Ms Kurt, rather than her children, who were targeted indirectly, by way of their mother, and the barring order had been issued by police officers trained in domestic violence.[193] In this light, the majority endorsed the domestic authorities' decision not to order pre-trial detention for the perpetrator.[194] Having requalified her claims raised under Articles 3 (free from inhumane treatment) and Article 8 (the right to private and family life) as falling under Article 2 (the right to life), the Court did not consider these Articles—or Article 14 (non-discrimination) either, which claim it deemed inadmissible.[195]

Nevertheless, *Kurt* made important contributions to state responsibility for domestic violence. Considering its findings in *Talpis* that the circumstances of domestic violence must be considered in the risk assessment, the Court clarified its understanding of the operative measures, that is, the required response to domestic violence. First, it reiterated that any response to domestic violence must be 'immediate,' and conducted with 'special diligence.'[196] Examining the risk assessment for domestic violence, the Court referred to Article 51 Istanbul Convention, which states that the lethality risk, the seriousness of the situation and the risk of repeated violence are crucial elements in any such assessment.[197] One issue concerning risk assessment is the Court's apropos mention of the importance of standardized risk assessments, such as the Spousal Assault Risk Assessment (SARA), the Dynamic Risk Analysis System (DyriAs), and others.[198] Such standardized assessment tools provide the authorities with clear-cut criteria, e.g., on possession of weapons, children, previous history of assault, etc., on how to assess risks of domestic violence.[199] The Court only required risk assessments to be 'autonomous, proactive, and comprehensive' (see below), and noted that 'the use of standardized checklists, which indicate specific risk factors and have been developed based on sound criminological research and best practices in domestic violence cases, can contribute to the comprehensiveness of the authorities' risk assessment.'[200] By themselves, these standards are important steps in the recognition of domestic violence in

[193] Ibid., paras 203–204.
[194] Ibid., para. 207.
[195] Ibid., paras 104 and 214–215.
[196] Ibid., paras 165–166.
[197] Ibid., para. 167.
[198] Ibid., para. 101.
[199] See European Institute for Gender-based Violence (EIGE), 'Risk Assessment and Management of Intimate Partner Violence in the EU' (2019) https://eige.europa.eu/publications/risk-assessment-and-management-intimate-partner-violence-eu.
[200] *Kurt v. Austria* [GC] (n 15) para. 171.

international law. Many States already had standardized risk assessment tools in place. Austria in particular had no standardized risk assessment, but the authorities had used a checklist to evaluate the risk of lethal violence to Ms Kurt and her children.[201] Contrary to the dissenting judges who agreed with the majority that standardized risk assessments were not required under the *Osman* test, standardized questions can counter implicit bias, by requiring police to ask all women and girls the same questions regardless of their migration or socio-economic status, and should be mandatory under the *Osman* test, so as to take account of the specificities of domestic violence.[202]

Concerning the well-established 'immediacy' requirement of the *Osman* test, the Court cautioned that the term 'immediate' cannot be precisely defined. At the same time, it clarified that 'immediacy' required considering the circumstances of domestic violence, characterized by 'consecutive cycles of domestic violence, often with an increase in frequency, intensity and danger over time.'[203] The Court noted that, in line with its previous case law, a record of domestic violence could cause a 'significant risk and possibly deadly violence,' and could therefore constitute 'immediate' violence.[204] It did not advance any new standards here, but considered that it had applied the immediate risk standard flexibly, 'taking into account the common trajectory of escalation in domestic violence cases, even if the exact time and place of an attack could not be predicted.'[205] In this sense, the Court seems to have recognized the continuous nature of an individual act of domestic violence.[206] Applying this standard to Ms Kurt's case, the Court found that, unlike in other domestic violence cases, the authorities had responded immediately to her criminal complaints, and even had a checklist based on which they conducted a risk assessment.[207]

That domestic violence risk assessments must be 'autonomous, proactive and comprehensive' advances the ECtHR's case law in domestic violence.[208] The Court explained that the terms 'autonomous' and 'proactive' require the domestic authorities to take the victim's perception of the domestic violence risk only 'as a starting-point.' Accordingly, they should not rely on a withdrawal or change of her complaint to halt criminal proceedings

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[201] Ibid., para. 191.
[202] Ibid., Dissenting Opinion of Judges Turkovic, Lemmens, Harutyunyan, Elósegui, Felici, Pavli, and Yüksel, para. 10.
[203] Ibid., para. 175.
[204] Ibid.
[205] Ibid., para. 176.
[206] Ibid.
[207] Ibid., paras 191–194.
[208] Ibid., para. 168.

against a perpetrator.[209] Instead, the domestic authorities should carry out their own assessment, 'proactively collecting and assessing information on all relevant risk factors and elements of the case.'[210] This clarification combats 'victim-blaming' through which the victim is held responsible for how she reacted to domestic violence. The responsibility is now laid upon the State. Furthermore, the Court—though cautiously—set out the ideal conditions for a comprehensive risk assessment as (1) well-trained law-enforcement officials trained in understanding the dynamics of domestic violence, and (2) use of systematic checklists.[211] The majority argued that the police officers who handled Ms Kurt's case and conducted the relevant risk assessment had 'significant relevant experience and training […], which the Court should be careful not to question in a facile manner with the benefit of hindsight.'[212] The Court's reference to the 'benefit of hindsight' seems to have been used as an excuse not to fully scrutinize the risk having been present of her children becoming victims of domestic violence.

At the same time, the Court disregarded the insidious nature of abuse in domestic violence, accompanied by threats and violence to the loved ones of the 'main' victim in order to hurt her.[213] Evidently, Austria's risk assessment was flawed with respect to children as secondary victims, which point was also raised by the dissenting judges.[214] The Court's approach almost seems contradictory in the way it navigates the progressive general principles and its ultimate rejection of the case. At first, the Court carefully showed that, whenever children are involved, the child protection authorities and educational facilities 'should be informed,' and that teaching perpetrators about non-violence was 'desirable.'[215] It surprisingly refrained from imposing any obligations on Austria in this regard. Had the Court only applied a gender perspective, and asked what usually happened in domestic violence cases, the outcome might have been different. Indeed, the victim's close relatives, especially her chil-

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[209] Ibid., para. 169. See also *Valiulienė v. Lithuania* (n 68) para. 69; ECtHR, *T.M. and C.M. v. the Republic of Moldova*, App No 26608/11 (28 January 2014) para. 46; *Talpis v. Italy* (n 17), paras 107–125; *Opuz v. Turkey* (n 21) para. 153.

[210] *Kurt v. Austria* [GC] (n 15) para. 170.

[211] Ibid., paras 172–173.

[212] Ibid., para. 204.

[213] Lisa Maria Weinberger, 'Kurt v. Austria: A Missed Chance to tackle Intersectional Discrimination and Gender-Based Stereotyping in Domestic Violence Cases' *Strasbourg Observers* (18 August 2021), https://strasbourgobservers.com/2021/08/18/kurt-v-austria-a-missed-chance-to-tackle-intersectional-discrimination-and-gender-based-stereotyping-in-domestic-violence-cases/.

[214] *Kurt v. Austria* [GC] (n 15), Dissenting Opinion of Judges Turkovic, Lemmens, Harutyunyan, Elósegui, Felici, Pavli, and Yüksel, para. 9.

[215] *Kurt v. Austria* [GC] (n 15) paras 180–181.

dren, are also at risk in femicide.[216] The Court's assessment that the children had not been at risk at the school disregards the fact that children are often used as pawns to harm women in domestic violence cases. It might have found that a barring order must extend to schools to protect her children and other close relatives, especially since the domestic authorities extended a protection order to her parents' house. As its findings in *Opuz* suggest, the Court should have understood that family members, such as the mother of a woman in an abusive relationship, can be targeted.[217] Moreover, as the dissenting judges rightly note, 'children who are victims of domestic violence are particularly vulnerable individuals and entitled to State protection against serious breaches of personal integrity.'[218] In connection to this, the Court should have ordered pre-trial detention for Ms Kurt's husband in light of his record of previous violence, the only measure that can adequately protect women and girls.[219] Admittedly, the notorious margin of appreciation somewhat limits the Court's ability to affect change in domestic contexts. This should nevertheless not be misused to undermine survivor's rights.

Moreover, the Court ignored the Article 14 ECHR claim. Admittedly, the applicant had raised this issue too late, making her claim miss the six-month time limit. In this case, and since the Grand Chamber had the opportunity to deal with its first domestic violence case, it would have been pertinent for the Court to regard the Article 14 claim on its own motion. Since domestic violence is always gendered, the Court should have discussed this claim; not doing so sent a message that domestic violence is not understood in its reality. This would contrast with the Court's apparent recognition of the nature of domestic violence as gendered, and therefore indirectly as a problem of inequality. It appears that this omission was one of convenience, as the Court had indeed not hesitated to deal with her claims regarding Articles 3 and 8 under Article 2 alone. For clarity, the Court should always mention any substantive article alongside the non-discrimination provision.

The Court framed domestic violence in terms of lethal risk alone, which obscures the many human rights violations inherent in femicide. Considering that domestic violence risks of women and girls do not always result in death, the Court ought to have examined whether 'slow-death' or ongoing risk of violation of their rights—e.g., to be free from torture—might not have warranted

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[216] See, e.g., CEDAW Committee, *Angela Gonzalez Carreño v. Spain*, paras 9.2–9.4.

[217] See *Opuz v. Turkey* (n 21) para. 183.

[218] *Kurt v. Austria* [GC] (n 15) Dissenting opinion of Judges Turkovic, Lemmens, Harutyunyan, Elósegui, Felici, Pavli, and Yüksel, para. 12; *Opuz v. Turkey* (n 21) para. 159, ECHR 2009; *Talpis v. Italy* (n 17) para. 99 and *Volodina v. Russia* (n 36) para. 72.

[219] See *Kurt v. Austria* [GC] (n 15) paras 207 and 210.

the extension of the barring order to the school. By failing to do so, despite the applicant's Article 3 and 8 claims, the Court overlooked the non-lethal risks of femicide to which women and girls are subjected.

Finally, the Court still fails to pay attention to the intersectional ways in which women and girls suffer from violence. The Court should clearly require States to adopt standardized risk assessment tools under *Osman*. This would be supported by its findings that most CoE States already use standardized domestic violence risk assessments. Standardized questions could help reveal a woman's personal circumstances—Ms Kurt was an Austrian citizen of Turkish origin—such as her educational background, which influence how she is subjected to violence.[220] Moreover, as Weinberger points out, 'her experience with the police cannot simply be equated to that of a (White) woman born in Austria.'[221] Judge Elósegui also noted that Ms Kurt had reported the criminal acts with the help of a German translator.[222] That Ms Kurt was targeted differently as a migrant woman can be observed in her husband's explanation to the police that he had not raped her, as Turkish women typically 'played hard to get,' an issue the Court failed to discuss.[223]

In sum, the case presents a major step forward in terms of the progressive principles with regard to the required risk assessment. Equally important, the consideration of the immediacy requirement suggests that the Court is willing to display gender sensitivity towards domestic violence in the future. However, the Court does not yet consider the widespread nature of domestic violence to influence that risk. The Court still does not fully see domestic violence as a compounded human rights violation, affecting the victim and her loved ones. As regards its inattention to her children's situation, the Court was negligent in not finding any international responsibility for Austria in this case.

SEXUAL TORTURE?

The terms sexual violence and rape are not defined under the Convention, but the ECtHR clarified that physical resistance is not part of the definition of rape and that non-consent lies at the core of the crime of rape. Currently, rape and sexual violence committed by State actors can well constitute torture in line with the Court's case law, whereas the same acts committed by private actors cannot. This reveals the Court's implicit bias towards women's experiences of violence. Arguably, it also shows that the applicants have yet to make clear

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220 See also ibid., Dissenting Opinion of Judge Elósegui, para. 10.
221 Weinberger (n 213).
222 *Kurt v. Austria* [GC] (n 15), Dissenting Opinion of Judge Elósegui, paras 8–9.
223 See *Kurt v. Austria* [GC] (n 15) para. 28.

claims to the effect that rape is torture, as the Court often considers itself bound by the scope of their complaints. Already in the 1990s, feminist legal scholars like Charlesworth, Chinkin and Wright, and also MacKinnon, called for rape to be classified as torture.[224] Such a classification matters because a 'special stigma' is attached to the prohibition of torture, and it is a jus cogens violation from which no derogation is permitted.[225]

By State Actors

***Aydin v. Turkey* (1997)**

Şükran Aydin, a 17-year old of Kurdish origin, was arrested and detained along with some of her family in the context of clashes between the Turkish security forces and members of the Kurdistan Workers' Party (PKK).[226] During her detention, members of the security forces 'put her into a car tyre and spun [her] round and round,' then forced her to remain naked and raped her.[227] After her release, Şükran lodged a complaint about her treatment in detention. Two doctors concluded that her hymen had been torn and that her thighs were bruised extensively. However, the doctors failed to draw any conclusions on the bruising and were said to be unable to establish whether she had been raped.[228] The ECtHR found that the acts of physical and mental violence inflicted on Şükran, including the rape, amounted to torture (Art. 3 ECHR). The Court also held that her claims were not effectively investigated in violation of her right to an effective remedy (Art. 13 ECHR).[229]

The Court found that as 'the especially cruel act of rape' was committed against a young woman, the treatment met the required threshold for torture.[230] The Court stated that the prohibition of torture allows for no exceptions and no derogation as 'the special stigma of "torture"' is attached only to treatment 'causing very serious and cruel suffering.'[231] Such suffering was found to have existed in Şükran's case as 'rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain

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[224] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85(4) *The American Journal of International Law* 613–645 at 629–632.

[225] ECtHR, *Afet Süreyya Eren v. Turkey*, App No 36617/07 (20 October 2015), para. 82. See Art. 42 Draft Articles.

[226] *Aydin v. Turkey* (n 21) paras 16–19.

[227] Ibid., para. 20.

[228] Ibid., paras 24–26.

[229] Ibid., paras 103 and 109.

[230] Ibid., para. 84.

[231] Ibid., para. 82.

of forced penetration, which must have left her feeling debased and violated both physically and emotionally.'[232] As to the prohibited purpose required in torture, the Court noted that rape, along with other suffering inflicted on Şükran during her detention, was intended to elicit information in the context of a tense security situation in Turkey.[233] While it is commendable that the ECtHR recognized that rape constituted torture, it may have overlooked the sexual aspect of torture and instead focused on the non-sexual ill-treatment.[234] In this sense, the Court did not query whether rape is committed for discriminatory purposes, namely to dominate Şükran or lower her position in society as a Kurdish woman. Finally, the ECtHR signaled that rape is particularly appalling in state custody where the victim relies on state mechanisms and is vulnerable with 'weakened resistance.'[235] However, would rape committed by someone the victim loved and trusted not be just as reprehensible and make the harm similarly grievous?

The ECtHR also considered that Turkey had breached Articles 3 and 13 ECHR as the prosecutor failed to investigate her rape and establish the facts promptly.[236] The Court considered the fact that the Prosecutor had deferred to the security forces, whose members had raped her, a 'particularly serious' issue. The medical examination was also found deficient, as it should have been carried out by medical professionals with experience in rape cases.[237] The Court seems to have used a gender perspective, 'an analytical category for interrogating the unarticulated assumptions of the international legal regime.'[238] It required the authorities to be attentive to potential rape allegations: '[The obligation to investigate] also implies that the victim be examined, with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination.'[239] Finally, since Ms Aydin's rape allegations were not taken seriously, she had no recourse to any other potential remedy, let alone compensation for these violations.

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[232] Ibid., para. 83.
[233] Ibid., para. 85.
[234] Ibid., paras 87–88.
[235] Ibid., para. 83.
[236] Ibid., paras 103 and 109.
[237] Ibid., para. 106.
[238] Ratna Kapur, 'Gender, Sovereignty and the Rise of Sexual Security Regime in International Law and Postcolonial India' (2013) 14 *Melbourne Journal of International Law* 317–345 at 340.
[239] *Aydin v. Turkey* (n 21) para. 107.

***Afet Süreyya Eren v. Turkey* (2016)**

Ms Eren was arrested on the presumption that she was a member of a terrorist organization.[240] In state custody, over a period of four days, she was hung by her arms and upside-down, stripped naked in the presence of her sister, sexually harassed, and threatened with rape.[241] Two prison doctors confirmed that her body was bruised and scratched, showing signs of swelling and other injuries.[242] Ms Eren complained about her ill-treatment to Turkish authorities. However, the proceedings were so arduous and prolonged that her complaint was dismissed as time-barred after seven years.[243] The ECtHR found that the State is presumed responsible for any ill-treatment in state custody, holding that she had been subjected to torture under Article 3 ECHR while she was detained.[244]

The ECtHR found that Ms Eren was tortured to extract information about her potential link to a terrorist organization. However, the Court did not discuss Ms Eren's claim that she was sexually harassed, subjected to forced nudity, and threatened with rape, presumably since these acts were not reflected in her medical report. The Court simply noted that she had raised the latter issues later than other complaints.[245] The Court should have considered that forced nudity, even without involving physical assault, is a traumatic experience, and constitutes sexual violence, as has been established by the IACtHR.[246]

Since the case was discontinued for being time-barred,[247] the Court emphasized that the proceedings were unduly delayed in violation of the procedural limb of Article 3 ECHR.[248] An adequate investigation requires national authorities to examine alleged ill-treatment when the claim is 'arguable' and 'raise[s] reasonable suspicion.' At the very least, the investigation must be 'independent, impartial and subject to public scrutiny,' as well as prompt.[249] Although this analysis does not reflect any gender-sensitivity of how women are affected by sexual violence, the case at least implicitly seems to have included sexual violence in the torture qualification.

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[240] *Eren v. Turkey* (n 225) para. 6.
[241] Ibid., paras 12 and 17.
[242] Ibid., paras 7–9.
[243] Ibid., paras 12–19.
[244] Ibid., para. 35.
[245] Ibid., para. 34.
[246] *Women Victims of Sexual Torture in Atenco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 371 (20 November 2018), paras 181 and 208.
[247] *Eren v. Turkey* (n 225) para. 42.
[248] Ibid., paras 42–47.
[249] Ibid., para. 39.

By Non-State Actors

The ECtHR's case law on sexual violence committed by private actors shows a sharp contrast and inconsistency with its approach to rape as torture when such acts are committed by state actors. The Court generally examines rape committed by private actors under both Articles 3 and 8 ECHR. However, the ECtHR does not specify whether rape constitutes ill-treatment, degrading or inhuman treatment, or torture, thus overlooking the specific harm women and girls suffer when they are raped.[250]

***M.C. v. Bulgaria* (2004)**

M.C. was raped twice by two acquaintances when she was 14 years old, the legal consent age for sexual intercourse in Bulgaria. At a disco bar, M.C. had met a group of men, one of whom was her classmate's elder brother. They offered to take her to another party and then drive her home. On their way, the men suggested stopping for a swim; M.C. opted to remain in the car. One of the assailants returned to the car, started to kiss her, pressed her against the car seat, and raped her.[251] Subsequently, the three men drove M.C. to a private house where her classmate's brother pushed her onto a bed and proceeded to rape her as well.[252] The next morning, M.C.'s mother found her at an assailant's house. M.C. immediately told her mother that she had been raped by her classmate's brother, upon hearing of which her mother took her to the local hospital where forensic doctors established that her hymen had been torn.[253] Over the next few days, M.C., influenced by living in a small conservative village, felt ashamed that she had 'failed to protect her virginity' and feared 'what people would say about it.'[254] Her mother initially thought that having M.C. marry her assailant would be an adequate solution;[255] After learning that she had been raped by two different assailants, however, her parents filed a criminal complaint with the authorities.[256]

An investigation was opened, with the perpetrators being arrested but then released on arguing that the sexual intercourse had been consensual.[257] Although M.C. had cried, she had not called for help or otherwise physically resisted. At the time, Bulgarian law required the use of force or threats as an

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250 See Sjöholm (n 16) 240.
251 *M.C. v. Bulgaria* (n 24) paras 16–18.
252 Ibid., paras 28–30.
253 Ibid., paras 32–36.
254 Ibid., para. 37.
255 Ibid., para. 38.
256 Ibid., para. 42.
257 Ibid., para. 44.

element of rape.[258] Hence, the state authorities concluded that the sexual intercourse did not amount to rape, and consequently did not bring any charges or prosecute the perpetrators despite the forensic expert's opinion that she might have been raped. The ECtHR found that, by not properly investigating her rape allegation, Bulgarian authorities failed to provide effective protection against rape and sexual abuse, breaching its positive obligations under Articles 3 and 8 ECHR.[259] The ECtHR was specific in what measures it expected States to undertake to prevent rapes: '[E]ffective deterrence against grave acts such as rape […] requires efficient criminal-law provisions. Children and other vulnerable individuals, in particular, are entitled to effective protection.'[260]

Bulgaria's rape definition contained the use of force, rather than lack of consent as the defining element. The Court surveyed the legislation of CoE Member States to pertinently note 'that the Convention is first and foremost a system for the protection of human rights' and that therefore 'the Court must have regard to the changing conditions within States and respond, for example, to any evolving convergence as to the standards to be achieved.'[261] The ECtHR noted that requirements of physical resistance had been steadily abandoned across Europe.[262] Moreover, expert opinions at the time already established that the frozen-fright syndrome—where a victim may freeze in response to a threat—is typical among young girls when they are raped. The Court further noted that underage victims often do not physically resist acts of violence because they are either afraid or under mental pressure. Focusing on the victim's sexual autonomy, the Court held that Articles 8 and 3 ECHR require non-consent, not physical resistance, as the defining criminal element of rape.[263] Assessing the International Criminal Tribunal for the former Yugoslavia (ICTY)'s rape definition adopted in *Kunarac*, which interprets consent in the light of the coercive circumstances, the ECtHR recognized 'a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.'[264]

Moreover, the Court emphasized the crucial need to implement criminal law provisions and prosecute sexual violence:

> [A]ny rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape

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[258] Ibid., para. 74.
[259] Ibid., para. 187.
[260] Ibid., para. 150.
[261] Ibid., para. 155.
[262] Ibid., para. 156.
[263] Ibid., para. 166.
[264] Ibid., para. 163.

> unpunished and thus jeopardising the effective protection of the individual's sexual autonomy.[265]

The ECtHR found the State's investigation flawed on several counts. First, the authorities had failed to undertake a 'context-sensitive assessment of the credibility of the statements.'[266] They failed to hear witnesses, including the victim and the perpetrators, to establish the specific events and verify the facts.[267] Another issue was the state authorities' attitude towards the crime: Notably, the authorities failed to investigate the facts because they considered it 'date rape,' in the absence of calls for help and physical resistance.[268] A third concern of the Court was the prosecution's focus on the victim's resistance as an element of rape.[269] Once satisfied that she had not resisted, the prosecution did not consider that she might not have consented to the acts.[270] The victim's young age and her psychological state as a rape victim should have been considered by state authorities.[271] Instead, the Prosecutor neglected these factors, arguing that:

> it is unusual for a girl who is under age and a virgin to have sexual intercourse twice within a short space of time with two different people, but this fact alone is insufficient to establish that a criminal act took place, in the absence of other evidence and in view of the impossibility of collecting further evidence.[272]

The Court concluded that the State had failed to comply with its positive obligations to implement a criminal law system punishing rape and other sexual abuses, thereby violating Articles 3 and 8 ECHR.[273]

***E.B. v. Romania* (2019)**

In *E.B. v. Romania*, the applicant was walking home from work when a man approached her and tried to engage in conversation. Initially, he asked her to perform oral sex in return for money and a mobile phone, an offer which she politely declined.[274] Threatening her with a knife, he then pulled E.B. to a nearby cemetery where he ordered her to undress. When she had obeyed

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[265] Ibid., para. 166.
[266] Ibid., para. 177.
[267] Ibid., para. 177.
[268] Ibid., para. 179.
[269] Ibid., para. 182.
[270] Ibid., para. 180.
[271] Ibid., para. 183.
[272] Ibid., para. 65.
[273] Ibid., para. 187.
[274] *E.B. v. Romania* (n 82) paras 8–9.

him, he raped her.[275] Immediately after her rape, E.B. tried to file a complaint but could not do so because the police station was closed. She filed a criminal complaint the next day. The police encouraged her to withdraw the complaint, citing a lack of witnesses and stating that '"she was asking for it" and, in any event, "it did her good."'[276] The state authorities interrogated the alleged perpetrator, who had previous rape convictions. Since he argued that E.B. had consented to the sexual intercourse, and she did not physically resist or call for help, the prosecution did not further investigate her rape claim despite the existence of a medical report certifying that she had sustained bruises on her arms.[277] The Court found a violation of both Articles 3 and 8 ECHR because the authorities had failed to effectively apply the criminal law system to punish acts of rape and sexual violence.[278]

The Court outlined states' due diligence obligation to prevent ill-treatment by private individuals and to secure victims' rights under Article 3 ECHR coupled with Article 1 ECHR.[279] In this brief judgment, the Court echoed its *M.C.* precedent, stating that rape must be criminalized, notwithstanding States' margin of appreciation; non-consent—instead of physical resistance—should be the key element to determine rape; alleged rape cases must be duly investigated; perpetrators must be brought to justice.[280] Accordingly, the Court's clear stance against requirements of physical resistance is now embedded in its case law, as it opposes 'any rigid approach to the prosecution of sexual offences.'[281]

The domestic authorities also failed to adequately resolve the conflicting accounts of the facts.[282] Although it did not directly invoke the Istanbul Convention, the ECtHR noted that Romania had failed to take protective measures—including protection from intimidation, retaliation, and victimization—and that its reaction to the applicant's complaint was 'inconsistent with international standards.'[283] Unlike in *M.C.*, where the Court generally stated that 'the investigation and the conclusion must be centred on the issue of non-consent,' in *E.B.*, the Court proposed concrete steps which the domestic authorities could have undertaken to clarify the facts[284]—e.g., interrogation of the applicant and the alleged perpetrator's friends and relatives, a special

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[275] Ibid., para. 10.
[276] Ibid., paras 11–12.23.
[277] Ibid., paras 14–15 and 25.
[278] Ibid., para. 68.
[279] Ibid., para. 53.
[280] Ibid., paras 54–55. See also *M.C. v. Bulgaria* (n 24) para. 153.
[281] *E.B. v. Romania* (n 82) para. 56.
[282] Ibid., para. 57.
[283] Ibid., paras 55–56. See *Prosecutor v. Kunarac et al*. (Appeals Judgment) ICTY-96-23 and 23/1 (12 June 2002) 132.
[284] *M.C. v. Bulgaria* (n 24) para. 181.

report by a specialized psychologist, or an investigation into potential reasons why the applicant would make false statements against the alleged perpetrator.[285] The ECtHR noted that the State should have considered her ability to consent in the light of her rape near a graveyard in the evening, a particularly intimidating context.[286] The Court also criticized Romania for not considering E.B.'s fear of being harmed again by her assailant and for failing to issue the requested protection measures for E.B. and her family.[287] The Court did not go as far as stating that coercive circumstances make consent impossible, as in *Kunarac*, but at least it alluded to this possibility.[288]

CONCLUDING REMARKS

The human rights protected under the ECHR are entrenched in the liberal tradition of the State, chiefly aimed at the restriction of state powers vis-à-vis individuals.[289] Originally, this meant that individuals' rights were primarily protected from State intrusion.[290] With this in mind, the Court's implicit requirement of state actors' presence in torture is understandable.[291]

On the one hand, the Court considers sexual violence as torture when committed in prisons. On the other hand, when rape is committed by private actors, it views it as other ill-treatment. Sexual violence and domestic violence alike should be considered as torture in all circumstances, whenever the criteria are met. A first step could be that the Court identify the specific acts at issue as torture under Article 3 ECHR (at present, the Court applies Art. 3 without specifying the violence at stake). As a second step, the Court ought to extend to private situations its *Aydin* conclusion that rape in prison is torture, rape at home being as harmful as rape committed in state settings.[292] Qualified as torture, rape is a serious human rights violation, which would attract high compensation.[293] To do so, the Court might make further reference to the Istanbul

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[285] *E.B. v. Romania* (n 82) para. 58.
[286] Ibid., para. 60.
[287] Ibid., para. 66.
[288] Ibid., para. 60.
[289] Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal* 87–125 at 89.
[290] McQuigg (n 116) 21; Romany, ibid.
[291] McQuigg, ibid.
[292] Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2007) 17.
[293] See Art. 41 ECHR; Caroline Bettinger-Lopez, 'Violence Against Women: Normative Developments in the Inter-American Human Rights System' in Jackie Jones

Convention and international reports, such as the UN Special Rapporteur on Torture's contribution to domestic violence as torture.[294]

The Court also has the potential to apply Article 14 of the Convention more consistently, as it has only responded to gendered harm in some domestic violence cases up till now.[295] Even though Article 14 ECHR is a complex provision, the Court should properly acknowledge gendered harm even in cases of sexual violence. The next obstacle to adjudicating Article 14 is that, when it does consider harm as gender based, the Court usually requires statistics and reports as proof that mainly women and girls are targeted. Given the challenges applicants face in adducing these official statistics, the Court could consider statistics and reports to assert the prevalence and breadth of femicide on its own motion. Moreover, the Court might simply ask States to collaborate, and provide the necessary information.

The ECtHR now regularly requires States to prevent human rights violations by private individuals,[296] applying its *Osman* standard to consider whether a State complied with its preventive duties, that is, whether it 'knew or ought to have known' of a 'real and immediate risk' to the rights of an individual.[297] According to the Court's case law, state authorities are aware of a risk to victims' rights if the latter filed police reports, or otherwise brought the situation to the former's attention. However, acid attacks on the streets of an Albanian city are seemingly random and threats thereof cannot be reported to the police in advance. In its current *Osman* interpretation, the Court can therefore only consider the case under a provision's procedural limb, if at all.[298] The Court has expanded its understanding of how the 'immediacy' standard should be examined in line with domestic violence risk assessments, and that States' responses must be expedient. States should take the Court's conclusion further and consider that any complaint should be responded to by ordering pre-trial detention for perpetrators with an established record of violence.

The measures required to prevent violence under Articles 3 and 8 ECHR encompass two obligations. States' positive obligation involves their duty to enact an adequate legal framework, that is, domestic provisions effectively criminalizing rape in terms of non-consent, rather than physical resistance,

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and Rashida Manjoo (eds), *The Legal Protection of Women from Violence* (Routledge 2018) 181.

294 UNGA, Relevance of the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Context of Domestic Violence (12 July 2019) UN Doc A/74/148, paras 10, 25, 31, 34 and 36.

295 Sjöholm (n 16) 19 and 241.

296 Art. 1 ECHR. See e.g., *M.C. v. Bulgaria* (n 24), para. 149.

297 *Osman v. UK* (n 97) paras 128–130.

298 See ECtHR, *Tershana v. Albania*, App No 48756/14 (4 August 2020).

and to have a 'toolbox of legal and operational measures' available to respond to domestic violence.[299] The Court already progressively defines domestic violence in terms of its recurring nature and considers non-consent, not physical resistance, to be the core of rape definitions. However, it should examine in-depth how consent plays out in contexts of unequal power relations and with regard to vulnerable individuals, such as minors and disabled people.

The second obligation is that States must implement this framework through effective investigation and prosecution. According to the ECtHR, this means that victims in domestic violence cases can file complaints with the state authorities who must take any reports of violence seriously; this may require the adequate training of law enforcement officers.[300] Overall, these measures must be effective—i.e., capable of leading to a result—in addition to allowing for reparation and redress. The Court should more consistently require that police adopt a gender perspective in the processing of rape allegations,[301] encouraging them to be less concerned with gender stereotypes and let go of their bias. Often, the Court does not analyze the bias in the police response at all, a considerable shortcoming in its case law.

[299] *X and Y v. the Netherlands* (n 24), para. 27; *M.C. v. Bulgaria* (n 24), paras 150, 185; *Kurt v. Austria* [GC] (n 15) para. 179.

[300] See *Kurt v. Austria* [GC] (n 15) para. 172.

[301] See also Sjöholm (n 16) 169.

7. Femicide and the inter-American human rights system

> It is as though your life is not worth anything. They rape. There is no limit. There is no authority. There is no one to stop them.
> Lana[1]

INTRODUCTION

Established in 1948, the Organization of American States (OAS) is the oldest regional human rights agency. Currently, 35 North, South, and Central American nations are OAS Member States.[2] The OAS adopted the American Declaration on the Rights and Duties of Man (American Declaration)—a safeguard of many civil and political rights as well as cultural, economic, and social rights—a few months before the United Nations General Assembly (UNGA) adopted the Universal Declaration of Human Rights (UDHR). The American Declaration is especially relevant for cases brought against OAS Member States, like the United States (US) and Canada, which are not signatories to the American Convention on Human Rights (ACHR), adopted in 1969.[3] The Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) are the fora for human rights adjudication in the Inter-American context. Created in 1959, the IACHR can carry out State visits and, since 1956, examines complaints about specific human rights violations, even those brought against the US and Canada.[4] The Commission (whose recommendations are not binding upon States) pre-screens cases for the IACtHR, performing initial examinations of cases involving human rights violations filed by individuals or non-governmental

[1] UNHCR Report, 'Women on the Run' (October 2015), 17, www.unhcr.org/about-us/background/56fc31864/women-on-the-run-full-report.html. All online sources were accessed 30 October 2021.

[2] Art. 1 Charter OAS. See also Ronagh McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights* (Routledge 2017); OAS, Member States, http://www.oas.org/en/member_states/default.asp.

[3] E.g., *Jessica Lenahan (Gonzalez) et al. v. the United States*, Inter-American Commission of Human Rights Case 12.626, Report No 80/11, 21 July 2011; Art. 26 ACHR.

[4] Arts 18–20 ACHR.

organizations (NGOs),[5] and brings them to the IACtHR's attention if deemed viable.[6] Unlike the European Court of Human Rights (ECtHR), before which individuals can bring complaints, only the IACHR and States can bring complaints before the IACtHR.[7]

That violence against women and girls is impermissible, is better established in the Inter-American context relative to other regions. As early as 1928, the Pan-American Association for the Advancement of Women, an inter-American women's rights' movement, tried to advance a treaty for equal rights for women, which was however not ratified.[8] Since its early days, the Inter-American system has tried to enfranchise women and recognized the need to respond to violence against women and girls (VAWG) by establishing a UN Special Rapporteur on the Rights of Women.[9]

The Inter-American Commission of Women (ICW), an organization promoting women's civil and political rights, spearheaded the establishment of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará Convention) in 1994.[10]

The IACtHR continues to be a pioneer in the recognition of gender-based violence against women in international human rights law. The Court decided several femicide cases on the widespread violence against and massacres of women and girls in Mexico and Guatemala, and sexual violence against female protestors in state custody and indigenous women in Mexico.[11] Considering the compounded nature of femicide, the IACtHR addresses many human rights violations together: the right to life, the right to personal integrity, the right to equal access to justice, and judicial protection, among other rights.[12] The term femicide has not been fully disambiguated. In the *Cotton Field Case*, the Court hesitantly, and without much explanation, denoted femicide as 'gender-based

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5 Art. 44 ACHR.

6 Art. 51 ACHR.

7 Arts 57 and 61 ACHR.

8 Inter-American Commission of Human Rights (IACHR), 'Brief History of the Commission,' www.oas.org/en/cim/history.asp.

9 OAS, IACHR, Rapporteurship on the Rights of Women, Mandate, www.oas.org/en/iachr/women/mandate/mandate.asp.

10 IACHR, 'Brief History of the Commission' (n 8).

11 Another case, *Barbara de Sousa and Others v. Brazil* on political violence and femicide, is currently pending before the Court, https://www.corteidh.or.cr/docs/tramite/barbosa_de_souza_y_otros.pdf.

12 E.g., *Velásquez Paiz v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 307 (19 November 2015), para. 172; *López Soto v. Venezuela*, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 36 (26 September 2018), paras 178 and 182.

murders of women, also known as femicide.'[13] Judge Cecilia Medina Quiroqa clarified the Court's cautious approach to the term femicide by saying that 'the Court could hardly use that word [femicide] because it has many definitions in academia and among activists and therefore it would not be good to adhere to any of them.'[14]

Like the ECtHR, the IACtHR often considers sexual violence as violation of personal integrity, rather than torture. More recently, this approach has begun to dissipate. The IACtHR has responded to feminists' demands by recognizing that rape by a private individual constitutes torture, which indicates a positive change in the Court's case law.[15] The extensive discussion of how gender stereotypes relate to adequate investigations render the systemic aspect of femicide visible. To the extent that they have already recognized VAWG, existing human rights concepts inform the femicide concept.

At the same time, the IACtHR has not yet fully engaged States' responsibility for widespread violence against the female social group. The Court also applies the *Osman* test to determine state responsibility for non-state actor violence. In its current interpretation, this test does not weigh the specific ways violence targets women and girls. The domestic authorities' awareness being dependent on reports to the police does not fit the reality of harm in femicide. Women and girls often do not know that they are in imminent danger of being abducted and cannot alert the authorities. The Court fails to consider that all who belong to the targeted group composed of women and girls, are at risk of violence. As femicide is an ongoing human rights violation, upon disappearance, a woman could be subjected to other human rights violations, potentially rape and killings, and access to justice issues.[16] At the moment that family members report a woman's disappearance, state responsibility may already be engaged in the presence of such a pattern of violence. In an environment of perpetual violence against women and girls, they realize that they are con-

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[13] *González et al. v. Mexico (Cotton Field Case)*, Preliminary Objection, Merits, Reparations, and Costs, Inter American Court of Human Rights Series C No 205 (16 November 2009), para. 143.

[14] Marjana Carbajal, 'Son crímenes que fueron minimizados' *Página 12* (21 December 2009), https://www.pagina12.com.ar/diario/sociedad/3-137361-2009-12-21.html [unofficial translation by the author].

[15] Angela Hefti, 'López Soto v Venezuela: The Inter-American Court of Human Rights' Answer to Violence Against Women' *OxHRH Blog* (19 June 2019), https://ohrh.law.ox.ac.uk/lopez-soto-v-venezuela-the-inter-american-court-of-human-rights-answer-to-violence-against-women/.

[16] See Bonita Meyersfeld, *Domestic Violence and International Law* (Hart 2011) 118–122.

stantly at risk of being abducted, which indicates that the State likely knows this as well.[17]

THE BELÉM DO PARÁ CONVENTION

The IACtHR considers that the Belém do Pará Convention, together with CEDAW, 'complement[s] the international corpus juris in matters of protection of women's right to humane treatment, of which the American Convention forms part.'[18] Article 1 Belém do Pará Convention defines violence against women explicitly as 'any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.'[19] The Preamble of the Convention lays down in rather broad terms that violence is 'an offense against human dignity and a manifestation of the historically unequal power relations between women and men, that pervades every sector of society, regardless of class, race, or ethnic group, income, culture, level of education, age or religion, and strikes at its very foundation.' The Convention does not mention the term femicide, nor sexual torture, and its group-related targeting.

As the first treaty of its kind, adopted in 1994, the Belém do Pará Convention is a milestone in the history of international human rights law on violence against women, setting a precedent for the Maputo Protocol (2003) in the African hemisphere and the Istanbul Convention (2011) in Europe. Most States in America, except the US and Canada, have ratified the Belém do Pará Convention. Consequently, the IACtHR has relied on the Convention to analyze violations of women's rights.

A unique aspect of the Belém do Pará Convention is that some provisions are directly justiciable in the Inter-American human rights system.[20] Article 12 Belém do Pará Convention stipulates that individuals, NGOs, and groups can 'lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 Belém do Pará by a State Party.' Taken to its logical conclusion, the IACtHR considered

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[17] See *Cotton Field Case* (n 13).

[18] *Miguel Castro-Castro Prison v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 160 (25 November 2006) para. 276. See also Lorena Sosa, 'Inter-American Case Law on Femicide: Obscuring Intersections?' (2017) 35(2) *Netherlands Quarterly of Human Rights* 85–103 at 103.

[19] Art. 1 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará Convention) (adopted 9 June 1994, entered into force 3 May 1995).

[20] Arts 7 and 12 Belém do Pará Convention.

that, since Article 12 Belém do Pará Convention allows the IACHR to hear complaints about violations thereof, the Commission must be allowed to bring cases before the Court.[21] It follows that the Court can adjudicate cases relating to potential breaches of Article 7 Belém do Pará Convention, which requires States to condemn and prevent VAWG, and which serves 'as reference of interpretation' to specify the scope of other human rights violations.[22]

After the Commission had applied the Belém do Pará Convention in *Maria da Penha*, the IACtHR used its Article 7 in *Castro-Castro* to emphasize that States must not engage in VAWG.[23] In the *Cotton Field* case, the Court proceeded to establish direct jurisdiction over violations of Article 7 Belém do Pará Convention, stating that, while the Court has no direct jurisdiction over some provisions, such as Article 8 (progressive measures to eradicate violence against women) and Article 9 (considerations of women's vulnerability), it can rely on these Articles to specify States' obligations under Article 7 Belém do Pará Convention.[24] The IACtHR's assumption of jurisdiction over breaches of Article 7 Belém do Pará constitutes an important recognition of women's right to be free from violence.[25]

FEMICIDE UNDER THE IACTHR

Compared to the ECtHR, the IACtHR has issued fewer judgments concerning VAWG. However, the latter has dealt with abductions—sometimes linked to domestic violence, sexual violence and forced nudity—in great depth and issued detailed judgments on the Ciudad Juarez femicide.[26] Given its meticulous examination of and experience with gendered harm, the IACtHR's case law is especially useful to conceptualize femicide as a human rights violation.

The IACtHR performs a joint analysis of many human rights violations in femicide: the right to fair trial and judicial protection (Arts 8 and 25 ACHR), the right to non-discrimination (Arts 1(1) and 24 ACHR), the right to life (Art. 4 ACHR), the right to be free from (sexual) torture and the right to personal integrity (Art. 5 ACHR), as well as the right to family life and honor (Art. 11 ACHR), and violations of the duty to prevent and punish violence (Art.

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21 Art. 12 Belém do Pará Convention; *Castro-Castro v. Peru* (n 18) paras 292–293.
22 *Castro-Castro v. Peru* (n 18) para. 276.
23 Ibid., para. 276.
24 *Cotton Field Case* (n 13), paras 38–73.
25 See Meyersfeld (n 16) 81.
26 See Caroline Bettinger-Lopez, 'Violence Against Women: Normative Developments in the Inter-American Human Rights System' in Jackie Jones and Rashida Manjoo (eds), *The Legal Protection of Women from Violence* (Routledge 2018) 166–170.

7(a)–(b) Belém do Pará Convention). The Court also stresses the role of family members' involvement in femicide, finding violations of their right to personal integrity and honor when they report their relatives' disappearance, and when the victim's body is located (Arts 5 and 11 ACHR).[27]

Gender-based Violence

The discriminatory aspect of femicide overlays all substantive human rights violations. The structural inequality, where women's lives are disposable, facilitates widespread abductions, sexual violence, and killings of women, e.g., in Ciudad Juarez, Mexico. When they disappear in Ciudad Juarez, the police often fail to investigate and locate the missing women and girls, usually based on references to previous sexual history or a victim's private life. The police remain inactive at a time when the victim may still be alive. This sends a message to potential assailants that violence against women is tolerated. As a result, a climate of impunity is created where further acts of gender-based violence are committed. Another manifestation of discrimination is when the authorities fail to clarify the facts and punish the perpetrators once the victim's next of kin registers a complaint. The discrimination inherent in femicide is covered by CEDAW as well as Article 1 Belém do Pará Convention, both of which the Court frequently incorporates. CEDAW takes a horizontal approach to discrimination, speaking of discrimination in terms of 'distinction, exclusion or restriction.' The Belém do Pará Convention's vertical conception of unequal power relations, whereby 'a group [i]s superior or [has] privilege [to] adversely treat[] [another] group inferior, with hostility or any other form of discrimination,' appears more pertinent to the degradation and ill-treatment women and girls suffer in femicide.[28]

Severe Violence

The recognition of sexual violence and rape as issues of international concern is relatively new in the Inter-American human rights system. In the early 2000s, the IACtHR examined rape in relation to sexual violence in the context of detention in *Castro-Castro v. Peru* and *Espinoza Gonzáles v. Peru* as a paradigmatic form of violence against women.[29] The Court relied on international criminal law approaches to define sexual violence in line with the International

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[27] See *López Soto v. Venezuela* (n 12) paras 262 and 264–267.

[28] *Velásquez Paiz v. Guatemala* (n 12) para. 173.

[29] *Castro-Castro v. Peru* (n 18); *Gladys Espinoza Gonzáles v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Serie C No 289 (20 November 2014).

Criminal Tribunal for Rwanda (ICTR)'s *Akayesu* case,[30] while applying the narrow *Furundžija* definition of rape: '[An] act of vaginal or anal penetration, without the victim's consent, through the use of other parts of the aggressor's body or objects.'[31] The IACtHR's approach to gendered harm as torture is unique among regional human rights bodies as it recognizes not only rape, but also sexual violence more generally as violating the prohibition of torture. This means that whether acts constitute sexual violence or rape may become irrelevant for the finding of torture by the Court in future.

The IACtHR distanced itself from a state official requirement for acts of rape and sexual violence, as initially envisioned by the Convention Against Torture (CAT).[32] In doing so, the Court referred to the CAT Committee's decision in *V.L. v. Switzerland*, where the Committee found that 'the complainant was clearly under the physical control of the police even though the acts concerned were perpetrated outside formal detention facilities.'[33] The Committee thus expanded this concept and acknowledged that rape committed by police officials and military personnel could constitute torture when committed outside state facilities.[34] The Inter-American Convention to Prevent and Punish Torture (IACPPT)'s wording includes state officials. However, the IACtHR has interpreted this provision as referring only to criminal responsibility for torture committed.[35] Based on *V.L.*, in *Fernandez Ortega et al. v. Mexico* and *Rosendo Cantú v. Mexico*, the IACtHR considered that rapes committed in the private sphere—in a woman's home or near a stream where she washed her clothes—constitute torture.[36] Finally, in *López Soto*, the Court clarified that state involvement is not required for the commission of torture.[37] And yet, discussions on rape as torture are absent in the femicide cases, where women and girls' bodies were found with the victims likely having been raped by

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[30] *Castro-Castro v. Peru* (n 18) para. 306.

[31] Ibid., para. 310. See also *Rosendo Cantú et al. v Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 216 (31 August 2010), para. 109.

[32] Ibid., para. 117; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law, a Feminist Analysis* (Juris Publishing 2000) 234.

[33] In *V.L. v. Switzerland*, the CAT Committee considered the rape of a woman who was taken from her home to be raped as a punishment for the political activities of her husband. CAT, *V.L. v. Switzerland*, UN Doc CAT/C/37/D/262/2005, 22 January 2007, para. 8.10.

[34] See also CAT's departure from the public sphere requirement. Ibid.

[35] *López Soto v. Venezuela* (n 12) para. 190.

[36] *Rosendo Cantú v. Mexico* (n 31) para. 118; *Fernandez Ortega et al v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 224 (30 August 2010), para. 121.

[37] *López Soto v. Venezuela* (n 12) para. 190.

unidentified perpetrators. Instead of classifying these acts as torture, the Court considered them attacks on personal integrity, which was criticized by Judge Medina Quiroqa.[38]

The IACtHR has established that rape can constitute sexual torture if it meets three cumulative elements:[39] (1) the act is intentional; (2) it causes severe physical and mental suffering; (3) it is committed with a purpose. The Court consistently finds acts of rape to be intentional. The IACtHR also reiterates that severe mental and physical suffering 'leaves the victim "physically and emotionally humiliated," a situation that is difficult to overcome with the passage of time, contrary to other traumatic experiences,'[40] recognizing that rape can have severe repercussions on the victims—including mental pain and social consequences.[41] The Court has found the purpose of rape in punishment of the victims, discrimination, and most recently, an exercise of social control over women and girls.

The Risk Assessment

The most relevant duty in femicide cases in the Inter-American system is to prevent VAWG, since disappearances, sexual violence, and killings of women are often committed by non-state actors.[42] Based on its sister Court's *Osman* test, the IACtHR generally finds that, a State may have known of a 'real or immediate risk' to the individual woman. The IACtHR then considers whether a State had taken sufficient preventive measures designed to avert the risk, e.g., by enacting a femicide law. The Court has established that the *Osman* test is met after a woman is reported missing, but not for the risk she is exposed to in a structural context of violence, where women and girls' lives are in jeopardy. The Court initially found that States 'knew or ought to have known' of a real or immediate risk through official police reports in *Cotton Field* and *Veliz Franco*.[43] With *Velásquez Paiz*, the Court seemingly lowered the threshold to determine state knowledge. The victim's parents' informal

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38 *Cotton Field Case* (n 13), Dissenting Opinion Judge Medina, para. 1.

39 *Fernandez Ortega et al. v. Mexico* (n 36) para. 121.

40 *Women Victims of Sexual Torture in Atenco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 371 (20 November 2018), para. 196.

41 Ibid., para.124.

42 See for state responsibility of non-state actors in human rights law, *Velasquez Rodríguez v. Honduras*, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 4 (29 July 1988), para. 172.

43 *Veliz Franco et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 277 (19 May 2014), para. 146.

phone call to the police and the dispatching of a police patrol was considered to make the authorities aware of Ms Velásquez's disappearance.[44] Moreover, in *López Soto*, the Court further lowered this standard, stating that 'news of an abduction or of a disappearance' activates the State's reinforced due diligence obligation.[45] The Court should also consider that the widespread occurrence of the violence might already trigger state responsibility in contexts for which statistics and reports to that effect exist.

Gender-sensitive Investigation

Gender-bias inaction by state officials can give rise to state responsibility based on the Court's promising case law. Crimes against women and girls must accordingly be handled with sensitivity to the ways in which violence targets them. The IACtHR usually jointly examines Articles 8(1) ACHR (right to fair trial) and 25(1) ACHR (right to equal protection before the law), which together codify States' procedural obligation to investigate acts of femicide.[46] Under Article 25 ACHR, an effective remedy must be 'simple and prompt,'[47] and be 'capable [of] producing the results for which it was designed.'[48] A successful investigation must be serious, impartial, and effective, designed to seek the truth and punish the perpetrators.[49] The Court supplements this obligation with an enhanced due diligence obligation. This means that States must investigate violence against women and girls without delay, an obligation arising from Article 7(b) Belém do Pará Convention (the obligation to eradicate violence against women).[50] The Court has developed specific investigative standards in femicide cases: (1) the obligation to investigate these cases with a gender perspective; (2) to refrain from stereotyping women and girls. An investigation with a gender perspective (essentially the woman question)[51] asks how violence targets women and girls specifically. This means going beyond a woman's murder to examine how she was killed and how the authorities might have responded if a man's life were at stake.[52] The Court requires States to ask two questions to determine whether a woman's murder

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[44] *Velásquez Paiz v. Guatemala* (n 12) para. 121.

[45] Ibid., paras 154–155 and 157.

[46] See Cecilia Medina, *The American Convention on Human Rights, Crucial Rights and their Theory and Practice* (Intersentia 2014) 236–239.

[47] Ibid., 237.

[48] *Velasquez Rodríguez v. Honduras* (n 42) para. 166.

[49] Ibid., para. 292.

[50] See e.g., *López Soto v. Venezuela* (n 12) para. 258.

[51] Katharine Bartlett, 'Feminist Legal Methods' (1990) 104(4) *Harvard Law Review* 828–888 at 837–849.

[52] Ibid.; see *Veliz Franco v. Guatemala* (n 43) para. 187.

was gender-based: Did her murder involve sexual violence/rape? And/or was she brutally murdered/mutilated (overkilled)?[53] Contrary to their obligation to adopt a gender perspective, when States engage in gender stereotyping, they discriminate against women and girls and render criminal investigations ineffective.[54] Drawing on Cook and Cusack's work, the Court defines gender stereotypes as 'a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women.'[55] Many femicide cases are characterized by gender stereotypes, such as inquiries into the victim's way of dressing, her previous sexual conduct, and seemingly harmless jokes and assumptions about a woman's whereabouts, attitude and moral behavior. To the extent that the domestic authorities fail to respond to and investigate reports of missing women and girls based on preconceptions about how a girl should behave, they become especially harmful.

DOMESTIC VIOLENCE

Not many classic domestic violence cases have been brought in the inter-American human rights system, although in some cases where women and girls disappeared, such as the *Cotton Field Case*, evidence suggests that they may have known their murderer. Considering these disguised domestic violence cases, the issue of non-state actor femicide merits great attention. The Inter-American Commission first pronounced itself on domestic violence and applied the Belém do Pará Convention in 2001 in *Maria da Penha*, where it centered on the authorities' inaction—articulating the IACtHR's due diligence standards—and found Brazil in violation of her rights to equality before the law and access to justice.[56] In 2011, in *Lenahan*, the IACHR could not apply the Belém do Pará Convention, since the US was not a signatory. Instead, it viewed the violence committed against Ms Lenahan and her daughters in terms of discrimination, developing the State's duty to prevent gender-based vio-

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[53] UN Entity for Gender Equality and the Empowerment of Women, Latin American Model Protocol for the Investigation of Gender-related Killings of Women (Femicide/Feminicide) (2004) [hereinafter the Latin American Model Protocol]; *Veliz Franco v. Guatemala* (n 43) paras 187–188.

[54] *Cotton Field Case* (n 13) para. 401; Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Pennsylvania University Press 2010) 20.

[55] *Cotton Field Case* (n 13), para. 401. Cook and Cusack define gender stereotyping as an 'overarching term that refers to a structured set of beliefs about the personal attributes of women and men.' Cook and Cusack (n 54) 20.

[56] *Maria da Penha v. Brazil* (16 April 2001) Inter-American Commission Case 12.051, Report No 54/01, paras 41 and 177.

lence against women and girls, on which the Court continued to build.[57] These two cases constitute milestones for women's right to be free from domestic violence in the inter-American human rights system and beyond.[58] They have also brought about social change and fueled laws and policies at the domestic level. In 2006, *Maria Da Penha* led to the adoption of the solid 2006 Maria Da Penha Law in Brazil, which incorporates standards on domestic violence.[59] As a result of Jessica Lenahan and her lawyers' advocacy efforts with the US State Department, the US enacted federal guidelines on how law enforcement can better respond to domestic violence in 2015—federal law has yet to be strengthened to grasp domestic violence.[60]

Maria Da Penha v. Brazil (2001)

Ms Da Penha's husband tried to kill her twice. The first time, he shot Ms Da Penha while she was asleep, resulting in serious injuries for which she underwent various operations, from which she did not recover fully, remaining paralyzed from the waist down.[61] Two weeks after her return home, her husband tried to electrocute her while she was taking a bath. Having survived both attacks, she filed a criminal complaint against her husband.[62] However, the authorities failed to arrest or sentence her husband even though the threats continued. For more than 15 years, her husband remained free.[63]

The Commission found that Brazil had breached Ms Da Penha's right to equality since (1) domestic violence was at an extremely high level in Brazil;[64] (2) domestic violence formed part of a widespread pattern of violence per-

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[57] Patricia Tarre Moser, 'The Duty to Ensure Human Rights and its Evolution in the Inter-American System: Comparing Maria da Penha v. Brazil with Jessica Lenahan (Gonzales) v. United States' (2012) 21 *Journal of Gender, Social Policy and the Law* 437–453 at 439–443.

[58] See Bettinger-Lopez (n 26) 188.

[59] Elizabeth Abi-Mershed, 'The Inter-American Commission on Human Rights and Implementation of Recommendations in Individual Cases' (2020) 12(1) *Journal of Human Rights Practice* 171–177; Maria da Penha Law, Law No 11.340 (7 August 2006), www.planalto.gov.br/ccivil_03/_Ato2004-2006/2006/Lei/L11340.htm.

[60] US Department of Justice, 'Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence' (15 December 2015), www.justice.gov/opa/file/799366/download. *Jessica Lenahan v. United States* is also presented in the documentary film, 'Home Truth'. Katia Maguire and April Hayes (dirs./prods.), 'Home Truth,' www.hometruthfilm.com/. See also Bettinger-Lopez (n 26) 190.

[61] *Maria da Penha v. Brazil* (n 56) para. 8.

[62] Ibid., paras 2, 8–9 and 12.0.

[63] Ibid., para. 19.

[64] Ibid., para. 46.

petrated disproportionately against women; and (3) courts were reluctant to punish perpetrators.[65] Applying Article 3 (the right to a life free from violence) and—for the first time—Article 7 Belém do Pará Convention (concerning many duties to prevent violence), the IACHR found Brazil's judicial system to be ineffective in responding to domestic violence against Ms da Penha.[66] The domestic authorities' inaction had created a 'climate that is conducive to domestic violence since society sees no evidence of willingness by the State […] to take effective action to sanction these acts.'[67] The impunity with which perpetrators could commit crimes against women resulted in the continuance of 'the psychological, social, and historical roots' which perpetuate VAWG.[68] In the light of a general situation of impunity in Brazil, the domestic authorities' inaction demonstrated their perception of violence against female members of society as insignificant.[69] Contrary to Articles 8 and 25 ACHR, the proceedings lasted 17 years, which denied her a 'prompt and effective' remedy.[70] The Commission did not discuss the substantive rights at issue, namely a potential violation of her right to life, her right to physical integrity, and humane treatment 'for which there would have been considerably more stigma for the State than finding a violation of [procedural obligations].'[71]

Jessica Lenahan v. the United States (2011)

In 1999, Leslie, Katheryn, and Rebecca Gonzales, aged seven to ten years old, were abducted by their father, Jessica Lenahan's ex-husband, Simon Gonzales.[72] After their disappearance, Ms Lenahan called the police eight times, saying that she was worried about her daughters' safety and that she suspected they were with their father against whom she held a valid restraining order.[73] Instead of enforcing her restraining order, the police reassured her that the girls would be fine with their father.[74] Ten hours after Ms Lenahan's initial contact with the police, her ex-husband drove to the police department where he opened fire. The police killed him. The girls' bodies were discovered in the trunk of his car.[75] The police did not immediately inform Ms Lenahan of the

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65 Ibid., paras 47–50, referring to CEDAW.
66 Ibid., para. 58.
67 Ibid., para. 56.
68 Ibid., para. 55.
69 Ibid., para. 57.
70 Ibid., paras 38–40.
71 Bettinger-Lopez (n 26) 177.
72 *Lenahan v. United States* (n 3) para. 152.
73 Ibid., para. 71.
74 Ibid., paras 27–30 and 146.
75 Ibid., paras 32 and 80.

fact that her daughters had died, and the manner in which it occurred.[76] Ms Lenahan filed a lawsuit against the police department for their failure to enforce her restraining order, reaching the US Supreme Court. In *Town of Castle Rock v. Jessica Gonzales*, the US Supreme Court held that the police department's inaction did not violate her due process rights under the US Constitution, despite Colorado state law requiring enforcement of the restraining order, and rejected her claims.[77] Ms Lenahan continued to seek justice by filing a petition with the IACHR, arguing that the US had failed to protect her and her three daughters from domestic violence.[78] As the first international judicial body to hear a domestic violence case against the US, the IACHR found that, under Article 2 of the American Declaration (the US had not ratified the ACHR or the Belém do Pará Convention) the US' failure to protect Ms Lenahan and her daughters from domestic violence discriminated against them and that the US had violated her daughters' rights to life and judicial protection.[79]

The IACHR considered that domestic violence disproportionately affects women and girls and that it is 'one of the most extreme and pervasive forms of discrimination.'[80] In this respect, the Commission understood the principle of due diligence to 'encompasses the organization of the entire state structure—including the State's legislative framework, public policies, law enforcement machinery, and judicial system—to adequately and effectively prevent and respond to these problems.'[81] The IACHR relied on the *Osman* standard to note that the US knew about the risk of violence, evidenced by an existing restraining order, 'a judicial determination of risk.'[82] The restraining order itself laid out the measures the State could have reasonably taken (e.g., the arrest of Simon Gonzales).[83] The US' failure to effectively protect women and implement restraining orders was found to be systemic and historical.[84] By failing to implement the restraining order, the US authorities had failed to protect Ms Lenahan, Katheryn, Leslie, and Rebecca from violence, 'which

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[76] Ibid., paras 33 and 85.

[77] *Town of Castle Rock v. Gonzales* (Gonzales IV), 545 U.S. 748 (2005), paras 90–91.

[78] *Lenahan v. United States* (n 3) paras 2–3.

[79] Ibid., paras 164–165 and 170.

[80] Ibid., paras 110–111 and 163. See also UNGA Resolution, Human Rights Council, Accelerating Efforts to Eliminate All Forms of Violence Against Women: Ensuring Due Diligence in Prevention, UNGA Res (16 June 2010) UN Doc A/HRC/14/L.9/Rev.1.

[81] *Lenahan v. United States* (n 3) para. 120.

[82] Ibid., para. 145.

[83] Ibid.

[84] Ibid., paras 161–162.

constitutes a form of discrimination.'[85] The US had failed to provide an answer on whether Leslie, Katheryn, and Rebecca had died in the crossfire, or at the hands of their father.[86] Hence, Ms Lenahan never obtained an effective remedy for the human rights violation against her daughters.

SEXUAL MASSACRES

Plan de Sánchez v. Guatemala and *Dos Erres v. Guatemala* relate to massacres and mass rapes of indigenous Maya communities committed during the civil war under Efraín Ríos Montt's military dictatorship. They constituted the advent of the IACtHR's case law relevant to femicide.[87] The Guatemalan military employed sexual violence against women and girls as a counter-insurgency strategy towards alleged guerrilla fighters. The sexual violence against the female social group of Maya communities pursued various purposes: destroying the supposed guerrilla groups, serving as 'rewards' for the combatants (see Chapter 2);[88] destroying entire communities, women and girls being stigmatized and ostracized by their own villages.[89] After the civil war, instead of subsiding naturally, brutal rapes and killings of women and girls prevailed.[90] For more than 30 years, military members ordered to rape women had internalized a war waged on women's bodies so rape remained 'normal' in peacetime.[91] Having been created by the state military, this culture of violence went unaddressed by state authorities and was exacerbated by drug trafficking, gang activity, and other factors.[92] This context must be understood as the arena for present-day femicide in Guatemala of rapes, culminating in women's deaths, as exemplified by *Velásquez Paiz* and *Veliz Franco*. When States remain passive in the face of cultural patterns, created or fostered through military strategies, their state responsibility for femicide may be engaged.

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[85] Ibid., para. 160.

[86] Ibid., paras 186 and 196.

[87] See Nunca Más Report, Guatemala, 'Chapter 5.2 Sexual Violence': Case 1871 and Case 710, http://www.odhag.org.gt/publicaciones/remhi-guatemala-nunca-mas/.

[88] Guatemala Human Rights Commission/US, 'Guatemala's Feminicide Law: Progress Against Impunity?' (2009), 1, 3 and 27, www.ghrc-usa.org/Publications/Femicide_Law_ProgressAgainstImpunity.pdf. [hereinafter Guatemala's Femicide Law: Progress Against Impunity?].

[89] Ibid.

[90] Ibid.

[91] Ibid., 3–4; Adrián Reyes and IPS Correspondents, 'Guatemala: Asesinatos Crueles recuerdan Guerra Civil' *Inter Press Service* (17 June 2005), www.ipsnoticias.net/2005/06/guatemala-crueles-asesinatos-de-mujeres-recuerdan-guerra-civil/.

[92] Guatemala's Femicide Law: Progress Against Impunity? (n 88) 3–6.

Plan de Sánchez (2004)

On 18 July 1982, the Guatemalan army attacked Plan de Sánchez, a Maya village in central Guatemala. As they anticipated the strike, male villagers hid in the forests, while female inhabitants, children and the elderly, remained in the village; the locals believed the soldiers would not harm them. However, the military contingent who entered Plan de Sánchez separated a group of 20 women and girls, aged 12–20, whom the soldiers brutally raped and then massacred. After that, they executed the surviving elderly women and young girls, along with some boys and elderly villagers, whom they believed to be guerrillas.[93] During the years following, the survivors lived their lives in fear, discontinued their Maya religious rites, and remained under constant threat from the military who continued to harass them.[94] While most villagers were eventually massacred, the manner of killing differed between women or men. Men and boys were instantly killed, whereas women and girls were raped before being executed—a weapon which had an effect on their communities:

> The rape of women was a state practice, executed in the context of massacres, designed to destroy the dignity of women at the cultural, social, family and individual levels. These women consider themselves stigmatized in their communities and have suffered from the presence of the perpetrators in the town's common areas.[95]

Plan de Sánchez mainly clarified facts and identified the victims. The Court mentioned the term 'rape' twice in its judgment, without drawing any legal conclusions on the issue. This lack of recognition was somewhat remedied by the Court's Reparation Judgment, which discussed the effects of rape on women who survived the massacre.[96] The judgment does not carry many legal references since Guatemala had accepted its responsibility under international law. *Plan de Sánchez* illustrates the distinct human rights violations against women and girls and is a prelude to *Dos Erres v. Guatemala*.[97]

Dos Erres (2009)

On 6 December 1982, Guatemalan soldiers attacked the Dos Erres community, whose inhabitants they believed to be guerrilla sympathizers. Guatemalan

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[93] *Plan de Sánchez Massacre v. Guatemala*, Reparations, Inter-American Court of Human Rights Series C No 116 (19 November 2004), para. 49.19.
[94] Ibid., para. 32.
[95] Ibid., para. 49.19.
[96] Ibid., paras 34–38.
[97] Ibid., para. 49.18.

Special Forces divided the villagers into groups. They separated the men from the women and massacred the men immediately.[98] The soldiers then systematically attacked the women: 'also killing them at that time […] they were savagely raped.'[99] Unprecedented in scale and horror, the massacres were meant to lead to the inhabitants' deaths.[100] The VAWG included forced abortions[101] 'by beating [women] or even jumping on their abdomen until the fetus came out miscarried.'[102]

The IACtHR articulated legal standards on the States' duty to investigate sexual violence and torture in the context of this massacre.[103] The Court did not analyze the substantive elements of rape and sexual violence, likely due to the State's apparent passivity in the face of widespread sexual violence.[104] Overall, Guatemala had failed to investigate the facts thoroughly, to exhume and identify most of the victims, to execute arrest warrants, and to hold the responsible state officials accountable.[105] Of particular relevance to femicide is the IACtHR's brief analysis uncovering that Guatemala had failed to carry out an investigation from a gender perspective.[106] Considering that the eventual investigation regarded a limited conception of the right to life, ignoring the cruel rapes, forced abortions, and subsequent killings of women, the authorities had violated their international obligations to investigate torture and women's rights violations with due diligence.[107] In line with *Plan de Sánchez*, the Court acknowledged that '[t]he rape of women was a State practice, executed in the context of massacres, directed to destroying the dignity of women at a cultural, social, family, and individual level.'[108] This judgment shows that the authorities' focus on certain human rights violations can significantly impact the investigation of and hide the violence committed against women and girls.[109]

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[98] *Dos Erres Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 211 (24 November 2009), paras 79 and 81.
[99] Ibid., paras 70–73 and 138–139.
[100] Ibid., paras 79–81.
[101] Ibid., paras 79–81 and 138.
[102] Ibid., para. 81.
[103] Ibid., paras 147–148 and 155.
[104] Ibid., paras 137–140 and 217.
[105] Ibid., paras 146–152.
[106] Ibid., para. 141. See Concurring Opinion Judge Ramón Cadena Rámila.
[107] Ibid., paras 136–138.
[108] Ibid., paras 49.19 and 139.
[109] Ibid., paras 170–172 and 200.

STATE ACTION I: SEXUAL VIOLENCE IN STATE CUSTODY

The IACtHR dealt with several cases of sexual violence committed within a pattern of widespread sexual violence and rapes against women suspected of terrorism during Peru's Fujimori regime (1990–2000). These cases reveal how the Fujimori regime systemized rape and sexual violence as a state-ordered measure against women 'intended to punish, intimidate, pressure, humiliate and degrade the population' in response to internal disturbances.[110] *Castro-Castro* is the landmark case on sexual violence as torture,[111] which highlights impunity as an element of femicide. A significant development is the IACtHR's recognition in *Espinoza Gonzáles* that rape can constitute torture with the aim of discriminating women, an issue which is further developed in its recent case law. Similar to the ECtHR's approach, the IACtHR seems to consider rapes in prison somehow more serious than rapes committed in private contexts. The IACtHR also examined state officials' contribution to a social context, where violence against female social groups persists. Even non-state actor femicide can be crucially influenced by the state authorities' answer to such violence.

***Castro-Castro v. Peru* (2006)**

On 6 May 1992, during *Transfer Operation 1*, armed forces and guards primarily targeted female inmates of Peru's Miguel Castro-Castro penitentiary, a maximum-security prison which housed 135 women and girls, presumed members of the terrorist organization *Sendero Luminoso*. They sexually assaulted, injured, and killed many female prisoners during the supposed prison transfer.[112] The inmates had to climb over dead bodies while avoiding bullets,[113] being subject to insecurity and despair as they feared for their lives—some of them up to eight months pregnant.[114] Male prisoners who came to their assistance, were attacked as well. Surviving female inmates were forced to endure vaginal examinations and to be naked in front of armed men.[115] The IACtHR found Peru responsible for violating the right to life (Art.

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[110] *Castro-Castro v. Peru* (n 18) paras 223–225.

[111] *J. v. Peru* is not discussed here given its similarity to the previous cases. *J. v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 275 (27 November 2013).

[112] *Castro-Castro v. Peru* (n 18) paras 197.15, 223 and 226–227.

[113] Ibid., para. 290.

[114] Ibid., paras 291–293 and 298.

[115] Ibid., paras 222 and 304–306.

4(1) ACHR), the right to humane treatment (Art. 5(2) ACHR),[116] the right to judicial protection and fair trial (Arts 8(1) and 25 ACHR), the right to be free from (rape) torture (Arts 1, 6, and 8 IACPPT), and the right to be free from violence (Art 7(b) Belém do Pará Convention).[117]

Castro-Castro has outlined the State's duty to prevent VAWG in the Inter-American human rights system.[118] The IACtHR applied the Belém do Pará Convention after the Commission had applied and interpreted the Convention in *Maria da Penha* in 2001.[119] The Court's direct jurisdiction over the Belém do Pará Convention has helped shape its role in protecting women from violence. The Court considered that the forced nudity female detainees had been subjected to constituted sexual violence. This recognition of forced nudity as a human rights issue in itself, was a new development in the Court's case law. In coming to this conclusion, the Court relied on the ICTR's *Akayesu Case*. The IACtHR defined sexual violence as 'actions with a sexual nature committed with a person without their consent, which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever.'[120] Being forced to remain nude, under constant supervision, sometimes in the presence of male guards, had caused the female detainees 'serious psychological and moral suffering' and constituted sexual violence against them.[121] The Court considered that their right to personal dignity had been violated on those grounds.[122]

The IACtHR also found that involuntary vaginal inspection through the use of fingers represents rape, and that rape 'due to its effects' amounts to (sexual) torture, a much-needed step in the understanding of harm to women as a serious matter in need of attention.[123] Similarly, the Court highlighted the *Furundžija* definition, establishing that rape is not limited to vaginal intercourse, but could also include other forms of penetration, such as forced oral penetration.[124]

An especially noteworthy aspect is that the Court did not dwell on whether rape met the intent and purpose requirement for torture. Citing the ECtHR's *Aydin Case*, the IACtHR noted that rape 'causes great physical and psychological damage that leaves the victim "physically and emotionally humiliated," [a] situation difficult to overcome with time, contrary to what happens with other

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[116] Ibid., paras 332–333.
[117] Ibid., para. 408.
[118] See also Bettinger-Lopez (n 26) 182.
[119] *Maria da Penha v. Brazil* (n 56) para. 58.
[120] *Castro-Castro v. Peru* (n 18) para. 306.
[121] Ibid., paras 303–306 and 308.
[122] Ibid., para. 312.
[123] Ibid.
[124] Ibid., para. 310.

traumatic experiences.'[125] Although the Court seemingly recognized rape as torture regardless of any other criterion, the IACtHR's later case law clarified how rape meets the criteria defining torture.

In line with *Aydin*, the IACtHR appeared outraged that prison guards had raped women and girls, and stated that the 'sexual rape of a detainee by a State agent is an especially gross and reprehensible act, taking into account the victim's vulnerability and the abuse of power displayed by the agent.'[126] The Court established an unnecessary hierarchy of rapes committed in private and those in state custody, thereby placing rape committed by state officials above rape committed in private. This approach falls short of recognizing that 'private' torture, committed against women at home by the persons with whom they had a relationship, violates the victim's trust just as much, if not more.[127]

As to the duty to investigate human rights violations, the IACtHR asserted that States must investigate human rights violations with due diligence—'they must start, ex officio and without delay, a serious, impartial, and effective investigation'—a duty which is confirmed through Article 7(b) Belém do Pará Convention.[128] The domestic authorities had ignored the sexual violence committed against female prisoners during the so-called prison transfer, and instead centered its investigation on the deaths of the victims—thus once again emphasizing human rights violations typical to men and boys in a case concerning mainly women and girls.[129] The Court thus ruled that by failing to investigate the facts for 13 years, Peru had failed to guarantee equal access to justice to human rights victims within a reasonable time period.[130]

Finally, the IACtHR recognized the seriousness of the violence against female detainees by concluding that a massacre akin to a crime against humanity had been committed.[131] The Court's consideration of the impunity with which crimes against women and girls were treated, was particularly noteworthy for the development of the concept of femicide: 'Impunity must be fought through all means available, taking into account the need to make justice in a specific case and that promotes the chronicle repetition of violations to human rights and the total defenselessness of the victims.'[132] The IACtHR

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[125] Ibid., paras 311–312. See ECtHR, *Aydin v. Turkey*, App No 57/1996/676/866 (25 September 1997), para. 83.

[126] *Castro-Castro v. Peru* (n 18) para. 311.

[127] Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2007) 17.

[128] *Castro-Castro v. Peru* (n 18) paras 344–346 and 378.

[129] Ibid., para. 386.

[130] Ibid., paras 387 and 408.

[131] Ibid., paras. 404-405.

[132] Ibid., para. 405.

asserted that Peru should take all necessary measures to prosecute those responsible for planning the massacre in order to comply with its obligation to combat impunity.[133]

Gladys Espinoza Gonzáles v. Peru (2014)

Gladys Espinoza Gonzáles was arrested on terrorist charges in 1993 and subjected to sexual violence on the premises of the Peruvian Counter-Terrorism Directorate. She was then transferred to a maximum-security prison, where she was held in permanent solitary confinement, and was repeatedly sexually assaulted, raped, and tortured.[134] Medical reports confirmed the corresponding injuries on her body and sexual organs.[135] The IACtHR found that Peru had violated her rights to personal liberty (Art. 7 ACHR), personal integrity and dignity (Art. 5(1)–(2) ACHR), honor (Art. 11 ACHR), the right to judicial protection (Art. 25 ACHR), and the obligations established in Articles 1 and 6–8 IACPPT.[136] The Court further held that her family members' rights to personal integrity had been violated due to the traumatic events and the pain they endured as a result of the violence against Ms Espinoza Gonzáles.[137]

The IACtHR determined that the non-consensual sexual intercourse while Ms Espinoza Gonzáles was detained, constituted rape.[138] The Court emphasized that it 'is sufficient that penetration occurs, however slight this may be,' thus allowing for an even broader interpretations of its rape definition than in *Castro-Castro*.[139] Considering rape as 'a form of sexual violence' in *Espinoza Gonzáles*, the Court equalized rape and other sexual violence in terms of severity, a most welcome consideration of the many ways women and girls are subjected to violence in femicide. The Court took this consideration in its recent case law even further to recognize sexual violence as well as rape as torture.[140]

The Court held that Ms Espinoza Gonzáles' rape violated the prohibition of torture. In contrast to *Castro-Castro*, where the Court had only briefly addressed rape as 'severe pain and suffering,' the IACtHR here analyzed rape.[141] Considering the severity of the rapes, 'she felt that she was abandoning her body' and she had asked her assailants to kill her, the Court found that

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133 Ibid., para. 407.
134 *Espinoza Gonzáles v. Peru* (n 29) para. 167.
135 Ibid., para. 203.
136 Ibid., paras 196 and 229.
137 Ibid., para. 299.
138 The IACtHR applied the *Castro-Castro* rape definition. Ibid., paras 192–193.
139 Ibid., para. 192.
140 *Atenco v. Mexico* (n 40) para. 193.
141 *Espinoza Gonzáles v. Peru* (n 29) paras 185 and 188.

she was intentionally raped.[142] Moreover, the pursued purpose was to elicit information and punish her for failing to provide information.[143] The Court found that her body was used to punish, humiliate, and threaten her and her partner who had also been detained.[144] The threats against her regarding more rapes and the potential infliction of HIV, constituted a form of 'psychological torture.'[145] Of direct relevance to femicide is that the Court found that her rape discriminated against her as a woman and therefore constituted torture.[146]

The IACtHR also considered the widespread, disproportionate practices of sexual violence which discriminated against women and girls.[147] In this respect, the Court showed that armed conflict affects women and children differently and 'sexual violence, […] is frequently used as a symbolic means of humiliating the opposing party or as a means of punishment and repression.'[148] Beyond the individual harm inflicted, sexual violence had the power to convey a message to the community at large.[149] Citing expert witness Julissa Mantilla Falcón, the Court stated that sexual violence in armed conflict must be considered as a strategy of war.[150] Considering this context, the Court held that Ms Espinoza Gonzáles had been subjected to gender-based violence under the CEDAW Committee's General Recommendation No. 19.[151] The State had remained passive in response to this violence, which further violated her Articles 8 and 25 ACHR rights and Article 7(b) Belém do Pará Convention.[152] The Court stressed that criminal investigations into VAWG must not depend on the victim or her family's initiative.[153] This judicial inaction creates a climate of impunity, and causes[154] '[women and girls'] persistent mistrust in the system for the administration of justice.'[155] This mistrust was cemented by the use of stereotypes against her.[156] The State's Supreme Court unduly relied on psychological appraisals, claiming that Ms Espinoza Gonzáles 'manipulated reality in her own interest,' instead of critically considering the medical

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142 Ibid., paras 159 and 189.
143 Ibid., para. 189.
144 Ibid., paras 214 and 229.
145 Ibid., paras 185 and 188.
146 Ibid., para. 229.
147 Ibid., para. 203.
148 Ibid., para. 226.
149 Ibid., para. 226.
150 Ibid., para. 227.
151 Ibid., paras 219–221.
152 Ibid., paras 243–286.
153 Ibid., para. 238.
154 Ibid.
155 Ibid., para. 280.
156 Ibid., paras 250–253 and 259.

reports.[157] Based on its preconceived notions about her, the Supreme Court had ignored serious torture allegations.[158] The Court concluded that the Peruvian judiciary should have adopted a gender perspective in the investigation.[159] Ms Espinoza Gonzáles' right to equal access to justice was held to be violated.[160]

STATE ACTION II: MILITARY VIOLENCE AGAINST INDIGENOUS WOMEN AND GIRLS

In 2002, a military contingent was stationed in the State of Guerrero, Mexico, to counter organized crimes. Several complaints were filed concerning the rapes of civilians by military officials searching the area for insurgents, two of them by the young indigenous Valentina Rosendo Cantú and Ines Fernandez Ortega. *Rosendo Cantú* and *Fernandez Ortega* draw attention to intersectional violence which affects a specific segment of the female social group. Considering the sexism they were exposed to as young women, the racism against them as indigenous people who barely knew Spanish and could not file complaints without help, as well as 17-year-old Valentina's situation as a minor, the IACtHR abandoned 'a single-issue framework for discrimination.'[161] The Court implicitly incorporated Crenshaw's intersectionality framework to unravel the complex ways in which women are discriminated, which ensures that their identity as both 'woman' and 'coloured' is taken into account as regards rape and domestic violence.[162] Applying Crenshaw's framework also steers clear of the notion of essentialism, which 'constitutes the view that all women are alike, sharing a common "essence" or certain "essential" traits that differentiate them from men.'[163]

The IACtHR took the prohibition against torture out of the detention center—where it conventionally applied—into Fernandez Ortega's home and to the stream where Rosendo Cantú was washing her clothes—the so-called

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157 Ibid., paras 250–253, 279 and 286–288.

158 Ibid., paras 268 and 279.

159 Ibid., paras 242 and 281.

160 Ibid., para. 279.

161 Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' in Kelly Weisberg (ed), *Feminist Legal Theory, Foundations* (Pennsylvania University Press 1993) 386–387.

162 See Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(6) *Stanford Law Review* 1241–1299 at 1244. The Court referred to 'intersectional' discrimination in *V.P.C. and Others v. Nicaragua*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 350 (8 March 2018), para. 154.

163 Crenshaw (n 162), 1242. See also Meyersfeld (n 16) 123–124.

private space which has traditionally been considered outside the reach of state responsibility.[164] Even though the perpetrators in the cases were still state actors, these rape cases could be seen as the first step towards recognition of sexual violence committed in the domestic sphere as torture.[165]

Fernandez Ortega et al. v. Mexico (2010)

Ms Ines Fernandez Ortega was inside her home with her children[166] when soldiers entered her house, where they questioned her about some meat her husband had allegedly stolen. When Ms Fernandez Ortega did not answer their questions, because she had limited Spanish skills and was afraid of the soldiers, they threw her onto the ground and raped her.[167] Soon thereafter, she went to a hospital, where she initially received no medical attention.[168] She spoke Me'phaa and could not file a complaint herself. Her husband and other community members helped her lodge the complaint, which was initially rejected but later transferred to the military court.[169] The IACtHR found violations of her right to be free from torture (Art. 5(2) ACHR), and her right to honor and dignity (Art. 11(1) in relation to Art. 1(1) ACHR), her right to judicial protection and fair trial (Arts 8 and 25 ACHR, Arts 1, 6, and 8 of the IACPPT, as well as Art. 7(b) Belém do Pará Convention).[170] Finally, the Court held that her husband and children's rights to personal and moral integrity (Arts 5(1) and 11(2) ACHR) had been breached.[171]

The IACtHR categorized Ms Fernandez Ortega's rape as violence under Article 1 Belém do Pará Convention and as torture under the required three-prong test.[172] The Court found that (1) she was intentionally raped, since the attackers had forcibly penetrated her in the presence of other soldiers who pointed their weapons at her.[173] Ms Fernandez Ortega had suffered (2) severe harm due to the psychological and physical harm inflicted on her. She reported to be 'sore and had physical aches and pains,' although the medical certificate

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[164] See Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press 2011) 206.

[165] See Rosa Celorio, 'The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting' (2011) 65(3) *Miami Law Review* 819–866 at 838–839.

[166] *Fernandez Ortega et al. v. Mexico* (n 36) paras 125–126.

[167] Ibid., paras 56 and 82.

[168] Ibid., para. 86.

[169] Ibid., para. 85.

[170] Ibid., paras 3 and 128.

[171] Ibid., paras 145–146.

[172] Ibid., para. 118.

[173] Ibid., para. 121.

issued after her rape did not attest to any physical injuries.[174] Similar to the ECtHR's *Aydin Case*, the IACtHR clarified that mental pain in itself could constitute 'physical and mental suffering' under the definition of torture.[175] Moreover, the Court considered that since she was raped at home, the prospect that more soldiers could enter her home to gang-rape her at any time 'increase[d] the level of vulnerability and humiliation and made her feel completely powerless and totally unable to react.'[176] Her distress was intensified by her concern for her children's safety, who were with her shortly before her rape.[177] Finally, the rape was believed to lead to 'loss of spirit' according to her indigenous worldview and thus recognized severe social repercussions, which could destroy her ties to her community.[178]

The IACtHR held that the purpose of torture 'include[s] intimidating, degrading, humiliating, punishing, or controlling the person,' and that Ms Fernandez Ortega was raped as a punishment because she did not provide the requested information.[179] The Court noted that 'the possibility [existed] that there were also other objectives.'[180] Regrettably, it did not rule on sexual torture. The IACtHR did find that her right to private life, which entails 'sexual life, and the right to establish and develop relationships with other human beings,' was violated.[181] Although the Court's discussions on the right to private life were limited and inconsequential, references to women's right to honor, dignity, and private life are unfortunate in the light of their connotation.

The IACtHR rightly held that rape does not belong in any military court as it is unrelated to military discipline and its activities, and ought to fall outside the competence of military jurisdictions.[182] By this logic, should rape be adjudicated by a military court, this could mean that sexual violence is seen as a legitimized method of warfare and that women are legitimate prey who may be legally raped under certain circumstances. Hence, the Court took a stance in favor of eradicating impunity for rape in warfare. Being denied the possibility to have her complaint heard by an ordinary tribunal she was denied an adequate remedy.[183]

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174 Ibid., para. 123.
175 Ibid., para. 124.
176 Ibid., paras 125–126.
177 Ibid.
178 Ibid., paras 124–126.
179 Ibid., para. 127.
180 Ibid.
181 Ibid., para. 129.
182 Ibid., paras 176–177.
183 Ibid., paras 179 and 182.

Besides, the IACtHR found that Mexico had failed to investigate the rape against Ms Fernandez Ortega with due diligence.[184] She had had to overcome various obstacles to lodge her complaint.[185] The Court was especially concerned about Mexican officials repeatedly summoning her to testify, stating that 'the investigation must try to avoid revictimization or the re-experiencing of the profoundly traumatic experience each time the victim remembers or testifies about what happened.'[186] She was repeatedly questioned, which showed the authorities' 'complete lack of motivation, sensitivity, and competence.'[187] Finally, the IACtHR found that Mexico had also violated her right to equal access to justice, based on her ethnicity as an indigenous woman.[188] Considering that 'it is essential that States offer effective protection that takes into account women and girls' particularities, social and economic characteristics, as well as their situation of special vulnerability, customary law, values, customs, and traditions,'[189] the Court found that the authorities had failed to respect her indigenous identity throughout the proceedings, recognizing the multiple inequalities from which she had suffered.[190]

Rosendo Cantú v. Mexico (2010)

On 16 February 2002, Valentina Rosendo Cantú, a 17-year-old Me'phaa indigenous adolescent, was washing her clothes at a stream when eight soldiers approached her. They asked Valentina if she knew any of the people on a list of names that they showed her.[191] When she did not answer, some soldiers knocked her to the ground. She momentarily lost consciousness. When she woke up, the soldiers threatened to kill her along with her community if she did not cooperate. Two soldiers ripped off her skirt and underwear and raped her while the remaining six watched.[192] Her husband filed a complaint with the authorities of the community, and she went to a local health clinic where she obtained pain killers and anti-inflammatory medication. A few days later, she walked eight hours to another clinic where she was informed that she could not be treated without an appointment. The next day, a doctor examined her stomach but refused to assess possible injuries inflicted through

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184 Ibid., para. 198.
185 Ibid., para. 195.
186 Ibid., para. 196.
187 Ibid., para. 197.
188 Ibid., para. 199.
189 Ibid., para. 200.
190 Ibid.
191 *Rosendo Cantú v. Mexico* (n 31) para. 73.
192 Ibid., para. 73.

rape.[193] Valentina filed a complaint against members of the Mexican army with the help of her husband. Her case was referred to the military courts, also resulting in impunity for the perpetrators.[194] The IACtHR found violations of Valentina's rights to a fair trial and to judicial protection (Arts 8(1) and 25(1) ACHR), the obligation to eradicate violence against women (Art. 7(b) Belém do Pará Convention), her right to personal integrity (Art. 5(1)–(2) ACHR), the right to dignity and privacy (Art. 11(1) and (2) ACHR) and the prohibition of torture (Arts 1, 2, and 6 IACPPT).[195] Moreover, Valentina's daughter's right to psychological and moral integrity under Article 5(1) ACHR had been violated, as she was ostracized by her community.[196]

Apart from concerning a minor, *Rosendo Cantú* is almost identical to *Fernandez Ortega*. Valentina had been tortured at the hands of members of the military since (1) she was intentionally hit in the abdomen, causing her to fall on the ground, after which she was raped.[197] Like in *Fernandez Ortega*, the Court found that rape is traumatic, and inevitably (2) causes severe psychological and mental suffering even in the absence of physical suffering.[198] The IACtHR emphasized her status as a minor and the fear she endured as a result of the six other soldiers present while she was raped.[199] Reiterating that the (3) purpose of rape as torture can be multiple, the Court again disregarded the gendered aspect of rape, and found that Valentina was raped to punish her for failing to provide information.[200] In this case, the authorities violated her right of access to justice and fair trial as they did not provide medical help and adequate translation services and her husband had to translate the traumatic events and later separated from her; they also retraumatized her through repeated statements.[201] The IACtHR established that the minimum standard in investigating sexual violence requires 'immediacy and speed.'[202] Mexico had failed to protect Valentina, who was a child throughout the proceedings, thereby violating her rights of the child under Article 19 ACHR.[203] The IACtHR viewed Valentina's situation through intersectional lenses, taking into account that she was indigenous, female, and a minor, all of which contributed to the

193 Ibid., paras 37, 75 and 168.
194 Ibid., paras 38 and 59.
195 Ibid., para. 182.
196 Ibid., paras 137–139.
197 Ibid., para. 111.
198 Ibid., para. 114.
199 Ibid., paras 114–115.
200 Ibid., paras 110 and 117.
201 Ibid., paras 78, 133, 170, 178–179 and 184.
202 Ibid., para. 181.
203 Ibid., paras 201–202.

violence against her.[204] As these cases reveal, the female social group targeted in femicide, is delimited by intersectional aspects.

STATE PASSIVITY: FEMICIDE IN MEXICO AND GUATEMALA

The many human rights violations inherent in a single femicide case transpire in a context of widespread violence, which arises from systemic discrimination.[205] The IACtHR approaches femicide as a multi-faceted human rights issue. In three emblematic femicide cases, the Court recognized women's right to be free from gender-based violence. The IACtHR is flexible in its approach to VAWG as it establishes acts as gender-based violence by reference to Article 1 Belém do Pará Convention in addition to the CEDAW Committee's General Recommendation No. 19.[206] The Court is also practical in its approach as it considers whether sexual violence or extreme violence, such as bodily mutilation, characterized a crime against a woman to determine whether the violence is gender based.[207] This case law also affirms that impunity is an element of femicide, when the police remain inactive instead of investigating women and girls' abductions at a time when the victim could still have been rescued.

Another positive contribution to the recognition of femicide is that the IACtHR has identified the targeted female social group. The *Cotton Field Case* speaks of 'particularly young women from humble backgrounds.'[208] Although this phrase limits and identifies the targeted population, it may be excessively narrow to cover women and girls from other social classes. The issue of social class can be exemplified with *Veliz Franco* and *Velásquez Paiz*, both cases concerning the violence against women in Guatemala in the early 2000s. Whereas *Veliz Franco* dealt with the sexually violent murder of 15-year-old Maria Isabel from an underprivileged background, *Velásquez Paiz* involved a law student from a higher social background who was abducted and possibly raped after leaving a party. A limitation of the 'female social group' to women and girls of a certain social background would exclude several vic-

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[204] Ibid.

[205] See Osvaldo Muñoz Vargas, 'Maria Isabel, El Feminicidio con Rostro Adolescente en Guatemala' (2010) 21(1) *Revista Latinoamericana de Derechos Humanos* 85–96 at 88.

[206] *Cotton Field Case* (n 13) paras 231–232 and 398.

[207] Ibid., para. 455; *Veliz Franco v. Guatemala* (n 43) paras 187–188; *Velásquez Paiz v. Guatemala* (n 12) para. 196; Latin American Model Protocol (n 53) 64.

[208] *Cotton Field Case* (n 13) para. 282.

tims.[209] The objective criteria must be defined by taking account of different socio-economic, geographical, and other factors.

The IACtHR attributes state responsibility when individual women who belong to such groups remain unprotected, but the protection does not extend to the groups themselves—a rather individualistic understanding of human rights protection. Even though the Court regularly mentions the widespread context in relation to state responsibility, it places emphasis on whether an individual risk existed. Cautiously, the Court appears to expand state responsibility for failing to counter a widespread context of VAWG. This would lower the burden on the victim's families who are required to submit evidence before the Court about having reported such violence for state responsibility to arise, which is particularly a problem in the European context of domestic violence. For state responsibility to arise, the IACtHR could consider that an 'individual' risk is connected to the widespread risk of which the State was aware, and that an individual disappearance was part of such a pattern.

As to the widespread risk, the IACtHR already recognized knowledge on the part of States about collective threats in the *Cotton Field*, *Veliz Franco*, and *Velásquez Paiz Cases*. In the *Cotton Field Case*, the Court noted that 'the State was aware of the situation of risk for women in Ciudad Juarez.'[210] Guatemala was cognizant of a broad context of violence which put young women and girls at risk, especially in Guatemala City and Escuintla in *Veliz Franco*.[211] In *Velásquez Paiz*, the VAWG had become generally exacerbated in Guatemala.[212] Yet, the Court did not expound on why the danger was not real and immediate for women and girls in this dangerous climate. This nebulous reasoning does not embrace women and girls as members of a particularly affected social group. At the same time, it appears to acknowledge that the individual woman is at risk in the context of widespread violence.

The IACtHR seems willing to solve the problem of a widespread risk of violence, but still struggles to be consistent in its approach on whether such contexts give rise to state responsibility. In *Veliz Franco*, the Court was satisfied that Guatemala had taken enough measures to combat VAWG and was therefore not internationally responsible.[213] Although questionable on the facts, the reasoning in *Veliz Franco* is legally sound, unlike in the *Cotton Field* and *Velásquez Paiz Cases*. By contrast, the Court considered that Mexico and Guatemala had not taken enough preventive measures in the *Cotton Field*

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209 Sosa (n 18) 95 and 103.
210 *Cotton Field Case* (n 13) para. 282.
211 *Veliz Franco v. Guatemala* (n 43) paras 78 and 139.
212 *Velásquez Paiz v. Guatemala* (n 12) para. 111.
213 *Veliz Franco v. Guatemala* (n 43) paras 82 and 139.

Case, without attaching legal consequences to these (implicit) breaches.[214] The discussion of the preventive measures in relation to the structural risk implies that the Court realized that a real or immediate risk existed for the female social group more generally and that preventive measures would effectively meet their international responsibility.

The IACtHR may have intended to avoid providing a positive ruling on this issue, as it may have been concerned with limiting state responsibility for inaction vis-à-vis widespread risks. In the *Cotton Field Case*, the Court stated that, even though women and girls in Ciudad Juarez were at particular risk, 'these factors do not impose unlimited responsibility for any unlawful act against such women.'[215] Conversely, the Court did not hesitate to recognize that Honduras was responsible for inaction in the context of patterns of enforced disappearances, mainly committed against men and boys.[216] Moreover, the IACtHR's application of the *Osman* test overlooks that a woman's abduction in Ciudad Juarez was rarely preceded by those incidents which could constitute a warning similar to the domestic violence cases. Past human rights violations of the same nature affecting many women and girls in Ciudad Juarez should have triggered state responsibility. The fundamental problem with the current *Osman* test is that it allows States to tolerate, and even create, contexts of widespread violence against women with impunity.[217] Finally, the Court made clear that state responsibility is engaged when States fail to investigate VAWG with a gender perspective—the duties concerning investigations with a gender perspective being applicable irrespective of whether the violence is committed by state or non-state actors.

González et al. v. Mexico (*Cotton Field*) (2011)

González et al. v. Mexico on Ciudad Juarez' femicide crime waves is the vanguard femicide case, which set the standards for a human rights-centered approach to femicide.[218] The case dealt with the disappearances of three young women: Esmeralda Herrera's last contact was a phone call with a friend as she was getting ready for a party; Laura Ramos was last seen after she was denied entry to her workplace for arriving a few minutes late; Claudia González never returned home after leaving the sewing factory where she worked. The three women were between 17 and 20 years old. Shortly after they vanished, their mothers reported their disappearances to the police. However, the police

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214 *Cotton Field Case* (n 13) para. 262.
215 Ibid., para. 282.
216 *Velásquez Rodríguez v. Honduras* (n 42) paras 172–174.
217 See *Cotton Field Case* (n 13) para. 282.
218 Ibid., paras 127 and 164.

were negligent, unhelpful, and even openly refused to act, referring to the 72-hour waiting period before missing person cases could be investigated.[219] In November 2001, the women's severely mutilated bodies—parts of their breasts having been sliced off and their heads scalped—were found along with other female corpses in a cotton field.[220] The Court held that Mexico had failed to protect the three women from violence, violating the victims' right to life (Art. 4(1) ACHR), their right to personal integrity and personal liberty (Arts 5(1)–(2), and 7 ACHR), their right to judicial protection and due process (Arts 8 and 25 ACHR), the rights of the child (Art. 19 ACHR), and its duty to investigate VAWG (Art. 7(b)–(c) Belém do Pará Convention).

The IACtHR found that the three women had been subjected to gender-based violence under Article 1 Belém do Pará Convention and the CEDAW Committee's General Recommendation No. 19.[221] Mexico had admitted that a culture of discrimination existed, which led to the perception that crimes against women were insignificant and therefore did not require specific immediate action.[222] In this climate of widespread violence, the authorities stereotyped the victims, which ultimately prevented the police from doing their job and help search for the missing women.[223] The police told the victims' mothers respectively:

> *Esmeralda Herrera Monreal:* '[she had] not disappeared, but was out with her boyfriend or wandering around with friends.'[224]
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> *Claudia Yvette González:* 'she is surely with her boyfriend, because girls were very flighty and threw themselves at men. [When her mother filed a complaint about the disappearance, she was told] that perhaps her daughter had gone off with her boyfriend, and would soon return home.'[225]
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> *Laura Berenice Ramos Monárrez:* 'all the girls who get lost, all of them, […] go off with their boyfriend or want to live alone. [When she asked the police agents to accompany her to look for her daughter; they said] no Señora, it's very late, we have to go home and rest and you should wait for your moment to look for Laura […]. [G]o home and relax, have some [beer] and offer a toast to our health; because we can't go with you.'[226]

The police's stereotypes convey three sexist misconceptions. The police appeared to think that all women act without concern for others' feelings. They

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[219] Ibid., paras 197–200.
[220] Ibid., para. 277.
[221] Ibid., paras 133, 128–132, 398 and 395.
[222] Ibid., para. 398.
[223] Ibid., para. 401.
[224] Ibid., para. 198.
[225] Ibid., para. 199.
[226] Ibid., para. 200.

blamed the victim for being with her boyfriend or leaving her home contrary to the traditional role of staying within the private sphere of the home. Finally, they considered that women would be safe with their boyfriends. Why are seemingly innocent, if derogatory, remarks about women and girls' behavior relevant in the violation of their human rights? The IACtHR described it as follows:

> The result [of stereotyping] is that prosecutors, police and judges fail to take action on complaints of violence. These biased discriminatory patterns can also exert a negative influence on the investigation of such cases and the subsequent weighing of the evidence, where stereotypes about how women should conduct themselves in interpersonal relations can become a factor.[227]

One crucial aspect of this stereotyping is that it leads to the authorities' inaction at a time when they could still have rescued the victims.[228] Their inaction fosters a climate where harm to women and girls is seen as less important than human rights violations committed against men and boys.[229] Unpunished, the abductions of, sexual violence against, and rape of women are likely to escalate to widespread violence since assailants become aware that they will not suffer punishment for harming the female social group.[230] In the Court's eyes, such widespread violence in Ciudad Juarez was often gender-based, being mainly directed against women and girls.[231] While Mexico had referred to femicide as 'the phenomenon of Ciudad Juarez,'[232] and expert witnesses described the events as femicide,[233] the IACtHR appeared reluctant to use the term 'femicide,' likely because of its inconsistent usage.

The Mexican authorities failed to investigate the murders of the three young women. The perpetrators were never identified. Since their bodies were dumped in a cotton field, the crimes looked like they must have been committed in the public sphere. However, the perpetrators may have committed these acts in the 'private sphere,' they may even have known or have been in a relationship with the victims.[234] Segato contends that the bodies had likely been dumped in public to assert that perpetrators have the power to kill women

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[227] Ibid., para. 400.
[228] Ibid., para. 208.
[229] Ibid., paras 398–400.
[230] Ibid., para. 161.
[231] Ibid., paras 228–231.
[232] Ibid., para. 139.
[233] Ibid., para. 141.
[234] Meyersfeld (n 16) 52–53.

without being punished.[235] The fact that many acts of violence in Ciudad Juarez were committed in an intimate partnership or in revenge for romantic rejection, and therefore 'solely' relate to domestic violence cases, remains relevant.[236] As non-state actors had presumably harmed and killed the three victims, the IACtHR inquired into whether Mexico was responsible for inaction by failing to protect Claudia, Laura, and Esmeralda's human rights.[237]

At the heart of the *Cotton Field Case* was the State's duty to prevent human rights violations—i.e., the right to life, the right to personal liberty and security, the right of access to justice, and the right to personal integrity. To assess whether Mexico was responsible for their disappearance through inaction, the IACtHR applied the *Osman* test. The Court examined 'two crucial moments in which the obligation of prevention [arises].'[238] First, the IACtHR considered the widespread risk for women and girls in Ciudad Juarez. In the Court's words, this is the risk 'prior to the disappearance of the victims.'[239] Secondly, the Court assessed the explicit risk faced by the three young women 'before the discovery of their bodies.'[240]

The IACtHR began by considering the risk 'prior to the disappearance of the victims'—i.e., the widespread risk for the female social group in Ciudad Juarez—independent from Laura, Claudia, and Esmeralda's actual kidnappings. The Court acknowledged that the widespread threat against the female social group, originating in sexist societal structures, could in principle attract state responsibility.[241] The Court also identified the female social group at risk as including 'particularly young women from humble backgrounds.'[242] Furthermore, the Court found that 'the State was fully aware of the danger faced by these women of being subjected to violence.'[243] Addressing the third part of the *Osman* test—i.e., whether Mexico had attempted to address this structural violence—the Court examined the measures Mexico had taken to respond to acts of femicide at length: Mexico had adopted specific laws on violence against women, it had created specialized agencies (a prosecution unit

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[235] Rita Laura Segato, 'Territory, Sovereignty, and Crimes of the Second State' in Rosa-Linda Fregoso and Cynthia Bejarano (eds), *Terrorizing Women, Feminicide in the Americas* (Duke University Press 2010) 79.

[236] See IAC Report on Ciudad Juarez.

[237] Caroline Bettinger-Lopez, 'The Challenge of Domestic Implementation of International Human Rights Law in the Cotton Field Case' (2012) 15 *City University of New York Law Review* 115–334 at 319.

[238] *Cotton Field Case* (n 13) para. 281.

[239] Ibid., para. 281.

[240] Ibid.

[241] Ibid., para. 279.

[242] Ibid., para. 282.

[243] Ibid., para. 279.

and a national institute) dealing with the murders of women in Ciudad Juarez, and it had adopted specialized training for state authorities.[244] In 2001, when the three victims were abducted, Mexico had however not yet implemented these measures to protect women from violence.[245] In this respect, 'the Court [could] only note that the absence of a general policy which could have been initiated at least in 1998 […] is a failure of the State to comply in general with its obligation of prevention.'[246] Yet, the Court failed to attach any legal consequences to the breach relating to the preventive measures, although such a breach would have suggested that Mexico had not complied with *Osman*. The IACtHR instead maintained that 'it has not been established that [the State] knew of a real and imminent danger for the victims in this case.'[247] This statement contradicts the Court's recognition of Ciudad Juarez as a place where women and girls' lives are at risk.[248] The Court's reasoning appears to suggest an implicit requirement for a tragic or fatal incident before state responsibility is triggered.

Subsequently, the IACtHR considered the risk inherent in the time-lapse between when the three disappearances were reported and their bodies were found, thus assessing the State's preventive obligations regarding an individual abduction. The Court found that Mexico 'was aware that there was a real and imminent risk that the victims would be sexually abused, subjected to ill-treatment and killed' after the three women were reported missing and before their bodies were found.[249] In this widespread context of violence, an obligation of 'strict due diligence in regard to reports of missing women' exists pursuant to Article 7(b) Belém do Pará Convention.[250] The Court stated that it was crucial to act within the first few hours in cases of disappearances.[251] The omission of the State to take the reports of missing women seriously was 'particularly serious owing to the context.'[252] The Court held that the State did not sufficiently endeavor to prevent the victim's human rights violations.[253]

The IACtHR also concluded that Mexico had failed to comply with its 'procedural obligation' to investigate VAWG. The Court pertinently noted that the investigation standards apply to non-state actor committed violence:

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[244] Ibid., paras 262–279.
[245] Ibid., paras 273 and 279.
[246] Ibid., para. 282.
[247] Ibid.
[248] Ibid., para. 279.
[249] Ibid., para. 283.
[250] Ibid., paras 283–284.
[251] Ibid., para. 283.
[252] Ibid., para. 284.
[253] Ibid., para. 252.

'if their acts would not be investigated genuinely, they would be, to some extent, assisted by the public authorities, which would entail the State's international responsibility.'[254] In the context of high levels of non-state actor VAWG, States have an augmented duty to investigate killings, ill-treatment, and deprivation of personal liberty of women and girls.[255] Many irregularities had characterized the Mexican investigation into acts of femicide: delays, fabrication of guilt, poor handling of evidence, and the failure to consider the acts as gender-based.[256] The IACtHR considered that Mexico should have adopted a gender perspective—i.e., to 'undertake specific lines of inquiry concerning sexual assault, which must involve lines of inquiry into the corresponding patterns in the area.'[257]

One shortcoming of the *Cotton Field Case* concerned the IACtHR's failure to classify the sexual violence against women as violations of the prohibition of torture, rather than the right to personal integrity.[258] Judge Medina Quiroga rightly criticized the Court's approach to sexual violence and rape in her concurring opinion. First, she argued that the severe sexual injuries inflicted on the women's bodies meet the threshold required under the prohibition of torture, clarifying that the Court considers acts as torture, when 'the principal factor is the severity of the act and how it affects the victim.'[259] Second, the judge opposed any requirement of state participation (by action or inaction) in torture, remarking that the IACPPT did not require state officials to be present in acts of torture.[260] She contended that the Convention does not define the scope of torture. Therefore, the IACtHR must interpret the definition of torture and, in doing so, could take a different route than the CAT which requires state action.[261] Judge Medina Quiroga's concurring opinion presents the start of a shift in the Court's case law recognizing rape as torture. However, it took until *López Soto* in 2018 for the Court to find that private individuals can torture women and girls.[262]

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[254] Ibid., para. 291.
[255] Ibid., para. 293.
[256] Ibid., para. 388.
[257] Ibid., para. 455.
[258] Ibid., Concurring Opinión of Judge Medina, para. 1.
[259] Ibid., para. 2.
[260] Ibid., para. 7.
[261] Ibid., paras 12–13.
[262] *López Soto v. Venezuela* (n 12).

Veliz Franco v. Guatemala (2014)

Maria Isabel Veliz Franco, a 15-year-old student, disappeared on 16 December 2001. After leaving work, she was pulled into a truck by an unidentified individual.[263] According to Ms Rosa Elvira Franco, her mother, Maria Isabel was the girlfriend of a *mara* (gang member), and her daughter had wanted to end the relationship.[264] Ms Franco informed the authorities of her daughter's disappearance almost 20 hours before her body was found. She told them that she had searched for her daughter in vain and added that Maria Isabel might have been with a man shortly before her abduction.[265] Guatemalan authorities told her to come back later. When she did, the authorities informed her that they could not take her complaint at that time, she had to wait 24 to 62 hours. As a result, Ms Franco made inquiries at her daughter's workplace herself and learned that she had left with a man who may have harassed her in the past.[266] Two days after Maria Isabel's disappearance, her body was found, marked with signs of violence. The forensic expert told Ms Franco that Maria Isabel had likely been sexually abused and killed on the night of 17 December 2001, suggesting that she was still alive one day after having been abducted, on the day her mother had contacted the police.[267]

The state attorneys told Maria Isabel's mother that her daughter's lifestyle made her a prostitute, implying that it was her own fault that she was dead. They also mocked her mother during the investigation: the Prosecutor laughed at Ms Franco's pain, stating that her daughter was emotionally unstable; they referred to Maria Isabel as 'the crazy one.' More than 12 years after Maria Isabel's disappearance, the investigation was still in the preparatory stages.[268] Although a witness had seen the plastic bag with Maria Isabel's corpse being dumped on the street by a woman, and Ms Franco had Maria Isabel's calls analyzed at her own expense, the police authorities did not investigate the available evidence until three years later. The autopsy had failed to establish whether Maria Isabel had been drugged or raped. Furthermore, evidence was mishandled: some clothing items were lost during the investigations. [269]

The IACtHR held that Guatemala had violated its obligation to ensure Maria Isabel's free and full exercise of the right to life (Art. 4(1) ACHR), the right to personal integrity (Art. 5(1) ACHR), personal liberty, the rights of a child (Art.

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263 *Veliz Franco v. Guatemala* (n 43) para. 94.
264 Ibid.
265 Ibid., para. 146.
266 Ibid., para. 94.
267 Ibid., paras 95 and 98.
268 Ibid., para. 118.
269 *Veliz Franco v. Guatemala* (n 43) para. 199; Muñoz Vargas (n 205) 89.

19 ACHR), and the obligations to ensure the rights without discrimination (Arts 1(1) and 24 ACHR), as well as the obligations contemplated in Article 7(b) Belém do Pará Convention.[270] The Court did not use the term 'femicide' for the acts of violence.[271] The Court also found that Guatemala had violated Ms Franco's right to personal integrity (Art. 5(1) ACHR), for the harassment and threats she was subjected to throughout the proceedings.[272]

The IACtHR considered that the investigation of Maria Isabel's murder was marked by stereotypes against her and her mother, thereby discriminating against them.[273] The Court criticized the investigation's focus on 'Maria Isabel's way of dressing, her social and nightlife, her religious beliefs, and also her family's lack of concern or supervision,' which was reflected in the police's reaction to her disappearance and official reports.[274] Notably, the Prosecutor had told Ms Franco that her daughter 'was a tart, a prostitute,' and an expert report concluded that Maria Isabel went out with too many different boyfriends.[275] The Court found that the investigation was used to blame Maria Isabel and her mother for the murder, thereby discriminating against Maria Isabel and violating her mother's personal integrity.[276] As a result of this attitude, the authorities had failed to investigate the circumstances of her death and to identify the perpetrator.[277]

The IACtHR also experimentally explored international legal standards which combat stereotypes about previous sexual conduct. The Court cited the ICC's Rules of Procedure and Evidence, which state that '[c]redibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim' and 'a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim.'[278] Additionally, the IACtHR referred to the Istanbul Convention, which admits evidence on prior sexual conduct 'only when it is relevant and necessary.'[279] Adapting these international standards to the Inter-American human rights system, the Court held that 'opening lines of investigation into the previous social or sexual behavior of the victims in cases of gender violence is merely a manifestation of policies or attitudes

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[270] *Veliz Franco v. Guatemala*, ibid., para. 158.
[271] Ibid., para. 132.
[272] Ibid., paras 233–242.
[273] Ibid., paras 214–215.
[274] Ibid., para. 213.
[275] Ibid., paras 212–213.
[276] Ibid., para. 212.
[277] Ibid.
[278] Ibid., para. 209.
[279] Ibid., citing Art. 54 Istanbul Convention.

based on gender stereotypes.'[280] Finally, the IACtHR pointed out that the use of stereotypes had actually influenced the context of VAWG in Guatemala.[281] The Court's discussion reiterates that the persisting impunity in femicide, as an aspect of femicide, can be tackled by ensuring that authorities react swiftly regardless of the victim's personal background.

Based on the CEDAW Committee's General Recommendation No. 19, the IACtHR further established that Maria Isabel's murder took place in a discriminatory context of violence against women in which she was targeted 'owing to hatred or contempt based on her condition as a woman.'[282] The Court found it probable that Maria Isabel's murder was gender-based but was reluctant to make a definitive finding as the State had failed to investigate her murder. In deciding whether murder is gender-based, the Court relied on standards detailed in the Latin American Model Protocol, a policy instrument to help authorities identify femicide victims and conduct better investigations into potential femicide cases.[283] The IACtHR specifically looked at how Maria Isabel was killed, and the sexual violence, mutilations, or extreme cruelty used against her, as sexual violence and cruelty are indicators for gender-based violence.[284] The Court noted that she was probably subjected to sexual violence as a forensic doctor had told Ms Franco that her daughter was raped before she died.[285] Moreover, her body was found with 'signs of strangulation, a wound to the head, a cut on one ear and bites on her upper arms; her head was covered by towels and a plastic bag, and she had food in her mouth and nose; the bottom part of her blouse and underpants were torn.'[286] According to the Court, any uncertainty about whether her murder was gender-based, was attributable to Guatemala's failure to investigate her death.[287]

However, as in the *Cotton Field Case*, the IACtHR did not hold Guatemala responsible for failing to prevent widespread violence. Yet, the Court examined (1) the widespread violent context in which Maria Isabel disappeared in depth, before (2) discussing her individual disappearance.[288] Of particular relevance is that the Court recognized the existence of generalized VAWG in certain geographical locations, Guatemala City and Escuintla, and appeared to suggest that a defined social group, i.e., 'certain women and girls' may be

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[280] Ibid.
[281] Ibid., para. 213.
[282] Ibid., para. 211.
[283] Latin American Model Protocol (n 53) 64.
[284] *Veliz Franco v. Guatemala* (n 43) paras 178 and 187.
[285] Ibid., para. 211.
[286] Ibid., para. 178.
[287] Ibid., paras 178–183.
[288] Ibid., para. 138.

at risk of such violence.[289] The IACtHR noted that Guatemala should adopt measures to address this context on a 'juridical, political, administrative and cultural' level and 'prevent risk factors and also strengthen institutions so that these can respond effectively to VAWG cases.[290] Surprisingly, the IACtHR was satisfied that 'prior to December 2001, the State had implemented actions in relation to the problem of violence against women,' namely, the adoption of a femicide law and a domestic violence law.[291] Apart from these legal measures, the IACtHR remained silent on whether Guatemala had taken policy or social measures, which the Court had required in the *Cotton Field Case*.[292] Centering on Maria Isabel's situation with regard to that risk, the Court considered that Guatemala could not have known that Maria Isabel herself was in real and immediate danger prior to her disappearance.[293]

As to the second time-frame, the IACtHR held that once Maria Isabel had been reported missing, the domestic authorities knew of a real and immediate risk that she 'would be attacked' in the light of Guatemala's femicide prevalence.[294] The Court noted that Ms Franco's report within this context should have alarmed the authorities as to the possible violations of Maria Isabel's rights.[295] In addition, the State must have been aware of the context of impunity with which VAWG cases were treated.[296] The Court found that the State should have known that Maria Isabel's life was in danger.[297] Guatemala had failed to undertake measures to prevent violations of her rights. The Court concluded that Maria Isabel died after her mother filed her complaint, and that her life was in jeopardy at the time Guatemalan authorities became aware of her disappearance.[298] Considering that her situation as a female and as a child both separately triggered the State's enhanced due diligence obligation, the Court found that Guatemala should have swiftly investigated the violence against her.[299] Against this background, the State's due diligence obligation was prompted as soon as the authorities were advised of Maria Isabel's disappearance.[300]

The IACtHR held that Guatemala had violated Maria Isabel's right to equal access to justice and fair trial in failing to prevent violence against her under

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289 Ibid., para. 78.
290 Ibid., para. 135.
291 Ibid., para. 139.
292 See *Cotton Field Case* (n 13) para. 258.
293 *Veliz Franco v. Guatemala* (n 43) para. 139.
294 Ibid., paras 141 and 154.
295 Ibid., paras 147–149.
296 Ibid., para. 153.
297 Ibid., para. 147.
298 Ibid., para. 144.
299 Ibid., paras 133–134.
300 Ibid., paras 155 and 157.

Articles 8 and 25 ACHR and strengthened by Articles 7(b) and 7(c) Belém do Pará Convention.[301] Guatemalan authorities had failed to investigate whether Maria Isabel's murder included sexual violence and whether it was therefore gender-based.[302] The IACtHR stressed that, in addition to her murder, Guatemala should have tried to find out whether she was tortured or subjected to sexual violence before she died.[303] According to the Court, an effective investigation strengthens women's trust in state institutions, and 'society's duty to reject violence against women.'[304] The first stages of proceedings, when evidence is collected and autopsies performed, are particularly important to determine whether crimes involve gender-based violence and sexual violence or cruel acts.[305] By failing to properly and expeditiously investigate Maria Isabel's murder, Guatemala had also violated the right of access to justice of Maria Isabel Veliz Franco's mother.[306]

Velásquez Paiz v. Guatemala (2015)

In 1995, a 19-year-old law student, Claudina Isabel Velásquez Paiz, went missing after leaving a party.[307] Her parents called the police on the same night she disappeared. A police patrol was dispatched to the area at 3:00 AM.[308] Accompanied by Ms Velásquez Paiz's parents, the police scoured the streets.[309] After a while, the police told her parents that they would stop searching, and that her parents needed to wait 24 hours until they could file a missing person's report.[310] After the police left, Ms Velásquez Paiz's parents, together with friends and relatives, kept searching for her until the early morning. According to her boyfriend, Ms Velásquez Paiz had left his car on the night she went missing after they had a fight. He had not been able to follow her, because she walked into a pedestrian zone.[311] At 5:00 AM, her parents again tried to file a police report, but they were told about the waiting period once

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301 Ibid., para. 178.
302 Ibid., para. 196.
303 Ibid., para. 188.
304 Ibid., para. 185.
305 *Cotton Field Case* (n 13) para. 310. See also United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions-Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol) (1991) UN Doc E/ST/CSDHA/.12.
306 *Veliz Franco v. Guatemala* (n 43) para. 216.
307 *Velásquez Paiz v. Guatemala* (n 12) paras 51–52.
308 Ibid., para. 121.
309 Ibid., para. 125.
310 Ibid., paras 53–54.
311 Ibid., para. 127, fn. 210.

more. Half an hour later, Ms Velásquez Paiz's body was found in the street, bearing signs of beatings and sexual abuse. Her parents were called to identify her body in a morgue.[312] At 8:30 AM, three hours after her death, the police report of Claudina Velásquez Paiz's disappearance was finally registered.[313]

The IACtHR found that Guatemala had violated various human rights, including the right to life (Art. 4 ACHR) and the right to personal integrity (Art. 5 ACHR) by failing to take reasonable measures to prevent the violation of these rights under Article 7 Belém do Pará Convention.[314] In addition to the right to personal integrity, Ms Velásquez Paiz's family members' right of access to justice was also violated.[315] The IACtHR considered that Ms Velásquez Paiz's right to equal access to justice was violated.[316] From the start of the proceedings, the domestic authorities had inadequately investigated her case;[317] they had referred to her attire and the place where she went missing.[318] The domestic authorities considered her a *cualquiera* (a nobody) due to the fact that her body was found in an underprivileged neighborhood and her clothes smelled of alcohol.[319] Based on Ms Velásquez Paiz's belly piercing, the female investigator from the 'Unit on Female Homicides' suggested that she was a prostitute who had provoked her own murder.[320] Various police reports and psychiatric assessments replicated these stereotypes.[321] A psychiatric report, issued three years after Ms Velásquez Paiz's death, stated:

> [She was] imprudent, because she was in a risk situation and did not consider the consequences of walking alone at night; that shows an impulsive act, immaturity and irresponsibility and perhaps she was even under the influence of drugs or alcohol […] in her personal and social relationships the consummation of alcohol is predominant and the reunion organized by her friends constituted priorities in her life; her family as well as her University studies seemed secondary, as she skipped classes to be with her friends.[322]

These stereotypes translated to an inadequate investigation into Ms Velásquez Paiz's death. Expert witness Bovino noted that 'the qualifier "passionate"

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312 Ibid., paras 53–56.
313 Ibid., para. 125.
314 Ibid., para. 132.
315 Ibid., paras 212–220.
316 Ibid., para. 175.
317 Ibid., para. 196.
318 Ibid., paras 176 and 200.
319 Ibid., paras 177 and 181.
320 Ibid., para. 179, fn. 277.
321 Ibid., paras 184 and 187.
322 Ibid., para. 189.

emphasizes the behaviour of the aggressor.'[323] Expert witness Chinkin pointedly explained that the authorities deemed Ms Velásquez Paiz's murder trivial on the presumption that she was a prostitute, thus remaining inactive when confronted with her murder.[324] The IACtHR stressed that so-called 'moral' character must have no bearing on such proceeding, and that, in any event, the deaths of prostitutes must also be investigated thoroughly.[325] Yet, the police had considered the murder of a woman insufficient to warrant an investigation.[326] Ms Velásquez Paiz's murder had been inadequately investigated, thereby violating her right to equal access to justice.[327]

Confirming its previous case law, akin to the *Cotton Field* and *Veliz Franco Cases*, the IACtHR examined the widespread context of violence before Ms Velásquez Paiz's disappearance, and her individual risk once she was reported missing.[328] As to the context overarching Ms Velásquez Paiz's disappearance, the Court considered that violence against the female social group in Guatemala was at heightened levels until 2015, without specifying the provinces where women were particularly at risk as it had done in *Veliz Franco*.[329] Since 2001, this violence had also become crueler, including domestic violence, abduction, sexual harassment, and sexual violence.[330] The Court's approach contrasted with its approach in *Veliz Franco* one year earlier, where it had held that Guatemala had taken enough steps to address the current context, and that absent immediate danger for an individual, state responsibility was not engaged. The IACtHR discussed the many reports issued by the CEDAW Committee and Amnesty International criticizing the measures adopted by Guatemala because they were ineffective or lacked sufficient funding and political will.[331] The Court concluded that Guatemala itself had said that the prevention of VAWG posed a challenge.[332] The IACtHR seems to have been not entirely satisfied with Guatemala's preventive effort. Absent an unequivocal ruling on the issue, it remains unclear whether the Court recognized Guatemala's responsibility for widespread VAWG.[333] *Velásquez Paiz* appears to carefully open the door to holding States accountable for remaining passive in the face of widespread acts of VAWG.

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[323] Ibid., para. 187.
[324] Ibid., para. 181.
[325] Ibid., paras 182 and 184.
[326] Ibid., para. 181.
[327] Ibid., para. 191.
[328] Ibid., para. 110.
[329] Ibid., para. 111.
[330] Ibid.
[331] Ibid., paras 118–120.
[332] Ibid., para 120.
[333] Ibid.

As to the second time-frame, from the moment her parents had called the police and the police patrol arrived, at 3:00 AM, the Court considered that the State knew of a real or immediate risk to Ms Velásquez Paiz's rights, especially in the light of the widespread homicides of women and girls in Guatemala.[334] The Court noted that the authorities should presume that a missing woman is still alive until she is found.[335] Despite the police patrol's quick arrival at the location where Ms Velásquez Paiz had disappeared, they failed to question potential witnesses, merely patrolling the streets.[336] The Court considered that the police regarded her disappearance as a trivial matter not requiring urgent investigation by failing to undertake immediate search efforts and by insisting on the 24-hour waiting period.[337] The Court found that the State's actions had been deficient in view of the threat to Ms Velásquez Paiz's life and personal integrity,[338] as the State failed to take all reasonable measures to avert the risk once she had vanished. Finally, the Court considered that the state authorities' inaction in a climate of endemic violence against women was particularly troubling and contrary to Article 7 Belém do Pará Convention.[339]

The IACtHR reiterated that, where VAWG is at stake, authorities must apply a gender perspective, i.e., the investigation should go beyond the murder and examine the potential commission of sexual violence.[340] The Court conveniently examined whether her murder was gender-based itself. Based on the state of her body when she was found, the Court found that her murder had probably been gender-based.[341] Sexual abuse was likely given that her brassiere had been removed, her trousers were unzipped, her blouse was inside out, and traces of semen were found.[342] The IACtHR then provided useful guidelines about what an adequate investigation into potential acts of femicide should entail: States should become active and safeguard evidence within the first few hours—i.e., preservation of vaginal fluids and autopsy of the vaginal area.[343] Guatemalan authorities had failed to investigate the crime scene and to preserve the evidence.[344] The expert who examined her body four years later added to the forensic report that sexual violence had possibly been involved, and that the victim probably knew her attacker since some of the violence was

[334] Ibid., paras 120–121.
[335] Ibid., para. 122.
[336] Ibid., para. 126.
[337] Ibid., para. 130.
[338] Ibid., para. 126.
[339] Ibid., para. 133.
[340] Ibid., paras 147 and 196.
[341] Ibid., paras 150–156.
[342] Ibid., para. 192.
[343] Ibid., para. 148.
[344] Ibid., paras 156–157, 161, 168 and 185.

inflicted post mortem. The perpetrator had likely killed her to ensure that she could not identify him.[345] The Court concluded that the domestic authorities had failed to comply with their obligations to investigate violence against Ms Velásquez Paiz.[346]

SEXUAL TORTURE

López Soto and *Atenco* concern different actors, but both spearhead the recognition of sexual torture. The former relates to an individual abduction and subsequent sexual enslavement by an influential private individual; the latter concerns the abduction, sexual harassment, and rape of female protestors by state actors. The IACtHR recognized that rape violated the prohibition of torture in both cases. At the heart of the Court's most recent views on the issue of rape as torture lies its detailed analysis of the purpose pursued in rape—i.e., rape as torture is intended to exercise control over women in society—expanding its previously recognized discriminatory purpose of rape. Ultimately, the IACtHR's recognition of rape as torture, irrespective of whether the rape is committed by state or non-state actors, supports the contention that acts of femicide rise to the level of torture. Accordingly, I consider that only the violence against female social groups that amounts to torture constitutes femicide. The severity of femicide is measured by reference to the prohibition of torture and the right to life.

***López Soto v. Venezuela* (2018)**

In 2001, 18-year-old Linda López Soto was abducted by Luis Antonio Carrera Almoina, an influential private individual.[347] Ms López Soto was held hostage in hotels and private apartments for over three months, while Mr Carrera Almoina repeatedly raped, tortured, and emotionally abused her.[348] Her abductor called Ms López Soto's sister, Ana Cecilia, informing her that Linda would not return home. Ana Cecilia immediately reported her sister's abduction to the police (and on an additional five occasions), providing the assailant's name and phone number.[349] The authorities remained inactive, merely stating that she was probably with her boyfriend.[350] Ms López Soto was rescued, as she managed to call for help herself. She was found severely mutilated,

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345 Ibid., para. 165.
346 Ibid., para. 168.
347 *López Soto v. Venezuela* (n 12) paras 59–60 and 66.
348 Ibid., paras 60–63.
349 Ibid., paras 67–68.
350 Ibid., para. 68.

dehydrated, and underweight and remained hospitalized for almost one year.[351] The IACtHR found the following rights to be violated: her right to humane treatment (Art. 3 ACHR), her right to be free from torture (Art. 5(2) ACHR), her right to personal liberty (Art. 7 ACHR), her right to freedom of movement (Art. 11 ACHR), her right to be recognized as a person before the law (Art. 22 ACHR), her right to be free from sexual slavery (Art. 6(1) ACHR) and her right to equal access to justice (Arts 8 and 25 ACHR and Art 7 Belém do Parà Convention).[352]

The *López Soto Case's* court panel, composed of five male judges, delivered one of the most feminist judgments in the IACtHR's history.[353] The Court recognized that rape committed by private actors may amount to torture; it considered the domination of women the purpose of rape; and it canvassed the elements of sexual slavery. This positive outcome for women's rights is probably due to the victim's survival, the clarity of the facts and the Court's willingness to use a gender perspective.[354] Without Ms López Soto's testimony, the Court might have approached the case in the same way as the *Cotton Field*, *Veliz Franco*, and *Velásquez Paiz Cases*, i.e., considering sexual violence as a violation of her right to personal integrity. Venezuela did not dispute that the perpetrator had sexually abused, and verbally and physically assaulted Ms López.[355] At stake was whether Venezuela's responsibility was engaged for acts of sexual enslavement and torture committed by private individuals. The State argued that it did not incur responsibility for sexual violence and rape during her captivity since a private actor had committed these acts.[356]

The IACtHR held that Ms López Soto had been sexually enslaved, under Article 6(1) ACHR, which stipulates that '[n]o one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are

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[351] Ibid., paras 70–75.

[352] Ibid., paras 178 and 182.

[353] The Judges were Eduardo Ferrer Mac-Gregor Poisot (President), Eduardo Vio Grossi (Vice-President), Humberto Antonio Sierra Porto, Eugenio Raúl Zaffaroni, and Patricio Pazmiño Freire.

[354] The participation of female judges, while important in terms of representation, does not imply a gender perspective. See Ratna Kapur, 'Gender, Sovereignty and the Rise of Sexual Security Regime in International Law and Postcolonial India' (2013) 14 *Melbourne Journal of International Law* 317–345 at 340.

[355] *López Soto v. Venezuela* (n 12) para. 124; see also Daniela Kravetz, 'Holding States to Account for Gender-Based Violence: The Inter-American Court of Human Rights' decisions in López Soto vs Venezuela and Women Victims of Sexual Torture in Atenco vs Mexico' *EJIL: Talk!* (19 January 2019), www.ejiltalk.org/holding-states-to-account-for-gender-based-violence-the-inter-american-court-of-human-rights-decisions-in-lopez-soto-vs-venezuela-and-women-victims-of-sexual-torture-in-atenco-vs-mexico/#more-16824.

[356] *López Soto v. Venezuela* (n 12) para. 124.

the slave trade and traffic in women.' While Article 6(1) does not list sexual slavery, the Court pragmatically reinterpreted the provision to include sexual slavery, thereby making the specific harm inflicted on her visible.[357] Building on the *Hacienda Verde Workers v. Brazil Case*, where the Court dealt with the prohibition of slavery, in *López Soto*, the Court developed the legal requirements for *sexual* enslavement.[358] In sexual slavery, (1) the assailant exercises some type of ownership over the victim 'to the point of nullifying the personality of the victim,' and (2) sexual acts are involved which 'restrict or nullify her sexual autonomy.'[359]

Ms López Soto's physical and sexual autonomy was entirely controlled by her assailant. From the time she was captured until her rescue, he exercised dominion over her entire life: he imprisoned her, chained her to the bed, decided on her meals, and determined when she went to the bathroom.[360] In addition, the perpetrator constantly threatened her with his critical political connections, saying that he would never face the consequences for his acts and that her sister should therefore withdraw her complaint.[361] He also negated her sexual autonomy through cruel sexual abuse towards her: he kept her naked, burned her breasts, and forced her to watch and re-enact pornographic scenes.[362] The IACtHR concluded that it 'considered it necessary to make the sexual character of her enslavement visible, and thereby recognizing the specific ways in which sexual slavery disproportionately targets women, and which exacerbates the persisting historic subordination between men and women.'[363] By recognizing the sexual aspect of enslavement, the Court partially remedied the inadequate inclusion of harm to women in the ACHR.[364]

The IACtHR held in its modern feminist judgment that VAWG could constitute torture by private individuals, regardless of whether a state or a non-state actor commits these acts.[365] The Court thus finally acknowledged international critiques, issued by Chinkin, MacKinnon, Medina and others, that the State factor is present in VAWG as the State either commits or tolerates these acts. The IACtHR first referred to *Castro-Castro* and *Aydin*, where the respective Costa Rican and Strasbourg Courts had found that state-actor rape constituted

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[357] Ibid., para. 178.

[358] Ibid., paras 173–174; *Hacienda Brazil Verde Workers v. Brasil*, Preliminary Exceptions, Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 318 (20 October 2016), para. 427.

[359] *López Soto v. Venezuela* (n 12) para. 179.

[360] Ibid., para. 180.

[361] Ibid., para. 180, referring to fn. 266 (Linda López Soto's testimony).

[362] Ibid.

[363] Ibid., para. 181.

[364] See Hefti (n 15).

[365] *López Soto v. Venezuela* (n 12) para. 189.

torture.[366] Remarkably, in *López Soto*, the IACtHR clearly distanced itself from a state official requirement, noting that the prohibition of torture simply required the three-prong test (intent, severe mental and physical suffering, and prohibited purpose).[367] The Court considered that Article 5(2) ACHR does not define the scope of torture and that the Inter-American system does not require a nexus to a state official. Subsequently, the Court examined whether Article 3 IACPPT requires state actors to be present in acts of torture. According to said Article, criminal responsibility for torture arises for:

a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

The IACtHR explained that Article 3 IACPPT, which lists responsibility for acts of torture by state officials, refers to criminal as opposed to state responsibility—the IACPPT does not require state officials to be present in torture.[368] Additionally, the Court referenced CAT Committee's General Comment No. 2 to emphasize that the State is responsible for private actors when it allows or tolerates these acts, especially if it has failed to prevent acts of torture.[369] The IACtHR asserted that the gravity inherent in rape as torture must be recognized to eradicate VAWG.[370] An evolutionary and systematic interpretation of the prohibition of torture was crucial in adapting it to present-day conditions.[371] As such, the Court also considered that the Belém do Pará Convention should 'permeate the evolutionary interpretation of the behaviors and acts of violence against women that can be framed as torture, [and] that acts of violence against women perpetrated by women cannot be excluded private individuals.'[372] Accordingly, the Court held that Venezuela violated the prohibition of torture for the sexual violence committed against the applicant by omission.[373]

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366 Ibid., para. 184.
367 Ibid., para. 189.
368 Ibid., para. 190.
369 Ibid., para. 191.
370 Ibid., para. 194.
371 Ibid., para. 193.
372 Ibid., para. 197.
373 Ibid., para. 199.

The IACtHR considered the physical and sexual abuses, committed over the course of almost four months, to satisfy the intentionality requirement.[374] In addition, the Court reiterated that 'severe suffering is inherent in rape,' harm which was aggravated by mutilations and threats in the case concerned.[375] Contrasting its approach in *Rosendo Cantú* and *Fernandez Ortega*, and refining its earlier consideration that rape can 'discriminate' against women in *Espinoza Gonzáles*, the IACtHR now considered the purpose of rape to have been the intimidation and domination of Ms López Soto.[376] By raping her, the assailant 'affirm[ed] a position of subordination of women, as well as his power position and patriarchal dominion over the victim, which demonstrates the discriminatory purpose.'[377] The Court concluded that Ms López Soto had been subjected to 'physical, sexual and psychological torture' contrary to Article 5(2) ACHR.[378]

López Soto also provides the basis for analyzing state responsibility for private acts in the Inter-American system.[379] Venezuela had enacted a specific law on 'violence against women and the family' but this legal framework was deficient, since it only applied to violence in the family, and the States' criminal law focused on women's 'moral' behavior.[380] The Court highlighted that stereotypes enshrined in the law divide women into groups of those who comply with societal norms and those who deviate from traditional moral and family values. The discussion of Venezuela's inadequate preventive measures, i.e., the biased criminal law, signals that States must effectively criminalize certain types of violence.

The authorities' inaction and the resulting impunity for the perpetrator was considered particularly outrageous as the police knew the perpetrator's identity, which would have required more expedient reaction by the state authorities. The IACtHR noted that States should eradicate underlying causes of VAWG as well.[381] Based on expert witness Daniela Kravetz's testimony, the Court concluded that States should adopt a 'range of measures which seek, in addition to preventing specific acts of violence, to eradicate any future practice of gender-based violence,' pertinently reiterating the socio-cultural patterns which perpetuate the subordination of women.[382]

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374 Ibid., para. 187.
375 Ibid.
376 Ibid., para. 188.
377 Ibid.
378 Ibid.
379 Ibid., paras 127 and 129.
380 Ibid., paras 132 and 152.
381 Ibid., para. 134.
382 Ibid., para. 136.

Applying the *Osman* test, the Court stated that, even though she was raped and sexually enslaved by a private individual, Venezuela incurred responsibility for its inaction because it 'knew or ought to have known' that Ms López Soto's right to integrity, liberty, dignity, autonomy, and private life were at 'real or immediate risk,' and it failed to take reasonable measures to mitigate that risk.[383] Highlighting that Article 2 Belém do Pará Convention lists abductions as a form of violence, the Court considered that through Ms López Soto's sister's calls to the police, Venezuela was aware of the acts against Ms López Soto and the name and phone number of the assailant—the son of a public figure who was known to the authorities.[384] Even so, the State failed to take reasonable measures to prevent any further violations of her rights.[385] The police's indolent reaction caused repercussions as the alerted perpetrator became more brutal against Ms López Soto.[386] The Court held that Venezuela's state responsibility was engaged on account of the authorities' inadequate reaction in the face of Ms López Soto's abduction and captivity.[387]

A few particularities of the state responsibility discussion merit closer analysis. In *López Soto*, the IACtHR recognized that acts of femicide are cumulative since women who are disappeared, are at risk of being raped and killed, regardless of the context of violence against women. By comparison, in the *Veliz Franco*, *Velásquez Paiz*, and *Cotton Field Cases*, the Court had considered that the 'real and immediate risk' existed due to the context of violence against women together with individual abductions.[388] To the extent that ongoing risks for individual women were recognized, the *López Soto* approach is laudable. However, the Court should additionally have established that the structural context makes the risk collective, and that Venezuela's responsibility was attracted well before her abduction as it had failed to address that context. Moreover, the Court seems to have intended to make the *Osman* test more restrictive, remarking that the risk analysis needs to be supplemented by the consideration whether the State created the risk situation.[389]

The next issue identified by the IACtHR was that Venezuela's legal framework enshrined gender stereotypes and was thus discriminatory against women and girls.[390] Since only detainees could be tortured under Venezuelan law, the acts against Ms López Soto fell outside the scope of the Criminal

[383] Ibid., paras 139–140, 154–155, 157 and 164. See also Kravetz (n 355).
[384] Ibid., paras 155–157 and 167.
[385] Ibid., para. 167.
[386] Ibid., para. 168.
[387] Ibid., para. 169.
[388] See ibid., para. 145.
[389] Ibid., para. 149.
[390] Ibid., para. 227.

Code. Additionally, Article 393 of the Criminal Code reduced the penalties for rapes and sexual violence committed against prostitutes, thereby sending the message that some women deserve less protection from violence than others.[391] As a result of this legislation, the authorities tended to frame women and girls subjected to violence as prostitutes. In *López Soto*, the authorities inquired whether Ms López Soto and her sister were escorts, which the Court rightly pointed out to be irrelevant for the investigation.[392] Ms López Soto was re-victimized throughout the proceedings, being made to recount the events shortly after she underwent a medical operation. Even though she had requested to talk to and be examined by female doctors, psychologists, and officials, she was interrogated in the presence of armed men and examined exclusively by male doctors. The Court highlighted that she was retraumatized by repetitive statements about her sexual slavery and torture.[393] The IACtHR held that Venezuela had failed to investigate acts of violence against Ms López Soto contrary to Articles 8 and 25 ACHR as specified by Article 7(b) Belém do Pará Convention.[394]

Women Victims of Sexual Torture in Atenco v. Mexico (2018)

In May 2006, around 50 female protestors and flower vendors were explicitly targeted and mistreated, insulted, sexually harassed, and/or raped by police officers in Atenco, Mexico.[395] Female bystanders, such as students, journalists, and health care workers were also arrested by the police.[396] Throughout these arrests, the police informed women and girl protestors that they were targeted for being present at the protests.[397] Police insults centered on two themes: women were called 'whores' and they were told that they were attacked for being in public, e.g., 'because she was not in her house washing dishes.'[398] Moreover, the police threatened the female detainees with worse treatment to come—namely, abduction, rape and death.[399] Once arrested, the women were transferred to the state prison facility. On the way and upon arrival, the police sexually assaulted women, sometimes in the presence of their male family members who had also been arrested: they touched their breasts, introduced

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391 See Expert Testimony Christine Chinkin. Ibid., paras 228–233.
392 Ibid., para. 232.
393 Ibid., para. 215.
394 Ibid., para. 258.
395 Ibid., *Atenco v. Mexico* (n 40) paras 76–77 and 79–81.
396 Ibid., paras 83–85.
397 Ibid.
398 Ibid., para. 83.
399 Ibid., paras 84–99.

their fingers and objects into women's mouths and vaginas, and made one woman perform oral sex on two soldiers.[400] Some women reported having heard other women screaming as they were being raped.[401] At the prison, they were forced to line up and undress. In response to women's requests to be examined by gynecologists, state authorities mocked them.[402] Although most women were released in 2006 and 2008, the Mexican authorities consistently denied and failed to investigate rape allegations.[403] Mexico had failed to respect and guarantee the rights to personal integrity and to privacy (Arts 5(1) and 11 ACHR), and the right not to be subjected to torture (Art. 5(2) ACHR in relation to Art. 1(1) ACHR). Moreover, the State had failed to investigate violence against the plaintiffs, breaching Articles 1 and 6 IACPPT and Article 7 Belém do Pará Convention.[404]

The IACtHR considered that acts of sexual violence in a broad sense and rape in particular, potentially rise to the level of torture, a laudable step in the recognition of gender-based harm. First, the Court qualified acts of forced nudity and various sexual assaults, including touching and pinching of genitals and breasts, and the prison doctors' mockery of the women, as sexual violence.[405] The Court then explained that sexual violence denies a person the ability to make decisions about the most intimate aspects of their life and to control their personal decisions and essential bodily functions.[406] The Court's consistent case law, established in *Castro-Castro*, defines sexual violence broadly as non-consensual sexual acts, not necessitating any penetration.[407]

Moreover, the Court found that the penetration of a victim's mouth, anus, or vagina with fingers, objects, or a state agent's penis, constituted rape.[408] Contrary to sexual violence, which is broader than a physical invasion of someone's body, according to *Castro-Castro*, rape requires 'anal or vaginal penetration.'[409] The Court emphasized that any penetration by a perpetrator's body part, 'however superficial,' constitutes rape.[410] Regrettably, in the same vein, the Court once again considered the relationship of trust between the victim in state custody and police officers to make rape particularly severe, because, in such circumstances, 'the agent abuses his power and takes advan-

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400 Ibid.
401 Ibid., paras 87–90.
402 Ibid., paras 100–106.
403 Ibid., paras 74 and 114.
404 Ibid., para. 183.
405 Ibid., paras 181, 208 and 188–190.
406 Ibid., para. 179.
407 Ibid., para. 181; *Castro-Castro v. Peru* (n 18) para. 306.
408 *Atenco v. Mexico* (n 40) paras 181 and 189.
409 Ibid., para. 182.
410 Ibid., para. 182.

tage of the vulnerability of the victim, which can cause severe psychological consequences for the victims.'[411]

In *Atenco*, the Court established that the sexual violence and rape of the 11 female plaintiffs constituted torture.[412] State agents had intentionally committed sexual acts against women since they targeted many women in the same way, issuing threats and insults.[413] In addition, the Court held that severe suffering is inherent in sexual violence and rape, even absent physical injuries.[414] Moreover, the Court emphasized the element of mental torture, and noted that threats could cause 'moral anguish of such a degree that it can be considered psychological torture.'[415] Attentive to the social consequences of rape, the IACtHR clarified that the rapes and sexual violence were intended 'to frighten [the 11 women], intimidate them and prevent them from participating in political life or express[ing] their disagreement in the public sphere.'[416] Accordingly, sexual violence against female protestors served as a means of social control to intimidate and silence women.[417] The Court emphasized that the torture was committed as part of a police operation, whereby women were controlled by state agents and 'in a situation of complete defenselessness;'[418] national authorities had exploited the vulnerable condition of the victims.[419] The IACtHR also considered that the sexual violence pursued the aim of intimidation of other protestors who witnessed what happened to women who opposed authority in a society where women are supposed to be subservient.[420] Mexican officials had used sexual violence as 'another weapon in the repression of protests, as if, together with tear gas and anti-riot equipment, it would just be another tactic to achieve the purpose of dispersing the protest and making sure that the state authority was not questioned.'[421] Of direct relevance to femicide is the IACtHR's clarification that rape is used to punish women and girls for transgression of social norms.[422]

The Court also considered that the physical and verbal violence against women was gender-based.[423] Security forces had used sexual violence against

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411 Ibid., paras 183 and 196.
412 Ibid., para. 193.
413 Ibid., paras 191 and 195.
414 Ibid., para. 196.
415 Ibid., para. 192.
416 Ibid., para. 198.
417 Ibid., para. 216.
418 Ibid., para. 199.
419 Ibid.
420 Ibid., para. 203.
421 Ibid., para. 204.
422 *Atenco v. Mexico* (n 40); see also Kravetz (n 355).
423 Ibid., paras. 211 and 220.

women because they were women, while the violence against men was limited to 'excessive use of force.'[424] Women and girls were targeted because they had participated in a public demonstration against the state authority.[425] The Court found that the police used sexual abuse to punish the women for being in public, and participating in political life.[426] The abuse included stereotyping statements such as: 'prostitute, you like being raped,' 'she should [be] in her house cooking instead of being here, and she did not think [about] [her] family or [her] children,' and 'women only serve to make tortillas.'[427] Considering that stereotypes voiced and acted on by state authorities prevent women from exercising their civil and political rights, the Court asserted that States must take 'positive measures to combat stereotypical and discriminatory attitudes [of authorities].'[428] The IACtHR held that it is not enough for the State simply to sanction the police officers who stereotype women. The Court insists on a requirement for States to 'implement programs, policies or mechanisms to actively fight against these prejudices and guarantee women real equality.'[429] The IACtHR was particularly concerned about high-level officials' public reactions when women and girls went public with the sexual violence suffered in the course of the *Atenco* protests:

> [It] is absolutely unacceptable that the first public reaction of the highest authorities concerned has been to question the credibility of the accusers of sexual violence, accuse them and stigmatize them as guerrillas, as well as denying what happened when it had not even started an investigation.[430]

The Court concluded that the physical and mental harm based on stereotyping inflicted on women amounted to discrimination.[431]

The IACtHR considered that the plaintiffs' right to judicial protection and fair trial had been violated.[432] At stake was the lack of medical and gynecological examinations and refusal to hear women's testimonies.[433] By failing to record their statements and provide medical and psychological support, the authorities revictimized the women.[434] The investigations into 'previous sexual

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424 Ibid., para. 211.
425 Ibid., paras. 211-213.
426 Ibid., paras. 216-217.
427 Ibid., para. 214.
428 Ibid., para. 218.
429 Ibid., para. 218.
430 Ibid., para. 219.
431 Ibid., para. 214.
432 Ibid., para. 270.
433 Ibid., para. 310.
434 Ibid., para. 272.

or social conduct' reflected a gender stereotyping policy.[435] The credibility of the women was further minimized by state officials who labelled them as 'radicals' or 'insurgents,' and doctors who called them 'dirty.'[436] The Court concluded that 'statements of this type […] create a climate adverse to the effective investigation of the facts and foster impunity.'[437] As further discussed in Chapter 10, state authorities contribute to the risk situation when they publicly endorse VAWG.

CONCLUDING REMARKS

The IACtHR has displayed sensitivity to femicide. Feminist human rights critique by renowned scholars—Chinkin, Cook, Creshnaw, Lagarde, and MacKinnon and others—is implemented in its case law, such as the framing of rape as torture, intersectional harm, and gender stereotyping. The Court also takes a promising approach to adjudicate femicide cases. The IACtHR frequently classifies gender-based violence under Article 1 Belém do Pará Convention and sometimes under Article 1 CEDAW. The Court appears less concerned with CEDAW than other regional human rights bodies, especially in relation to rape constituting torture. Furthermore, the explicit framing of rape as torture, regardless of who has committed the act, is unique to the Inter-American system.

Three issues were tackled by the IACtHR: the definition of rape, the connection between rape and torture, and the silent but always-lurking question of whether the State must commit or be present in acts of torture. As to the definition of rape, the Court relied on the ICTY's *Furundžija* case, which defines rape rather mechanically. The definition functions well to encompass acts such as forced fellatio as in *Atenco*.[438] However, the *Akayesu* definition is broader and thus better suited to cover unusual and cruel ways in which women and girls are raped, such as penetration into wounds as sometimes occurs in femicide.[439] Once a woman is abducted, as was the case for Ms López Soto, she is held in captivity, which renders any sexual intercourse rape regardless of

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[435] Ibid., para. 317.
[436] Ibid., para. 314.
[437] Ibid., paras 312 and 315.
[438] *Atenco v. Mexico* (n 40) para. 182, referring to *Castro-Castro*, para. 310.
[439] International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T (2 September 1998), paras 598 and 688; Daniel Hernández Guzmán, 'Más Allá de los Feminicidios: Violencia y Cuerpo Femenino en "La parte de los Crímenes" de Roberto Bolaño' (2016) 20(40) *Cuadernos de Literatura* 633–647 at 637–638.

any apparent consent.[440] Coercive contexts relevant to femicide are also those where women are deprived of their liberty, e.g., in forced marriages or domestic violence, where they live in fear of violent acts.

To determine whether rape is torture, the IACtHR applies a three-prong test. The intentionality and severity of the rape are usually uncontested. The central question which has given rise to different responses in the Court's case law is the purpose rape pursues. At the outset, in *Fernandez Ortega* and *Rosendo Cantú*, the Court considered that rape punished women and girls for failing to disclose information. In *Espinoza Gonzáles*, in the context of widespread rapes and sexual violence in armed conflict, the purpose of rape was to discriminate against Ms Espinoza Gonzáles as a woman.[441] In *López Soto,* the IACtHR recognized that rape discriminated, intimidated, and dominated Ms López Soto.[442] Going one step further in *Atenco*, the Court persuasively explained that, in addition to humiliating the 11 women, the rapes had a function of societal control and punishment for their presence in the public sphere contrary to societal expectations.[443] At the same time, the IACtHR, like the ECtHR, considers that rape committed by state actors is particularly severe because of the trust relationship between private citizen and state official being exploited and destroyed. However, the trust that a domestic violence victim puts in her own partner, or male relative and supposed friend, should equally exacerbate the harm to women and girls.

Three aspects inform the femicide concept and cement the previous findings. Even when committed by non-state actors, rape is conceived of as torture in femicide. This attention to sexual violence and rape as key aspects of femicide is warranted given that such violence characterizes many acts of femicide, and they can serve as the required severity threshold in femicide.[444] The IACtHR has set standards to combat the impunity with which crimes against women and girls are treated. The Court considers that state responsibility arises when States fail to investigate crimes with a gender perspective, i.e., to determine whether sexual violence or extreme cruelty was involved in women and girls' torture and/or murders in both state and non-state actor violence. The IACtHR

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[440] *Prosecutor v. Kunarac et al*. (Appeals Judgment) ICTY-96-23 and 23/1 (12 June 2002), para. 132.

[441] *Espinoza Gonzáles v. Peru* (n 29) para. 229.

[442] *López Soto v. Venezuela* (n 12) para. 188.

[443] *Atenco v. Mexico* (n 40) paras 182–185.

[444] See Miller, who criticizes the overt attention on rape and sexual violence. Alice Miller, 'Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection' (2004) 7(2) *Health and Human Rights* 17–47 at 19.

is adamant that state authorities must not stereotype women, as such acts discriminate women in their right to equal access to justice.

The Court also sheds light on how States have contributed to dangerous situations for women and girls. States commit crimes against women and girls, e.g., in cases relating to detention, i.e., *Castro-Castro* and *Espinoza Gonzáles*, and to rapes and sexual violence massacres commissioned by the military in *Dos Erres* and *Plan de Sánchez*. This military or government policy of sexual violence at a time of civil war and unrest may also have translated into the widespread femicide in peacetime Guatemala, as seen in *Veliz Franco* and *Velásquez Paiz*. As crimes against women in femicide often originate in a state-sponsored context, States' role in creating the context, and subsequently condoning it, should influence the determination of state responsibility.

The IACtHR adopted the *Osman* test in *Pueblo Bello v. Colombia*.[445] Accordingly, state responsibility is engaged when the State 'knew or ought to have known' of a 'real or immediate risk' to the rights of the person, and consequently failed to take reasonable measures to prevent that risk.[446] The Court applies the *Osman* test to what it calls two different time frames in femicide cases. The first one is before a woman or girl has disappeared, and the second one relates to the time between her disappearance and her body being found. Since femicide is a widespread human rights violation, I am primarily concerned with the first time frame, in other words, the structural situation of risk to the female social group. To hold States responsible for failing to act in the face of widespread human rights violations against women and girls, the Court should shift to focusing on group-related risks. The IACtHR can build on the *Cotton Field*, *Veliz Franco*, and *Velásquez Paiz* cases, where the Court identified the female social group at risk. Since the Court further held that States knew of risks to the female social group, and even determined that Guatemala had not complied with its duty to take preventive measures in *Velásquez Paiz*, the task remaining is to hold States responsible for systemic violence against women and girls, similar to its case law on patterns of enforced disappearances which the Court regularly considers to engage state responsibility. The African human rights system, discussed in the next chapter, has already achieved the recognition of structural risks under *Osman* to some extent.

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[445] *Pueblo Bello v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Serie C No 140 (31 January 2006).

[446] Ibid., paras 283–284.

8. Femicide and the African human rights system

> I was captured and taken to the forest. Boko Haram fighters told us that if we did not follow their beliefs, they would execute us. But if we believed in their ways and married them, we could live [.] Ultimately, all of us (all six who were abducted together) 'married' them. But it was torture living in the forest. They kept us locked up in huts or tents and we had little food. […] I was there for two years when the military rescued us. At that time, I was pregnant.
>
> Falmata I.[1]

INTRODUCTION

The African human rights framework relevant to femicide, consisting of the African Charter on Human and Peoples' Rights (African Charter) and the Additional Protocol to the African Charter on Human and Peoples' Rights (Maputo Protocol), has addressed women's rights violations with limited success: female genital mutilation (FGM), early or forced marriage, forced labor, and discriminatory inheritance laws—all of which constitute acts of femicide once the severity threshold (torture or death) is met—remain prevalent across Africa.[2] These deficiencies in the pan-African response to femicide should be viewed in comparison to the context of widespread and prevalent violence against women and girls (VAWG) in Europe.

The recognition of femicide in the continental African human rights system is limited by challenges in accessing the relevant fora. The African Commission on Human and People's Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court) oversee the implementation of human rights in continental Africa.[3] Established in 1987,

[1] Testimony of Falmata I. in Global Coalition to protect Education from Attack, 'I Will Never Go Back to School' (October 2018), 34, www.protectingeducation.org/sites/default/files/documents/attacks_on_nigerian_women_and_girls.pdf. All online sources were accessed 30 October 2021.

[2] Ashwanee Budoo, 'Analysing the Monitoring Mechanisms of the African Women's Protocol at the Level of the African Union' (2018) 18 *African Human Rights Law Journal* 58–74.

[3] The sub-regional Economic Community of West African States (ECOWAS) Community Court for Justice also has jurisdiction over human rights violations arising

the African Commission functions as the primary supervisor of human rights violations in Africa.[4] It consists of 11 experts, one of whom also serves as the Special Rapporteur on the Rights of Women in Africa, a focal point in promoting respect for women in Africa.[5] The Commission can assess States' periodic reports on their progress in implementing the African Charter, produce resolutions and reports on grave human rights abuses, issue General Comments and provide quasi-judicial 'recommendations' concerning complaints about violations of the African Charter and the Maputo Protocol.[6] The Commission can deal with communications filed by NGOs in addition to receiving individual complaints ('communications').[7] The African Commission has compulsory jurisdiction over States which are members of the African Charter. As of 2021, the African Commission has dealt with two cases on VAWG: *Egyptian Initiative for Personal Rights and Interrights v. Egypt* and *Equality Now and Ethiopian Women Lawyers' Association v. Federal Republic of Ethiopia*.[8] Considering the scant case law relevant to femicide, it is currently impossible to draw general conclusions on the African Commission's approach to femicide.

Complementing the African Commission's mandate, the African Court was established in 2006. Like the Commission, the Court has relatively broad jurisdiction over issues concerning VAWG.[9] Based on Article 7 of its Protocol, the African Court can hear complaints on the basis of the African Charter as well as the Maputo Protocol, which is of direct relevance to women's rights, potentially making the Court a strong forum for future femicide cases.[10] However, access to the Court is restricted. Under Article 34(6) African Court

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from the African Charter and has been more successful in addressing VAWG. See ECOWAS Community Court for Justice, 'Mandate and Jurisdiction,' http://www.courtecowas.org/mandate-and-jurisdiction-2/.

4 Art. 30 African Charter on Human and People's Rights (African Charter) (adopted 27 June 1981, entered into force 21 October 1986).

5 Budoo (n 2) 58–74.

6 Arts 45 and 62 African Charter.

7 Arts 48, 49 and 55 African Charter.

8 African Commission on Human and People's Rights (African Commission), *Egyptian Initiative for Personal Rights and Interrights v. Egypt*, Communication No 323/06, 1 March 2011; African Commission*, Equality Now and Ethiopian Women Lawyers Association v. Federal Republic of Ethiopia,* Communication No. 341/2007, 25 February 2016. Another case, *Echaria v. Kenya*, was declared inadmissible, because the applicants failed to approach the Commission in time. African Commission, *Njeri Echaria v. Kenya*, Communication No 375/09, 5 November 2011, para. 61.

9 Art. 1 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 19 June 1988, entered into force 25 January 2004).

10 Art. 7 African Court Protocol.

Protocol, States which ratify the Court's Protocol, must declare intent to be bound by the Court. As of 2021, only eight States have declared intent, which further limits the Court's case law.[11] Moreover, NGOs must apply for observer status in the African Union (AU) to be able to file communications.[12] Given these hurdles, the Court has not decided any cases relevant to femicide, although early marriage and inheritance by women were discussed in *APDF & IHRDA v. Republic of Mali*.[13] Since the Court is not yet fully functional, the African Commission has issued a substantial and growing body of case law on violations of the African Charter. In *Equality Now* and *Egyptian Initiative for Personal Rights*, the African Commission recognizes discrimination against women and girls but fixates on a formal equality approach, comparing similarly situated individuals with each other, potentially a setback in the recognition of gender-based violence in the African region.[14] A formal equality approach neglects structural problems which lead to widespread violence against the female social group in addition to the issue that no comparable male exists in some circumstances, such as in cases of forced marriage or FGM.

An asymmetric approach to discrimination, such as the one espoused in Article 1 of the Convention on the Elimination of Discrimination Against Women (CEDAW), would be better suited to address gender-based violence.[15] This would further expose the discriminatory context fueling such violence, which is crucial in eliminating its root causes in turn. In *Equality Now*, the African Commission proffered a potential avenue for state responsibility in the context of widespread violence against women, regardless of an individual risk.[16] The Commission's approach is an important basis for more stringent state responsibility in the face of systemic VAWG.

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[11] Art. 34(6) African Court Protocol; African Court on Human and Peoples' Rights. Burkina Faso, The Gambia, Ghana, Malawi, Mali, Niger, Tunisia and Guinea Bissau have made a declaration. African Court on Human and Peoples' Rights, 'Declarations', https://www.african-court.org/wpafc/declarations/; African Court on Human and Peoples' Rights, 'Press Release' (3 November 2021), https://www.african-court.org/wpafc/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/.

[12] Budoo (n 2) 361; Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples' Rights in Africa, ACHPR/Res.361(LIX) 2016, www.achpr.org/sessions/resolutions?id=373.

[13] African Court, Association pour le progrès et la défense des droits des femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v. Republic of Mali, Communication No 46/2016 11, May 2018.

[14] *Equality Now v. Ethiopia* (n 8) para. 149.

[15] *Interrights v. Egypt* (n 8) para. 122; *Equality Now v. Ethiopia* (n 8) para. 144.

[16] *Equality Now v. Ethiopia* (n 8) paras 127–131.

THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The African Charter on Human and People's Rights (African Charter) contains rights and freedoms specific to the African region, which can be seen in its focus on entire peoples and the protection of traditional and cultural values. The African Charter uniquely protects entire groups, stating that '[a]ll *peoples* shall have the right to existence […] [c]olonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.'[17] This focus on groups and oppression is useful to highlight the distinctive subordination faced by female social groups, embedded in socio-economic and cultural structures in femicide. Another issue arises in the juxtaposition of traditional, cultural, and family values and the equal protection of all people(s).[18] The focus on cultural and traditional rights is a legitimate response to centuries of colonialism of the African region, and references to culture and traditions are omnipresent in the African Charter. Its Preamble emphasizes the 'historical tradition and the value of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;' Article 17(3) notes that States must ensure 'morals and traditional values recognized by the community;' Article 18(3) stipulates that 'States have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.'[19] Cultural practices uniquely influence the scope of human rights in the African Charter.

At the same time, the African Charter safeguards traditions and practices, without recognizing that some of these cultural practices are harmful and excessively restrict women's rights. Harmful traditional practices (as opposed to non-harmful ones) reinforce the family unit as one where potentially harmful moral values are imposed on women and girls. In addition, the prevalent cultural practices of early and forced marriage are widespread in some parts of Africa. While some practices have deep cultural significance, they are also discriminatory and/or constitute VAWG.[20] For example, that a

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[17] Art. 20 African Charter [emphasis added].

[18] Susan Deller Ross, *Women's Human Rights: The International and Comparative Law Casebook* (University of Pennsylvania Press 2013) 168–170.

[19] See ibid.

[20] Nicholas Wasonga Orago and Maria Nassali, 'The African Human Rights System: Challenges and Potential in Addressing Violence Against Women in Africa' in Jackie Jones and Rashida Manjoo (eds), *The Legal Protection of Women from Violence* (Routledge 2018) 107–108. On cultural relativism, see Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2011) 103–104.

12-year-old girl is sold to a local Chief in line with the custom of 'wahiya,' whereby the girl serves as a domestic worker and a concubine, is a negative cultural practice constituting sexual slavery, rather than a culturally justifiable one. These harmful practices and domestic judges' roles in condoning them, engage state responsibility.[21] Of course, some cultural practices, such as 'ukhuwala,' a staged form of abduction for a couple to obtain parental agreement or overcome an inability to pay for the dowry, were not negative in their original iterations, a woman's consent being indispensable to the marriage.[22] At the same time, we should not forget women's progressive roles as chiefs and leaders in matriarchal African systems, another culturally established practice awarding power to women in society.[23]

The African Charter does not explicitly address VAWG and violent cultural practices. However, Articles 2 and 18(3) African Charter establish the principle that the rights set forth in the African Charter must be enjoyed without distinction on the grounds of sex.[24] However, two immediate concerns spring from the phrasing of these Articles. Article 18(3) is a sub-section of the right to protection of the family unit. On the one hand, the African Charter attempts to award women protection from discrimination within the family unit. On the other hand, the African Charter awards the family unit protection from interference, thus shielding it and granting it immunity from state intervention, while this unit is exactly where most violence against women is committed.[25] A second concern is that the African Charter, in speaking of 'women and children' in the same breath, implicitly places women at the same level as children. This comparison diminishes women's agency, as children have limited legal capacity, and reflects a patronizing attitude.[26] Finally, the non-discrimination provision's connection to the family unit 'which is the custodian of morals and traditional values recognized by the community,' conveys the message that women are protected insofar as they comply with moral and traditional values, and that these values supersede the protection of women from discrim-

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[21] See ECOWAS Community Court for Justice, *Hadijatou Mani Koraou v. Niger*, ECW/CCJ/APP/0808 (17 October 2008).

[22] See Western Cape High Court, *Jezile v S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015), paras 73–74.

[23] Josephine Jarpa Dawuni, 'Matri-Legal Feminism: An African Feminist Response to International Law' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement in International Law* (Edward Elgar 2019) 454 and 459.

[24] Arts 2 and 18(3) African Charter.

[25] See Frans Viljoen, 'An Introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 12–46.

[26] See Meyersfeld (n 20) 89.

ination.[27] Accordingly, while the African Charter enshrines the principle of non-discrimination, its effectiveness is limited when it comes to the protection of women and girls from violence.

THE MAPUTO PROTOCOL

The African Charter's normative deficiencies in dealing with women's rights are largely corrected by the Maputo Protocol, a comprehensive instrument in protecting women and girls from discrimination.[28] The African women's rights movement mobilized and lobbied for the Maputo Protocol, which was eventually adopted in 2005.[29] The Protocol is currently ratified by 42 AU Member States and signed by 49 States. Out of the 55 AU Member States, most States are thus either bound by the Maputo Protocol or have expressed their interest in ratifying it.[30] The African Commission and the African Court can both hear complaints about violations of the Maputo Protocol.[31] This should make the latter an especially important tool to assert women and girls' right to be free from violence. However, the Commission has a broad mandate, and it has not prioritized the implementation of the Maputo Protocol.[32]

The Maputo Protocol has been touted as a success story for reconciling civil, political, economic, social, and cultural rights.[33] Going further than the African Charter, it recognizes social rights which are not included in the African Charter alongside quests for women's political participation, thereby recognizing human rights as indivisible and interdependent.[34] Two General Comments specify the rights in the Maputo Protocol, one on reproductive rights and another on HIV.[35] The Protocol exceeds the scope of the Belém do Pará and

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[27] See ibid.

[28] Jing Geng, 'The Maputo Protocol and the Reconciliation of Gender and Culture in Africa' in Harris Rimmer and Ogg (n 23) 412.

[29] Viljoen (n 25) 12.

[30] See African Union (AU), 'Status List of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,' https://web.archive.org/web/20070606221500/http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf. Additional Protocol to African Charter on Human and Peoples' Rights (Maputo Protocol) (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

[31] Arts 27 and 32 Maputo Protocol.

[32] Budoo (n 2) 58–74.

[33] Viljoen (n 25) 20.

[34] Ibid.

[35] General Comment No 2 on Articles 14(1)(a–c) and (f) and 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, https://www.achpr.org/legalinstruments/detail?id=13.

the Istanbul Conventions in some respects, and is crucial for my understanding of the socio-economic connotations of femicide.

The Maputo Protocol stipulates several provisions relating to harmful cultural practices against women prevalent in the African region. Under Article 5, States must eliminate all forms of FGM through legislative and policy measures and awareness-raising campaigns. The Protocol also specifically prohibits early or forced marriage, sets the minimum age of marriage at 18, and lists monogamy as the 'preferred form of marriage.'[36] A list of sexual and reproductive rights includes women's control over their reproductive capacity and women's right to choose contraceptive methods. Furthermore, it authorizes abortion under some circumstances: in cases of rape, and/or incest, and 'where the continued pregnancy endangers the mental and physical health of the mother or the foetus.'[37]

The Maputo Protocol contains no reference to femicide. VAWG is defined broadly as:

> all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or of war.[38]

Under the rights to life, integrity and security of persons, the Maputo Protocol requires States to take measures to prohibit all forms of violence ('including unwanted or forced sex'), to identify causes and consequences of violence against women, and to tackle stereotypes which perpetuate such violence.[39] The Protocol suggests that marital rape is prohibited as it ensures that the right to be free from violence extends to the private as well as the public sphere.[40]

Overall, the Maputo Protocol is a response to prevalent so-called cultural harm to women and girls across Africa.[41] Its added value to the general discrimination provision in the African Charter is two-fold. First, it expresses moral condemnation of certain types of violent acts against women, such as forced marriage by abduction, which are still regarded as legitimate and

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[36] Art. 6 Maputo Protocol.

[37] The Maputo Protocol authorizes medical abortions in Art. 14(2)(c) Manjoo Report 2015, para. 17.

[38] Art. 1(j) Maputo Protocol.

[39] Art. 4 Maputo Protocol.

[40] Arts 1 and 4(2)(a) Maputo Protocol. Fareda Banda, 'Building on a Global Movement: Violence Against Women in the African Context' (2008) 8(1) *African Human Rights Journal* 1–22 at 13.

[41] Orago and Nassali (n 20) 112.

traditional in some regions.[42] Second, it looks at harmful practices through the lens of violence rather than discrimination, thereby specifying and unmasking the harm at stake.[43] Some violence against women has been legitimized in the name of cultural relativism, FGM being a case in point, thereby decrying attempts to abolish the practice as western and un-African.[44] However, the Maputo Protocol is an African response to VAWG, delegitimizing harmful cultural practices, including FGM and forced marriage.[45] Nevertheless, challenges to its implementation exist. Customary laws—e.g., forgiveness ceremonies or compensation for rape, civil wars, lack of domestic legal norms on violence against women, financial constraints, and lack of awareness that violence against women is prohibited—present obstacles to women's right to be free from violence.[46] Of equal importance is the progressive domestic implementation of the Maputo Protocol to uphold a criminalization of FGM due to its negative effects on women's health and their right to life.[47] More efforts must still be made towards ratifying and implementing the Maputo Protocol across the region.[48]

POLITICAL VIOLENCE AND FORCED MARRIAGE

The violence in femicide functions in myriad ways to prevent women and girls from fulfilling their aspirations and having their rights respected. This can be seen in the African context in the two examples of cases decided by the African Commission. A young girl who is abducted and married against her will, can no longer attend school, which violates her right to access to education and contributes to the cycle of poverty.[49] Sexual harassment may have a chilling effect on women and girls' efforts to attend political protests and act in dem-

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[42] See e.g., *Equality Now v. Ethiopia* (n 8).

[43] See Viljoen (n 25) 21.

[44] See Meyersfeld's discussion on cultural relativism. Meyersfeld (n 20) 103–104; Deller Ross (n 18) 460.

[45] Geng (n 28) 413.

[46] Orago and Nassali (n 20) 131-132.

[47] E.g., in March 2021, Kenya Constitutional Court considered that, based on the Maputo Protocol, the criminalization of female genital mutilation (FGM) was justified and even needed to be strengthened, in direct opposition to the view presented by the doctor in the case, who argued such criminalization discriminated against women and girls who had consented to the procedure. Kenya Constitutional Court, *Tatu Kamau v. Attorney General & two others; Equality Now & nine others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2021] eKLR (17 March 2021).

[48] See Budoo (n 2).

[49] See Western Cape High Court, *Jezile v. S and Others* (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015), paras. 73-74.

ocratic processes. While these acts of femicide are inherently intersectional, affecting female protestors of Muslim faith and poor black schoolgirls in various ways, they inevitably take away women and girls' power in making decisions about their lives, and place them in a paralyzed societal position, where their agency is oppressed.

Egyptian Initiative for Personal Rights and Interrights v. Egypt (2013)

The African Commission's *Egyptian Initiative for Personal Rights and Interrights v. Egypt* was set in the context of the Arab Spring.[50] During protests, supporters of the Mubarak regime and Egypt's National Democratic Party (NDP) surrounded four female journalists—either covering the demonstrations, or inadvertently present—and attacked them in the presence of police officers. The police and bystanders pushed the women to the floor, kicked and fondled them in their pubic areas and breasts. The attacks were accompanied by insults and slurs, such as whore and slut, from demonstrators and the police. A police officer told one of the women: 'I'll show you not to go down to the streets again,' while other police officers held her from the back and tried to tear off her clothes.[51] Medical reports confirmed bruises and other injuries on their bodies, yet all women were pressured by state authorities or their family members to withdraw their complaints, and even to quit their jobs and cease political participation. Investigators refused to record eyewitness testimonies, and the initial investigation was halted as the authorities could not identify the perpetrators.[52]

The African Commission found that Egypt had condoned sexual harassment and thereby failed to protect women and girls from violence. The Commission primarily applied a formal equality approach and asked (1) whether female and male protesters were similarly treated in the same situation; (2) whether such treatment was fair and just in a context where men and women exercised their political rights.[53] As to the first issue, the Commission noted that the treatment against the female protesters had been different based on their gender for three reasons. Firstly, the insults used against the women, 'slut' and 'whore,' are unlikely to be used to insult men and were meant to degrade and attack the integrity of women 'who refuse to abide by traditional, religious, and even social norms.'[54] Secondly, the type of violence committed against the women differed from violence typically committed against men, as the sexual harass-

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[50] *Interrights v. Egypt* (n 8) paras 4–10.
[51] Ibid., para. 132.
[52] Ibid., para. 226.
[53] Ibid., paras 121–123.
[54] Ibid., para. 143.

ment, consisting of the touching or attempts to touch breasts and sexual organs, was specific to attacks against women and girls.[55] The Commission's approach was context-sensitive considering that such violence had a more severe impact in Arab Muslim societies as women's honor was violated by their sexual exposure in public, which caused the applicants' additional harm. Thirdly, some applicants were accused of being prostitutes when they refused to withdraw their complaints, another aspect of discrimination.[56] Overall, the Commission found that 'the treatment was neither legitimate nor justifiable because there is no reasonable cause behind the discrimination inflicted upon the victims.'[57]

The Commission found that the sexual harassment, the slurs 'sluts' and 'whores,' and touching of the female journalists and protestors amounted to degrading treatment, concluding that such treatments 'not only cause serious physical or psychological suffering but also humiliate the individual' and 'can be interpreted to extend to the widest possible protection against abuses, whether physical or mental.'[58] Ultimately, the Commission recognized that such violence caused 'physical and emotional trauma,' but for femicide, the question arises whether such sexual harassment in context of mass protests constitutes torture.[59]

The Commission also found that Egypt had failed to prevent violence against female protestors and journalists. Citing Article 4(c) Declaration on the Elimination of Violence Against Women (DEVAW), the Commission summarily concluded that Egypt had failed to investigate the acts with due diligence, without further specifying the States' positive obligations.[60] In this case, high-ranking police officials had simply condoned the acts committed in their presence by private individuals, and had joined in with the sexual harassment of women at some point.[61] The Commission noted that it was insufficient for States simply to instate measures to prevent violence against women, as Egypt claimed to have done. Such measures needed to be effective and lead to 'palpable' results.[62] The State had failed to investigate sexual harassment, thereby failing to fulfil its positive obligations to prevent VAWG committed by private individuals as well as state agents.[63]

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55 Ibid., para. 144.
56 Ibid., para. 145.
57 Ibid., para. 149.
58 Ibid., paras 189 and 196.
59 See ibid., paras 201–202.
60 Ibid., para. 206.
61 Ibid., paras 6, 11 and 131–132.
62 Ibid., para. 178.
63 Ibid., para. 163.

Equality Now and Ethiopian Women Lawyers Association v. Federal Republic of Ethiopia (2015)

Waineshut Zebene Negash, a 13-year-old Ethiopian schoolgirl, was abducted by five men, and taken to a house where one of the men raped her.[64] Once informed of her abduction, the local police swiftly rescued her. Medical reports confirmed that Waineshut was bruised and had been raped. The perpetrator was detained but then released on bail. He kidnapped Waineshut again, this time holding her hostage for a whole month. He repeatedly raped her and forced her to sign a marriage contract before she managed to escape. When the perpetrator was first detained, fewer abductions by other perpetrators happened in the region. After he was released, more women and girls were abducted.[65] A local court sentenced the perpetrator and his accomplices to ten and eight years' imprisonment, respectively. Upon appeal, the High Court reversed that decision as the perpetrator was in possession of a marriage contract and the sexual intercourse must therefore have been consensual.[66]

The Commission found that Ethiopia had failed to protect Waineshut from abduction and rape by a private individual. The Commission stated that forced marriage is 'one of the most repugnant traditional practices' which violates a woman's right to liberty, security of person, and dignity.[67] Ethiopia had already criminalized rape and abduction, but it was still seen as normal practice to abduct and then rape a girl to make her one's wife in the region where Waineshut lived.[68] The Commission considered that her rape violated her right to human dignity and constituted degrading treatment.[69] Although rape is not listed in the African Charter, the Commission considered that rape is 'one of the most repugnant affronts to human dignity' since the 'personal volition of the victim is gravely subverted and disregarded, and the victim is reduced from being a human being who has innate worth, value, significance, and personal volition, to a mere object by which the perpetrator can meet his or her sadistic sexual urges.'[70] The phrase 'for his or her sadistic sexual urges' illustrates the Commission's interpretation that rapists are 'not normal' and somehow deviate from decent behavior. This contention that rape is an exception, and that the perpetrator has some kind of perverted sexual fetish, could compromise the understanding of the reality that these abuses are systemic and widespread

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64 *Equality Now v. Ethiopia* (n 8).
65 Ibid., para. 129.
66 Ibid., para. 5.
67 Ibid., para. 107.
68 Ibid., para. 109.
69 Ibid., paras 88, 91 and 118–119; Art. 5 African Charter.
70 Ibid., para. 120.

and often constitute torture.[71] As the Commission noted, abductions coupled with rape were widely practiced in the area where Waineshut was kidnapped.[72] The African Commission also considered that she had been forced to sign a marriage contract, which negated her autonomy.[73] In light of the widespread context of abductions, in femicide, even seemingly free consent to such a marriage would not be possible.

The forced marriage by abduction was not gender-based in the eyes of the Commission.[74] Equality before the law under Articles 2 and 3(1) of the African Charter was 'the right by all to equal treatment under similar conditions,' allowing the State to justify a distinction where just and objective grounds exist.[75] With the same formal equality approach as the European Court of Human Rights (ECtHR), the Commission found that Waineshut did not present prima facie evidence that she was treated differently than a comparable person in a similar situation, rejecting her discrimination claim.[76] The Commission sought a non-existent male comparator. In doing so, it appears to have misinterpreted CEDAW and the Maputo Protocol's similar substantive equality approach.[77] Indeed, the Commission explicitly referred to Article 1(f) of the Maputo Protocol, which defines discrimination as 'any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women.'[78] While the Commission noted that Article 1 CEDAW 'uses the same terms as the [Maputo] Protocol,' the Commission did not acknowledge that CEDAW's asymmetric definition does not require a male comparator.[79] In comparing the provisions of the African Charter, Article 1 CEDAW, and the Maputo Protocol, the Commission conflated formal and substantive equality.[80] Forced marriage by abduction is a negative cultural practice predominantly

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[71] Duncan Kennedy, *Sexy Dressing Etc., Essays on the Power and Politics of Cultural Identity* (Harvard University Press 1993) 138–139.

[72] *Equality Now v. Ethiopia* (n 8) para. 126.

[73] Ibid., para. 121.

[74] Ibid., paras 141–143.

[75] Ibid., para. 148.

[76] Ibid., paras 148–149.

[77] See similar approaches in Art. 1 of the Convention on the Elimination of Discrimination Against Women (CEDAW) and Art. 1(f) Maputo Protocol.

[78] *Equality Now v. Ethiopia* (n 8) para. 144.

[79] Ibid. On the asymmetric approach of discrimination under CEDAW, see Rikki Holmaat, 'The CEDAW: A Holistic Approach to Women's Equality and Freedom' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional, and National Law* (Cambridge University Press 2013) 99.

[80] See *Equality Now v. Ethiopia* (n 8).

targeting girls and a systemic issue, where no male comparator exists.[81] As it could not identify a male comparator, it failed to recognize forced marriage by abduction as gender-based.[82] The Commission erred in comparing *Equality Now* with *Interrights*, as both men and women were present during demonstrations on Tahrir Square in the latter case, and comparisons could be drawn.[83] Since abduction for the purpose of rape (and forced marriage) mainly targets women, Waineshut's abduction would qualify as gender-based violence under CEDAW.

The Commission stepped forward and engaged Ethiopia's state responsibility for condoning many instances of forced marriage, even in the absence of an incident such as a reported abduction.[84] The Commission amended *Osman* to apply to groups in determining the circumstances triggering state responsibility: (1) when the State is aware of a risk situation and (2) where a 'specific individual or category of individuals face a real risk of their rights and freedoms being seriously violated by non-state actors.'[85] Progressively, the African Commission has opened the door for engaging state responsibility for femicide with its focus on the widespread risk situation.

The Commission stated that the State must have been aware of a pattern of widespread forced marriage, which caused 'the continuing threat of being abducted, raped and forcibly married in the area where the practice was rampant,' and where Waineshut disappeared.[86] Given its knowledge of the widespread violence, the State should criminalize rape and abduction. The Commission even called for 'escalated measures,' without postulating the scope of these measures.[87] This suggests that States must put to rights a context of violence, regardless of an individual abduction triggering such an obligation.[88]

The Commission examined the situation in the region, concluding that 'the Respondent State was at all times aware of the prevalence of the practice, and more so when it was aware of the specific insecurity of Waineshut and her friends following her first abduction.' Accordingly, the State should have been aware of the risk of further offences against Waineshut 'and no less

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[81] See ibid., para. 149.

[82] Ibid., paras 145–146. See also Maria Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (Brill 2017) 339 and 672.

[83] See *Equality Now v. Ethiopia* (n 8) paras 145–148.

[84] Ibid., para. 122.

[85] Ibid., para. 125.

[86] Ibid., para. 126.

[87] Ibid., paras 124–126.

[88] Ibid., para. 126.

other girls in like situations.'[89] And yet, it failed to prevent forced marriage by abduction.[90] By failing to implement measures to protect her, the State failed to foil the second abduction.[91] In the African system, her previous abduction constituted sufficient reason for the State to exercise due diligence. Following the State's inaction after Waineshut was kidnapped the second time, abductions in the region thrived. They had halted when the perpetrator was detained after the first abduction: '[T]he Respondent State had not been prosecuting perpetrators of abduction and rape. Had it been doing so, the ripple effect of arrests and prosecution of perpetrators could have long operated as an effective deterrent as it did when her abductor was arrested the first instance.'[92] This development is notable compared to the European and the Inter-American approaches. The ECtHR strictly applies the *Osman* standard when violence is reported to national authorities, while the IACtHR recognizes that some state duties arise for widespread risks, even if it has not yet held a State responsible for failing to address large-scale VAWG. The focus of the African system on collective rights and its clear definition of the targeted group directly impacts on the determination of state responsibility by omission for femicide.

Finally, the Commission suggested a range of possible preventive measures, including informing the public about the issue and the criminal nature of abduction for rape and forced marriage, increasing security measures at the girl's school, or conducting police patrol.[93] The State should have identified perpetrators, punished them accordingly, and provided potential remedies for the victim.[94]

CONCLUDING REMARKS

Equality Now and *Interrights* involve acts of femicide specific to the African region. *Interrights* brought to the fore the deterring effect sexual harassment may have on women's participation in democratic processes. *Equality Now* shed light on the issue of forced marriage by abduction and implicated human rights violations. These cases constituted a welcome development in the Commission's adjudication of cases of gender-based violence in the African region. And yet, any optimism regarding the African human rights bodies' approach to acts of femicide is tremulous. The Commission sees discrimination through a formal equality lens, requiring the applicant to adduce evidence

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89 Ibid., para. 127.
90 Ibid., para. 131.
91 Ibid.
92 Ibid., para. 129.
93 Ibid., paras 128 and 132.
94 Ibid., paras 124 and 133.

to demonstrate the existence of a male comparator, who may not exist in some cases. An asymmetric approach to discrimination would be more suitable to cover the female group's oppression and could be adopted under the Maputo Protocol. Forced marriage and the rape inherent in such practices would breach the prohibition of torture or the right to life, thereby meeting the threshold of severity required in femicide.

Noteworthy is the African Commission's discussion on positive obligations. The Commission potentially created a window of opportunity for state responsibility in the face of widespread risks of violence against the female social group. The suffering of the collective female group has its roots in the tacit societal understanding that women have their fixed place in society shielded from the State.[95] Because cultures and traditions prescribe and accept certain forms of violence, women and girls may collectively be at risk of being forcibly abducted for marriage.[96] The Commission emphasized the collective nature of harm to the female social groups who are at risk of further violence in *Equality Now*, even though the case concerned the harm inflicted on one specific woman. However, the Commission's language use remained vague, making the advanced *Osman* standard not yet unequivocally established. Nevertheless, *Equality Now* still made great strides towards enhancing state responsibility for condoning a context where women's rights are at imminent risk of being violated. The African human rights bodies' approach to state responsibility is helpful to understand state responsibility for femicide characterized by systemic risks for women and girls to be subjected to violence.

[95] See Meyersfeld (n 20) 124.
[96] See ibid.

CONCLUSION TO PART II

The aspects of femicide addressed in Part II are the ongoing nature of human rights violations; the severity of harm (one or both of two human rights violations: either the violation of the prohibition of torture or the right to life); the discriminatory undertone of systemic violence against female social groups; and state responsibility by inaction for acts committed by unidentified or private actors. The African human rights system's limited case law relevant to femicide and the Convention on the Elimination of Discrimination Against Women (CEDAW) Committee's indirect approach to violence justified the focus on the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) in particular, the latter of which has developed the most progressive standards in terms of recognizing gender-based violence.

All regional human rights systems have adopted instruments on either violence against women and girls (VAWG) specifically (the Istanbul Convention and the Belém do Pará Convention), or women and girls' rights more broadly (the Maputo Protocol). This recognition of acts of femicide—such as domestic violence, forced marriage and abductions—is crucial in the Inter-American and African system, as Article 7 Belém do Pará Convention and the Maputo Protocol are justiciable, respectively. Even the ECtHR understands the European Convention on Human Rights as a 'living instrument,' capable to respond to present-day conditions, and has well integrated the Istanbul Convention into its analysis in the Grand Chamber's *Kurt v. Austria* case, on which it could build to further solidify these principles.

That acts of femicide are serious is gradually being recognized by regional human rights bodies. Case law in the Inter-American system on femicide is characterized by violations of the right to life, especially in connection with domestic violence and abductions, as well as violation of the prohibition of torture—such as rape (and sexual violence) committed by non-state actors. The ECtHR does not clarify whether violence against women is degrading, inhuman or even torturous treatment, but the Court's discussion of gendered harm under Article 3 ECHR suggests that rape too may amount to torture under this provision. African human rights bodies draw on the IACtHR and the ECtHR, but relevant standards on rape as torture have yet to develop.

Acts of femicide, such as domestic violence and rape, are also increasingly seen as torture by the CEDAW Committee, as it has acknowledged in General Recommendation No. 35. Moreover, rape pursues the purpose of discriminating against women and girls, as canvassed in the IACtHR's case law. Sexual violence can serve as a means of social control to prevent women from participating in political protests by intimidating, silencing and wielding power over them, which meets the 'prohibited purpose' criteria under the prohibition of torture. This is also supported by the sexual harassment and gender-based insults in the context of the Arab Spring protests examined by the African Commission, which intended to silence women's voices. As such, the violence in femicide is used to punish and control the female social group.

Another important aspect is the impunity femicide encounters. An ineffective or biased judicial system, where women's complaints are not taken seriously, has a deterring effect on women's willingness to seek help from the State. In the Inter-American system, state authorities often fail to investigate crimes against women, because women and girls are blamed for having provoked crimes by dressing inappropriately. In the ECtHR and the CEDAW Committee's cases, state authorities have attempted to reconcile intimate partners or left domestic violence unanswered. The authorities' stereotype that domestic violence is a 'private' matter is more challenging to discern than examining words uttered by police officers, yet the ECtHR has ruled that even the authorities' blatant inaction discriminated against women and girls. The IACtHR and the ECtHR both impose an especially strict duty on the State to investigate VAWG committed by prison guards and armed soldiers as well as unidentified perpetrators. This strengthened due diligence duty is formidable to remedy the sheer passivity with which VAWG was treated over the centuries at the domestic level.

Part II revolves around collective risks because individual risks, e.g., where a woman is continuously subject to human rights violations, are recognized by human rights bodies. Apart from the African Commission, regional human rights bodies are fixated on individual risk, thus overlooking structural risks such as those inherent in femicide, which cannot be reported as is required by the *Osman* standard. An issue to be addressed is how state responsibility can be triggered when States condone and even facilitate the widespread risk situations for the female social group. Finally, for state responsibility to be engaged, it is necessary to clarify and categorize the elements of femicide and list the human rights violations identified in Part II. The present work has laid the groundwork for the discussion in the next chapters, which conceptualize femicide as a human rights violation and clarify state responsibility for such violence.

PART III

A HUMAN RIGHTS CONCEPT OF FEMICIDE AND STATE RESPONSIBILITY

Part III is the heart of this book. Chapter 9 sets out the elements of femicide, closely relying on previously discussed human rights law and aspects of international crimes. The chapter uses existing human rights violations, defining their scope with content drawn from feminist legal approaches to human rights law, to make the conceptualization of femicide in human rights law practical. Since femicide is frequently committed by non-state actors, and its elements—such as the prohibition of torture—have the potential to trigger separate state obligations, this work must consider state responsibility. Chapter 10 shows how human rights bodies could adequately apply the *Osman* test, so that acts of femicide would be recognized under the state responsibility doctrine and could therefore be attributed to States. In this final discussion, I propose to reinterpret the *Osman* test to cover widespread risks against female social groups, clarifying and emphasizing that States are accountable for failing to respond to femicide. I sketch the minimal preventive measures that States should take to comply with their international obligations to prevent femicide.

9. Conceptualizing femicide as a human rights violation

> Significant numbers of the world's population are routinely subject to torture, starvation, terrorism, humiliation, mutilation, and even murder simply because they are female. Crimes such as these against any group other than women would be recognized as a civil and political emergency as well as a gross violation of the victims' humanity.
>
> Charlotte Bunch[1]

INTRODUCTION

Against the backdrop of extreme violence toward the female social group all over the world, this chapter conceptualizes femicide as a multi-faceted human rights violation.[2] Since the 1990s, the term 'femicide/feminicide' has been used in relation to a pattern of kidnappings, rapes, and murders of women and girls in Latin America. Far from being limited to the Latin American region, femicide exists across the globe: women and girls are forcibly married and killed at home, and abducted, raped and sexually enslaved in conflicts. Human rights bodies and criminal tribunals have either partly applied the existing international human rights and humanitarian law framework or not acknowledged gender as a critical factor contributing to violence against women and girls (VAWG). Often, they have not held States responsible for acts committed by private perpetrators.

Based on the analysis in the previous chapters, the proposed concept of femicide has the potential to help human rights bodies and States identify and address femicide. I depart from the general understanding of femicide as the killing of women and girls based on their gender, as such a concept would mask much gendered harm against women, such as sexual violence, which ultimately leaves women alive. I view femicide through a feminist human rights prism enhanced by the structures of the crime of genocide and crimes against

[1] Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12(4) *Human Rights Quarterly* 486–498.

[2] Jeremy Sarkin, 'A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World' (2018) 40(1) *Human Rights Quarterly* 1–36 at 2–3.

humanity. The contextual element emphasizes that femicide is a group-based and 'widespread' human rights violation. The many human rights violations inherent in femicide, the 'acts of femicide,' meet a certain level of severity, i.e., either the right to be free from torture or the right to life (with the stipulation that these human rights violations are conceptualized from a feminist perspective). Femicide further entails violence through which the aim of the subordination of women and girls is achieved, as theorized by MacKinnon and Fredman,[3] and the presence of a defined target, namely the female social group. Finally, some human rights must be breached cumulatively: the right to be free from gender-based violence, as established primarily by regional treaties or under the Convention on the Elimination of Discrimination Against Women (CEDAW)'s General Recommendations; the right to access to justice and/or fair trial rights, the element of impunity resulting in a lack of legal protection for the victim or her family members. Other human rights violations may be prevalent in femicide, such as the deprivation of the right to liberty and security, but these are not pre-conditions for femicide. I conceptualize femicide as:

> Widespread and severe violence targeting a female social group based on their gender, with the effect of objectifying, subordinating, humiliating, or instilling fear in women, ultimately relegating women and girls to a subordinate social status, where such violence remains unpunished by the State.

Of course, it would be desirable if human rights treaties included a precise definition of femicide. As some broad human rights standards relevant to femicide are available today, it is necessary to reinterpret them to best suit the circumstances. As explored previously, human rights bodies usually assess femicide as a multi-faceted human rights violation. The European Court of Human Rights (ECtHR) tends to decide cases of domestic violence and rape under the right to private life (Art. 8 European Convention on Human Rights, ECHR), the prohibition of degrading or inhuman treatment, and, rarely, under the prohibition of torture (Art. 3 ECHR) or the right to life (Art. 2 ECHR).[4] Currently, the ECtHR tends to overlook gendered harm, although it really should consistently apply the non-discrimination principle (Art. 14 ECHR) in torture and domestic violence cases. The Inter-American Court of Human Rights (IACtHR) more readily classifies its emblematic femicide cases as

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[3] Sandra Fredman, 'Substantive Equality Revisited: A Rejoinder to Catharine MacKinnon' (2016) 14(3) *International Journal of Constitutional Law* 712–738 at 749.

[4] The ECtHR rarely discusses Arts 13 and 6 ECHR. See ECtHR, *Volodina v. Russia*, App No 41261/17 (9 July 2019) para. 102; ECtHR, *Opuz v. Turkey*, App No 33401/02 (9 March 2009) paras 203–205.

gender-based, involving the right to life (Art. 4 American Convention on Human Rights, ACHR), the right to personal integrity and liberty (Arts 5 and 7 ACHR), the right to judicial protection and due process (Arts 8(1) and 25(1) ACHR), and the duty to prevent violence under Article 7 Belém do Pará Convention. The IACtHR has also begun to classify the violence in non-state actor femicide as torture. Conversely, the African Commission applies a rigid formal equality approach and does not recognize forced marriage as gender-based, contrary to the Maputo Protocol.[5]

Despite some of its shortcomings, the current human rights framework could address femicide, provided that human rights bodies emphasize the gendered harm, and adequately identify violence as torture when it meets the requirements. This would help to dismantle the conceptual bias in human rights violations relevant to femicide. Certain human rights violations, such as the right to privacy, should not be classified as acts of femicide, as these would likely trivialize harm to women and girls. In adjudicating on potential femicide cases, human rights bodies should: (1) inquire whether gender-based violence was committed and identify and define the types of violence used—such as female genital mutilation (FGM), forced marriage, sexual slavery, rape, domestic violence, among others; (2) query whether the violence was severe, either amounting to torture or leading to the deprivation of the right to life; (3) examine the extent to which women and girls, or their family members, were able to reach grievance mechanisms, i.e., whether women and girls were stereotyped, and if the State applied a gender perspective to identify the harm at issue.

The task at hand is to provide the broadest possible protection from femicide given its many iterations, while simultaneously being sufficiently specific to distinguish femicide from other human rights violations. Certain issues pertaining to cultural context are simplified and categorized to make the concept operable. The femicide concept can be applied in the African, Inter-American, and European human rights systems and by United Nations (UN) treaty bodies, especially the CEDAW Committee.

WIDESPREAD VIOLENCE

The systemic violence committed in femicide produces multiple victims similar to the widespread violence committed as part of crimes against human-

[5] African Commission, *Egyptian Initiative for Personal Rights and Interrights v. Egypt*, Communication No 323/06, 1 March 2011, paras 121–123; Art. 6(a) Maputo Protocol.

ity.[6] Femicide is correspondingly characterized by an observable pattern of acts which could include a series of killings, forced marriage, sexual enslavement, or domestic violence. As a case in point, the murder of a woman in Switzerland every other week might satisfy the widespread element.[7] No threshold number is established regarding how many women and girls need to be attacked, but such acts must not be 'single or isolated.'[8] Euphemized as so-called family tragedies, the media regularly portrays domestic violence as a series of isolated acts committed by pathological perpetrators, unrelated to the systemic context in which they occur.[9] In this vein, the initial assumption was that a serial killer was slaying women and girls in Ciudad Juarez.[10] In erroneously viewing acts of femicide in isolation, governments fail to embrace the opportunity to prevent and identify the causes of femicide.

Acts of femicide are widespread as they are rooted in structural inequality, which mostly regards women and girls as unequal to men and originates in culturally entrenched sexist attitudes and practices.[11] Manne describes sexism

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[6] See Douglas Guilfoyle, *International Criminal Law* (Oxford University Press 2016) 266; Antonio Cassese et al. (eds), *Cassese's International Criminal Law*, 3rd edition (Oxford University Press 2013) 93.

[7] See statistics in Eidgenössisches Büro für die Gleichstellung von Mann und Frau, 'Zahlen zu häuslicher Gewalt in der Schweiz' (5 June 2019), www.ebg.admin.ch/ebg/de/home/themen/haeusliche-gewalt/statistik.html. Except if indicated otherwise, all online sources were accessed 30 October 2021.

[8] See Guilfoyle (n 6) 246.

[9] Daniela Bandelli, *Feminicide, Gender and Violence: Discourses and Counterdiscourses in Italy* (Palgrave Macmillan 2017) 64. See examples of media reports that portray acts of femicide as singular, unconnected instances. 'Drei Tote bei Familiendrama in Apples' *TagesAnzeiger* (18 June 2019), https://www.tagesanzeiger.ch/panorama/vermischtes/drei-tote-bei-familiendrama-in-apples-vd/story/10461372; 'Tötungsdelikt: Polizei findet in Apples im Kanton Waadt eine dreiköpfige Familie tot auf' *NZZ* (18 June 2019, www.nzz.ch/panorama/kanton-waadt-polizei-findet-in-apples-familie-tot-auf-ld.1489780. More recently, some media has started to use the term 'femicide' to denote killings in contexts of domestic violence. E.g., Rose Hackman, 'Femicides in the US: The Silent Epidemic Few Dare to Name' *The Guardian* (21 September 2021), https://www.theguardian.com/us-news/2021/sep/26/femicide-us-silent-epidemic.

[10] Marcela Lagarde y de los Rios, 'Preface' in Rosa-Linda Fregoso and Cynthia Bejarano (eds), *Terrorizing Women, Feminicide in the Americas* (Duke University Press 2010) xiii; *González et al. v. Mexico (Cotton Field Case)*, Preliminary Objection, Merits, Reparations, and Costs, Inter American Court of Human Rights Series C No 205 (16 November 2009), para. 132.

[11] Franz Christian Ebert and Romina Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention' (2015) 15(2) *Human Rights Law Review* 343–368 at 363. Pateman maintains that, in contract theory, women's subordination is based on nature. Carol Pateman, *The Sexual Contract* (Stanford

as 'the "justificatory" branch of a patriarchal order, which consists in ideology that has the overall function of rationalizing and justifying patriarchal social relations.'[12] In the context of stereotyping, Cook and Cusack maintain that women's subordination is based on cultural and legal traditions entrenched in the patriarchal social order.[13] Sexist views in femicide are voiced by the police officers who tell female protestors to 'go home and make tortillas,' implying that women and girls' role is in the private sphere, rather than in political life (see Chapter 7). The structural context of femicide was examined by the CEDAW Committee in its report on the murders of Ciudad Juarez '[which] represent a structural situation and a social and cultural phenomenon deeply rooted in customs and mindsets.'[14] This structural discrimination oppresses women and girls in a society which considers gender-based violence against the subordinated group legitimate.[15] However, a contextual element usually functions as a trigger to turn sexist attitudes into gender-based violence.

In femicide cases, certain contextual elements, such as armed conflicts, increased military presence, violent peacetime structures, dire economic circumstances or oppressive political culture, seem to propel an already sexist society towards widespread VAWG.[16] The context-specific reasons and catalysts for femicide are complex; the elements mentioned here are by no means

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University Press 1988). See Convention on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No 19: Violence Against Women, CEDAW/A/47/38 at 1 (1993), para. 11; Rosa-Linda Fregoso and Cynthia Bejarano, 'Introduction: A Cartography of Femicide in the Americas' in Fregoso and Bejarano (n 10) 12.

[12] Kate Manne, *Down Girl: The Logic of Misogyny* (Oxford University Press 2017) 79.

[13] See Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (Pennsylvania University Press 2010) 20.

[14] *Cotton Field Case* (n 10) para. 133; Committee on the Elimination of Discrimination Against Women (CEDAW), Report on Mexico under Article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, UN Doc CEDAW/C/2005/O 8/MEXICO, 27 January 2005, paras 1937 and 1949 [hereinafter CEDAW Report 2005].

[15] General Recommendation No 19, para. 11; see World Conference on Women, Beijing Declaration and Platform for Action, Fourth World Conference on Women, UN Doc A/CONF.177/20 and A/CONF.177/20/Add.1 (15 September 1995) [hereinafter Bejing Platform for Action].

[16] See *Dos Erres Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 211 (24 November 2009); *Rosendo Cantú et al. v Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 216 (31 August 2010); *Cotton Field Case* (n 10); Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' (2008) 48(3) *Virginia Journal of International Law* 486–528. See also the ICTR's *Nahimana Case*, which discussed that hate

exhaustive as they are still being studied in other disciplines and require further investigation.[17] The political climate created by leaders who endorse sexist views, may foster femicide.[18] Former President Silvio Berlusconi normalized 'misogynist political culture' in Italy. Measures negatively affecting women and girls in the US have been taken under the leadership of former President Donald Trump.[19] These sexist views by the highest state official could play a role in the commission of femicide, and such policies may contribute to an environment where women and girl's rights are regularly violated. Countries' leaders who order sexual violence as a tool in counter-insurgency operations or terrorist organizations which purport sexist ideologies, also accept violence in domestic life.[20]

The situation in Ciudad Juarez illustrates one of the many factors which turn sexist societal attitudes into gender-based violence. At the outset, a pronounced *machista* 'culture of discrimination against women' existed leading to a spate of abductions, rapes, and killings of women and girls.[21] In Ciudad Juarez, the female social group's achievement of economic independence likely upset the existing power (im)balance, challenging the traditional roles of men as providers and women confined to the home sphere.[22] As the United Nations (UN) Special Rapporteur on Violence against Women explained, '[w]hile ultimately empowering women to overcome structural discrimination, these factors may exacerbate violence and hardship in the short-run.'[23] A sudden shift in gender roles caused a backlash against women and girls who had suddenly become providers in a sexist society which envisioned them in the home to cook, clean, and care for their children.[24] As Mercedes Olivera argued, 'the massive integration of women into the labor force in search of a wage […] effectively

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speech can turn into incitement to genocide under certain 'triggering' circumstances. *Prosecutor v. Nahimana* (Judgment) ICTR-99-52-T (3 December 2003) para. 1015.

17 See e.g., Christiana Kouta et al., 'Understanding and Preventing Femicide Using a Cultural and Ecological Approach' in Shalva Weil et al. (eds.), *Femicide across Europe* (Bristol University Press 2018).

18 Benesch (n 16).

19 See Bandelli (n 9) 65. Julie Hirschfeld Davis, 'Trump Sides With Kavanaugh, Accusing Democrats of Timing Sex Assault Charge to Delay Confirmation' *New York Times* (18 September 2018), www.nytimes.com/2018/09/18/us/politics/trump-kavanaugh.html.

20 Angelica Cházaro et al., 'Getting Away with Murder: Guatemala's Failure to Protect Women and Rodi Alvarado's Quest for Safety' in Fregoso and Bejarano (n 10) 99–101.

21 See *Cotton Field Case* (n 10) paras 129 and 132. See also CEDAW Report 2005 (n. 14).

22 *Cotton Field Case* (n 10) para. 134.

23 Ibid., para. 134.

24 Cházaro et al. (n 20) 98.

destroyed the traditional model of a sexual division of labor without changing the collective imaginary that women are dependent on men and that their obligations are in the home.'[25] In response to this challenge to the patriarchal social order, multiple perpetrators are believed to have killed a number of women and girls. Their acts conveyed the message that the patriarchal structures where men wield power over women, ought to be maintained. From an overarching perspective, the violence in femicide can be qualified as 'widespread.'

THE FEMALE SOCIAL GROUP

The salient aspect of the term femicide is that the prefix fem~ identifies the target to be women and girls, which clarifies that they are the center of the preventive efforts by the concerned State. Feminist theory teaches that 'things [which] are named somehow count and that things without names don't merit our attention.'[26] However, the femicide project may be confronted with the criticism that, in its exclusive concern with women and girls, the term is not neutral. I would contest that argument on the basis that so-called neutral human rights violations entail an implicit bias where human rights violations better match harm to men and boys.[27] For example, the principles of enforced disappearances and torture, although seemingly neutral, mainly address violence committed against men and boys.[28] A gender-neutral approach is susceptible to directing attention exclusively to violence used against men and boys.[29] At the same time, the category of a female social group must be defined broadly to go beyond cisgender women.[30]

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[25] Mercedes Oliveira, 'Violencia Feminicida: Violence Against Women and Mexico's Structural Crisis' in Fregoso and Bejarano (n 10) 53.

[26] Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' in Kelly Weisberg (ed), *Feminist Legal Theory, Foundations* (Pennsylvania University Press 1993) 61.

[27] See Catherine MacKinnon, 'Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8(4) *Chicago Journal* 635–658 at 427.

[28] See Lisa Ott, *Enforced Disappearances in International Law* (Intersentia 2011) 1. Criticism relating to the implementation of the prohibition of torture can be found in Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law, a Feminist Analysis* (Juris Publishing 2000).

[29] See Pateman (n 11) 119.

[30] Jaya Ramji-Nogales, 'Revisiting the Category "Women"' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar 2019) 251.

Members

The female social group is characterized by its member's common 'multiple oppression.'[31] Evidently, women and girls' shared alienation from the public sphere is not enough to define the targeted female social group. It would be neither reasonable nor practical to find that over half of humanity—all women and girls—are beset in femicide.[32] As it is intersectional, the female social group is affected in many ways.[33] Often (even if not always), the members of the group live in separate family units and spread out over larger geographical areas, so it has not been identified as and has not received protection equal to national, ethnic, religious and racial groups.[34] To determine who belongs into the category 'female social group' is a challenge that must not essentialize women and girls.[35]

The threatened group can usually be categorized on the basis of their risk of being targeted (see Chapter 10). This means that its members can be identified through the compounded ways in which they are singled out and discriminated.[36] Aspects of harm in femicide can include common social factors 'such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity,' and/or geographical criteria.[37] Colored women and other historically marginalized, such as indigenous, women's intersectional experiences of violence must be factored into the approach to femicide.[38] For example, verbal insults of a Peruvian indigenous woman as 'shitty indian' while she is raped, suggest that racial hierarchy plays into the gendered act.[39] Femicide should thus be conceptualized to ensure that other social factors are

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[31] Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence Against Women* (Cambridge University Press 2017) 33.

[32] Fernando Mariño, 'Una Reflexión sobre la posible Configuración del Crimen de Feminicidio' in Fernando Mariño et al. (eds), *Feminicidio, El Fin de la Impunidad* (Tirant lo Blanche 2012) 110.

[33] Beth Goldblatt, 'Violence Against Women and Social and Economic Rights: Deepening the Connections' in Harris Rimmer and Ogg (n 30) 360.

[34] Simone De Beauvoir, *The Second Sex* (Vintage Books 2011) 8. See also Kelly Askin, *War Crimes Against Women* (Kluwer Law International 1997) 254.

[35] Jaya Ramji-Nogales (n 30) 242.

[36] Sosa (n 31) 33.

[37] General Recommendation No 28, para. 18.

[38] Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43(6) *Stanford Law Review* 1241–1299 at 1244.

[39] Kimberly Theidon, '1325 + 17 = ? Filling in the Blanks of the Women, Peace, and Security Agenda' in Fionnuala Ní Aoloáin et al. (eds), *The Oxford Handbook of Gender and Conflict* (Oxford University Press 2018) 148.

taken into account in the delimitation of the targeted female social group.[40] The IACtHR has defined the female social group as consisting of either 'young women from humble backgrounds,' or more specifically women and girls living in Guatemala City and Escuintla.[41] Applying a geographic criterion, the African Commission was satisfied that girls 'in the area where the practice [of forced marriage] was rampant,' were at risk of being harmed.[42] Specific groups of women and girls at risk of domestic violence, connected through common characteristics, such as their migration status, could form a targeted female social group.[43] Cohesive groups, such as the targeted Yazidi population, can be delimited in terms of their religion and ethnicity (Yazidi) and their geographic location (Sinjar, Iraq). A group of schoolgirls can be distinguished based on their place of abduction (schools) and the region (Chibok, Nigeria), although this may be difficult where the territory in which a terrorist group operates, is not clearly delineated.

Challenges are encountered in determining who can be excluded from the targeted female social group, and the protection it affords. Criteria for delimiting the group may cause some cases of femicide to be disregarded, such as a criterion of reproductive age in the case of a 92-year-old woman killed by her 94-year-old husband in southern France.[44] In Ciudad Juarez, many women and girls of all social backgrounds fell victim, even if poor women and girls were primarily targeted.[45] Complex hierarchies exist within the female group, which must be kept in mind when delimiting the targeted group in a specific case.[46] At the same time, adherence to select criteria rather than all of them, with some criteria being prioritized, must suffice to grant protection in case of multiple criteria delimitating the targeted female social group. A case-specific

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[40] See Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2011) 123–124. See also Crenshaw (n 38) 1242.

[41] *Cotton Field Case* (n 10) 282; *Veliz Franco et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 277 (19 May 2014), paras. 78 and 111. In *Velásquez Paiz*, the IACtHR noted that levels of VAWG were rising, but did not otherwise define the targeted group. See also *Velásquez Paiz v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 307 (19 November 2015), para. 111.

[42] African Commission on Human and People's Rights*, Equality Now and Ethiopian Women Lawyers Association v. Federal Republic of Ethiopia,* Communication No. 341/2007, 25 February 2016, para. 126.

[43] See ECtHR, *Kurt v. Austria* [GC], App No 62903/15 (15 June 2021); *Goekce et al. v. Austria*, Communication No 25/2005, CEDAW/C/39/D/5/2005, 6 August 2007.

[44] BBC, 'France announces Anti-Feminicide Measures as 100th killing recorded' *BBC* (3 September 2019), www.bbc.com/news/world-europe-49571327.

[45] Lagarde y de los Rios (n 10) xx.

[46] Jaya Ramji-Nogales (n 30) 243.

assessment must be conducted to grapple with the question of who belongs to the group. Finally, children or other loved ones may be attacked to hurt the female social group.[47]

Perpetrators

Existing criminal laws on femicide require or imply that perpetrators of femicide are men or boys. Russell reasons that perpetrators of femicide must always be male, referring to data to demonstrate that the killings of women and girls are disproportionately committed by men. She explicitly excludes cases where women kill their female babies (feticide) and conduct FGM, as women involved in such violence are 'agents of males or the patriarchy.'[48] This approach neglects that such women and girls reinforce patriarchal structures and subjugate other women and girls by either carrying out violence or being complicit in acts of femicide.[49] The IACtHR noted in *Veliz Franco* that a witness saw 'a woman get out of a vehicle and drop a black sack in some bushes; the sack turned out to be the body of [Maria Isabel Veliz Franco].'[50] Similarly, in the Islamic State in Iraq and Al-Sham (ISIS), women have been complicit in the ill-treatment and torture of Yazidi women and girls.[51] An important distinction must be made between acts of femicide committed by a man or a woman. When women and girls commit gender-based acts, they are complicit in their own oppression. However, unlike men and boys, they do not belong to the ruling social class with all its privileges.[52] Elderly women typically perform the often-life-threatening FGM procedure.[53] Having undergone the same procedure when they were young, elderly women cut girls' genitals

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[47] *Opuz v. Turkey* (n 4) para. 132. See also *Talpis v. Italy*, App No 41237/14 (2 March 2017) para. 99.

[48] Diana Russell, 'The Origins and Importance of the Term Femicide,' www.dianarussell.com/origin_of_femicide.html (last accessed 18 November 2019).

[49] See Bender (n 26) 60. For a female perpetrator who orchestrated mass rapes in Butare, Rwanda, see *Prosecutor v. Nyiramasuhuko et al. (Butare)* (Appeals Judgment) ICTR-98-42 (22 April 2015).

[50] *Veliz Franco v. Guatemala* (n 41) 103.

[51] Annette Ramelsberger and Susi Wimmer, 'Es wäre Jennifer W. möglich und zumutbar gewesen, das Kind zu befreien' *Süddeutsche Zeitung* (25 October 2021), https://www.sueddeutsche.de/politik/jennifer-w-urteil-zehn-jahre-haft-1.5448528. 'Yazidi Women Seek Justice in U.S. Court for Crimes Committed by ISIL' *Yazda* (29 April 2021), https://www.yazda.org/yazidi-women-seek-justice-in-us-court-for-crimes-committed-by-isil.

[52] See Manne (n 12) 214.

[53] Various forms and levels of violence are present in FMG. See Susan Deller Ross, *Women's Human Rights: The International and Comparative Law Casebook* (University of Pennsylvania Press 2013) 464–465.

to help 'control and repress women by taking away their sexuality,' sexuality which was once taken from them as well.[54]

GENDER-BASED ACTS

Gender-based violence lies at the heart of femicide.[55] Current developments in international law and society suggest that gender-based violence is a human rights violation. The CEDAW Committee condemns it as customary international law,[56] defining gender-based violence as violence which mainly affects women and girls, or even affects them because they are women or girls, a definition largely adopted by regional human rights bodies. At the regional levels, many acts of femicide are listed and defined in the Istanbul Convention, the Belém do Pará Convention and the Maputo Protocol: e.g., forced marriage, FGM, domestic violence, forced sterilization, rape, and sexual violence.[57] The scope of some of these acts, i.e., sexual slavery and forced marriage, has been outlined in these specialized regional treaties and international case law. The regional women's rights treaties clarify that gender-based violence includes (1) acts committed against women or girls, (2) physical, psychological, economic,[58] and sexual harm, (3) regardless of whether it occurs in public or in private.[59] The relevant gender-based act, e.g., forced marriage can be identified by the human rights body or practitioner as long as it is defined in a regional

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[54] Interview in ibid., 464.

[55] See Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal* 87–125 at 97. See also Pateman (n 11) 118.

[56] General Recommendation No 35 on Gender-based Violence Against Women, updating General Recommendation No 19, CEDAW/C/GC/35 (2017), paras 2 and 7.

[57] See Art. 3 Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (adopted 7 April 2011, entered into force 1 August 2014); Art. 2 Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará Convention) (adopted 9 June 1994, entered into force 3 May 1995); Art. 1 Maputo Protocol (domestic and other violence) Additional Protocol to African Charter on Human and Peoples' Rights (Maputo Protocol) (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58; Art. 38 Istanbul Convention (female genital mutilation); Art. 39 Istanbul Convention (forced sterilization); The Istanbul Convention is the only regional treaty to define sexual violence and rape in Art. 36.

[58] Economic harm is only listed in the definition of Art. 3(a) Istanbul Convention.

[59] Only the Istanbul Convention and the Belém do Pará Convention explicitly reference 'gender-based violence,' whereas the Maputo Protocol uses the more generic term 'violence against women'. However, the two terms are apparently used interchangeably. Art. 1 Belém do Pará Convention; Art. 1(j) Maputo Protocol; Art. 3(a) Istanbul Convention.

treaty. Finally, where no definitions exist or States have not ratified the respective treaty, the CEDAW Committee's broad notion of gender-based violence can work as a residual clause.

Gender-based violence tends to recur over a longer period. As an insidious form of violence, e.g., domestic violence may impact on the victim's whole life.[60] FGM may cause health complications throughout a woman's lifespan, including death during childbirth, while a sexually enslaved woman can be injured through rape and is vulnerable to sexually transmitted diseases.[61] Such continuous crimes are serious and must be treated with urgency as potential slow-death measures.[62] Femicidal acts can be roughly divided into gender-based acts combined with sexual violence and those without any sexual component.

Sexual Violence

Sexual violence is part of forced marriage and sexual slavery, and it is therefore particularly present in femicide.[63] *Akayesu*'s rape definition best captures the unlimited, brutal ways of femicidal rapes, such as those through mutilation of a woman's body.[64] *Furundžija'*s mechanical rape description would exclude such rapes. *Akayesu'*s rape definition can further be supplemented by *Kunarac*'s approach to coercive circumstances.[65] As war crimes, crimes against humanity and genocide cannot be consented to, a victim of femicide cannot agree to her ordeal. The coercion in rape as an act of femicide is two-fold: the continuous nature of human rights violations and the widespread element.[66] Once the girl is abducted for forced marriage, she is raped each

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[60] *Volodina v. Russia* (n 4) para. 86.

[61] Deller Ross (n 53) 455–501; Omar Swartz, *Transformative Communication Studies, Culture, Hierarchy and the Human Condition* (Troubadour Publishing 2008) 54.

[62] See Meyersfeld (n 40) 118.

[63] Arts 11(3) (rape in relation to armed conflict) and 14(c) (reproductive rights) Maputo Protocol; Art. 2 Belém do Pará Convention (listing rape as a form of violence against women); Arts 25 (support for rape victims) and 36 Istanbul Convention (defines rape and sexual violence). See also Arts 3(g) and 4(e) ICTR Statute; Art. 5(g) ICTY Statute; Arts 7(g) and 8(vi) and (xxii) Rome Statute.

[64] See Daniel Hernández Guzmán, 'Más Allá de los Feminicidios: Violencia y Cuerpo Femenino en "La parte de los Crímenes" de Roberto Bolaño' (2016) 20(40) *Cuadernos de Literatura* 633–647 at 637–638.

[65] *Prosecutor v. Kunarac et al.* (Judgment) ICTY-96-23 & 23/1 (11 February 2001) paras 96 and 645–646; *Vertido v. the Philippines*, Communication No 18/2008, CEDAW/C/46/D/18/2008, 16 July 2010, paras 8.7 and 8.9.iii.

[66] See ECtHR, *E.B. v. Romania*, App No 49089/10 (19 March 2019) paras 54–55. See *Volodina v. Russia* (n 4) para. 86.

day—even if she is 'legally' married. She could also be under psychological pressure as she tries to regain her personal freedom. As to the widespread context, a woman abducted in Ciudad Juarez, who knows that women and girls are often killed, might seemingly 'consent' to sexual intercourse, hoping to remain alive by doing so. In femicidal contexts, which are coercive, sexual intercourse should therefore always constitute rape.

Forced marriage, relevant to the femicide of schoolgirls, is defined and prohibited under treaty law. The Istanbul Convention instructs States to 'ensure that marriages concluded under force may be voidable, annulled or dissolved without undue financial or administrative burden placed on the victim.'[67] The Maputo Protocol specifies that 'no marriage shall take place without the free and full consent of both parties' and sets the minimum marriage age at 18 years.[68] The International Criminal Court (ICC) also clarifies that forced marriage differs from sexual slavery, insofar as forced marriage means that the victim is linked to one aggressor.[69] One shortcoming of the conception of forced marriage in international law is that neither human rights treaties nor the ICC establish that rape is inevitably part of forced marriage, and that forced marriage is accompanied by other violent acts.[70]

The elements of sexual slavery in femicide can also be discerned in case law.[71] Sexual slavery is listed in the Rome Statute and has been adjudicated by the Special Court for Sierra Leone (SCSL).[72] As the latter noted, the sexual aspect in women's enslavement 'has been historically overlooked.'[73] Sexual slavery contains a slavery element (exercise of powers attached to the right of ownership) as well as a sexual element (the commission of sexual acts).[74] Only slavery is recognized in international instruments. While sexual slavery is absent from such instruments, the IACtHR made the sexual aspect of slavery

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[67] Art. 32 Istanbul Convention. Art. 37(2) requires States to criminalize 'intentional conduct of luring an adult or a child to the territory of [another State].'

[68] Art. 6(a) Maputo Protocol.

[69] *Prosecutor v. Ongwen* (Decision on the Confirmation of the Charges) ICC-02/04-01/15 (23 March 2016), para. 93.

[70] Cecilia Bailliet, 'Persecution in the Home' (2012) 30(1) *Nordic Journal of Human Rights* 36–62 at 48.

[71] *Kunarac* (n 65) para. 96; *López Soto v. Venezuela*, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 36 (26 September 2018).

[72] Art. 7(g) Rome Statute; *Prosecutor v. Sesay, Kallon and Gbao* (Judgment) SCSL-04-15-T (2 March 2009) para. 156.

[73] *Sesay* (n 72) para. 156.

[74] Ibid., para. 159.

visible in *López Soto*.[75] Sexual slavery means that the assailant exercises ownership over the victim and that her sexual autonomy is infringed.[76]

Other Violence

Other violence, such as domestic violence unrelated to sexual harm, merits consideration as acts of femicide. As Alice Miller has argued, '"hyper-attention" to sex perversely operate[s] to exclude attention to other aspects of harm,' referring to participatory equality and labor equality, among others.[77] Criticism that international attention is focused on sexual violence in a sensationalist manner is also reflected in the absence of provisions on harm other than sexual violence in treaties and international case law. Dowry-related deaths, widow burning, foot binding, and acid throwing are not included in any specialized women's rights instrument.[78] They can only be examined by courts through a procedural lens.[79] Yet, non-sexual violent acts may cause severe physical and mental harm, may even involve torture and murder, and could and should also be considered gender-based acts of femicide.

SEVERE VIOLENCE

Femicide is touted as an 'extreme form of gender-based violence,' which involves brutal attacks on woman and girls' physical and mental integrity.[80] Only serious harm, such as severe physical and psychological harm comparable to a crime against humanity in severity, ought to trigger the application of human rights law.[81] The criterium of 'severe violence' is open to interpretation. By this term, I understand one (or both) of two human rights violations: (1) the severity required must reach the threshold of the prohibition of torture; and/or (2) violate the right to life. The severity threshold I use is the prohibition

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[75] *López Soto v. Venezuela* (n 71) para. 181.

[76] Ibid., para. 179.

[77] Alice Miller, 'Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection' (2004) 7(2) *Health and Human Rights* 17–47 at 19.

[78] Art. 20 Maputo Protocol mentions widows' rights but remains silent on widow burning practices.

[79] See ECtHR, *Ebcin v. Turkey*, App No 19506/05 (11 May 2001); ECtHR, *Tershana v. Albania*, App No 48756/14 (4 August 2020).

[80] Human Rights Committee, General Comment No 35 on Article 6 of the ICCPR, on the Right to Life (30 October 2018) UN Doc CCPR/C/GC/36 [hereinafter General Comment No 35 (ICCPR)], para. 61.

[81] See Meyersfeld, who sets the threshold for domestic violence lower. Meyersfeld (n 40) 112–113.

of torture, as opposed to other degrading or inhuman treatment, since it best covers extreme forms of violence in femicide and conveys that violence against women is serious enough to trigger jus cogens protection. Admittedly, the prohibition of torture itself is defined in various ways. I take the widely used three-prong test and view it through the feminist critique to torture lens.

(Sexual) Torture

The prohibition of torture enjoys the status of a jus cogens and is a grave breach under international humanitarian law.[82] The recognition of acts of femicide as torture helps States recognize the seriousness of the plight of women and girls as regards forced marriage, sexual slavery, and domestic violence. As revealed previously, the commission of rape may breach the prohibition of torture, even when the rapists are non-state actors.[83] When human rights bodies fail to properly adjudicate gender-based acts as torture, even though the criteria outlined here are met, the acts at issue may still constitute femicide. That rape is intentionally committed, is considered established. It generally meets the severity threshold, even in the absence of physical harm, as 'severe suffering is inherent in rape'[84] and such pain cannot be easily overcome over time.[85] In the international criminal law context, the International Criminal Tribunal for Rwanda (ICTR) considered that Tutsi women's rapes destroyed 'their spirit and will to live;'[86] the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that serious harm 'results in a grave and long-term

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[82] Kelly Askin, 'Prosecuting Wartime Rape and other Gender-Related Crimes under International Law, Extraordinary Advances, Enduring Obstacles' in Sari Kouvo and Zoe Pearson (eds) *Gender and International Law* (Routledge 2014) 189–190. On grave breaches, see Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7 *Journal of International Criminal Justice* 811–831.

[83] See UNGA, Relevance of the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Context of Domestic Violence (12 July 2019) UN Doc A/74/148 [hereinafter Melzer, 'Torture and Domestic Violence'], paras 10, 25, 31, 34 and 36.

[84] *López Soto v. Venezuela* (n 71) para. 187.

[85] *Miguel Castro-Castro Prison v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 160 (25 November 2006), para. 124; *Fernandez Ortega et al v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 224 (30 August 2010), para. 311; *Women Victims of Sexual Torture in Atenco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 371 (20 November 2018) para. 196.

[86] International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Akayesu* (Judgment) ICTR-96-4-T (2 September 1998), para. 732.

disadvantage to a person's ability to lead a normal and constructive life.'[87] As to the third aspect, I consider in line with feminist critique to human rights law that the prohibited purpose also encompasses discrimination apart from other purposes. This understanding has translated into some international case law. The IACtHR considers that a purpose of torture can be discrimination, and that 'rape like torture pursues, among others, the purpose of intimidating, degrading, humiliating, punishing or controlling the person.'[88] Consequently, sexual slavery and forced marriage, which entail rape, would also breach the prohibition of torture as acts of femicide.[89] With respect to domestic violence, the United Nations (UN) Special Rapporteur on Torture, Nils Melzer, accepted feminists efforts[90] that domestic violence—including physical, psychological, economic, and sexual violence—can amount to torture.[91] These approaches should be advanced by human rights bodies, which ought to classify rape as torture as a matter of course in cases of femicide.[92]

Killings

Femicide may be (mis)understood as a human rights violation which necessarily ends the victim's life. Naturally, women and girls may be deprived of their lives instantly, e.g., in domestic violence cases resulting in death. Even so, physical and/or psychological or mental harm may have preceded their death.[93] However, although the right to life is particularly present in femicide, the victim does not always die immediately in sexual slavery or forced marriage, which may constitute slow-death measures.[94] A woman

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[87] International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Krstic* (Judgment) ICTY-98-33 (2 August 2001) paras 486 and 513. See *Prosecutor v. Seromba* (Appeals Judgment) ICTR-2001-66-A (12 March 2008), para. 46; *Akayesu* (n 86), para. 731.

[88] *Atenco v. Mexico* (n 85) para. 193.

[89] For breaches of the prohibition of torture, see *López Soto v. Venezuela* (n 71); ECtHR, *Aydin v. Turkey*, App No 57/1996/676/866 (25 September 1997); *Atenco v. Mexico* (n 85). See also Melzer (n 83).

[90] See in particular, Russell's work. Diana Russell, *Rape in Marriage* (MacMillan Publishing 1982).

[91] Melzer (n 83) paras 10, 25, 31, 34 and 36.

[92] See ibid., paras 25–26.

[93] E.g., ECtHR, *Branko Tomašić and Others v. Croatia,* App No 46598/06 (15 January 2009); *Talpis v. Italy* (n 47); *Angela Gonzalez Carreño v. Spain*, Communication No 47/2012, CEDAW/C/58/D/47/2012, 16 July 2014.

[94] Some women escape or are rescued before they are killed. *López Soto v. Venezuela* (n 71). For another example where a severely injured woman survived, see Redacción, 'Condenan a 11 años a la expareja de Arlette Contreras, la mujer agredida brutalmente por su novio en un hotel y cuyo caso se convirtió en un emblema de la vio-

who is abducted in Ciudad Juarez is likely to die after she is raped, sexually enslaved, and otherwise tortured. Furthermore, constant beatings, and physical and mental abuse may entail long-term health complications for domestic violence victims. Committed in armed conflict and crimes against humanity/genocidal contexts, rapes may cause injuries or lead to diseases. The Human Rights Committee (HRC)'s General Comment No. 35 on the right to life considers that '[f]emicide […] is a particularly grave form of assault on the right to life.'[95] And yet, the General Comment fails to formulate the right to life so as to include the distinctive ways women and girls are killed through dowry-related, honor or widow killings, FGM and domestic violence.[96] Furthermore, the General Comment makes no mention of slow-death measures as severe human rights violations fundamental to the exercise of other human rights.[97] As Chinkin points out, 'being a women is in itself life-threatening,' as a result of which women require legal protection against the risks associated with being female.[98]

THE 'SOCIAL' DESTRUCTION

The objective of femicide is the maintenance of the patriarchal social system, achieved through misogynist violence, where women and girls are subordinated to, or dominated by, men and boys and the institutionalized political power.[99] As the Declaration on the Elimination of Violence Against Women (DEVAW) outlines, violence serves as 'one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.'[100] Should a woman overstep her socially assigned role, she may be punished through violence.[101] In this vein, the CEDAW Committee states that

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lencia de género en Perú' *BBC* (9 July 2019), www.bbc.commundo/noticias-america-latina-48922685.

[95] General Comment No 35 (ICCPR), para. 61.

[96] See Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2007) 42; Helen Bequaert Holmes, 'A Feminist Analysis of the Universal Declaration of Human Rights' in Carol Gould (ed), *Beyond Domination, New Perspectives on Women and Philosophy* (Roman & Allanhelm Publishers 1983) 260–261; Carin Benninger-Budel, *Due Diligence and Its Application to Protect Women from Violence* (Brill 2008) 4.

[97] E.g., *Talpis v. Italy* (n 47) para. 97.

[98] Charlesworth and Chinkin (n 28) 234.

[99] Oliveira (n 25) 51. See Manne (n 12) 23.

[100] Preamble Declaration on the Elimination of Violence Against Women (DEVAW). See also General Recommendation No 19, para. 11; General Recommendation No 35, para. 19.

[101] Manne (n 12) 23.

'the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills, and work opportunities.'[102]

Two examples detail how misogynist violence punishes women for transgressing social norms. When 16-year-old Lubia left her abusive partner and moved in with her parents, he turned up at her parent's house armed with machetes. He slew her mother and severely injured her father who had tried to intervene.[103] The perpetrator's brother argued that, since she was pregnant with his child, '[h]e was right to go back and try to claim her […]. She shouldn't have left him.'[104] Lubia was punished for leaving an abusive situation. As Guatemalan scholar Morales Trujillo states, this type of violence is caused by 'the belief that women have no autonomy; that they do not own their own bodies or their own lives but are, instead, things or goods that belong to men, who can dispose of them as they please.'[105] Similarly, Mattia Stanga shot his ex-girlfriend, Alba Chiara, when he learned that she intended to leave him after six years.[106] Sociologist and psychiatrist Crepet notes that Mattia's reaction stemmed from 'emotional feudalism,' where men believe that they exercise the right to ownership over their girlfriends, 'as if she were a house, a car, and a woman.'[107] Because he considers the woman his 'property,' a man assumes that he can do whatever he likes to her, enforcing his dominant position through misogynist violence.

Feminist philosophy sees the function of VAWG as a tool to maintain the patriarchal social order. Having described sexism as the justification of patriarchy, Manne understands misogynist violence as violence which 'polices and enforces [the] governing norms and expectations [of the patriarchal social order]'[108] and the 'law-enforcement branch of patriarchal order.'[109] Brownmiller considers rape 'as a mechanism of social control to keep women

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[102] General Recommendation No 19, para. 11; General Recommendation No 35, para. 19.

[103] Azam Ahmed, 'Women Are Fleeing Death at Home. The U.S. Wants to Keep Them Out' *New York Times* (18 August 2019), www.nytimes.com/2019/08/18/world/americas/guatemala-violence-women-asylum.htm.

[104] Ibid.

[105] Hilda Morales Trujillo, 'Femicide and Sexual Violence in Guatemala' in Fregoso and Bejarano (n 10) 128.

[106] Margherita Bettoni, 'Liebe mich oder Stirb' (2019) 45 *Reportagen* 18–37 at 19.

[107] Ibid., 36.

[108] Manne (n 12) 23.

[109] Ibid., 63.

in line.'[110] Kennedy similarly maintains that women are disciplined for transgressing social norms, e.g., when they are blamed for violence against them because of the way they dressed.[111] However, as Fregoso and Bejarano clarify, the violence in femicide is influenced by other factors as well, as it can also be 'a tool of racism, economic oppression, and colonialism.'[112] As a result of violence, women and girls are socially destroyed, deprived of many of their human rights and fundamental freedoms.

A parallel can be drawn between the purpose behind femicide and the 'destruction' of national, ethnic, religious, and racial groups under the genocide framework. Although the aim of femicide differs from the genocidal bio-physical destruction, some instances of social subordination accompany the physical destruction of protected groups under the crime of genocide. For example, the transfer of children intends the destruction of the social fabric of a protected national group.[113] While the children may not be physically harmed, they are likely subjected to psychological stress for being deprived of their cultural background and removed from their families, subjected to cultural genocide and subordinated like women and girls. Having studied genocide, Lemkin argued that social subordination could be included in the definition of genocide. Lemkin described that, in Poland, the study of liberal arts was prohibited, Jewish libraries were burned, presumably to suppress critical thinking, and German was imposed as a language of instruction in many conquered territories.[114] Apart from its physical destruction, a group's social and cultural deprivation of citizenship was at stake.[115] As discussed in Chapter 4, women's reproductive capability is a crucial aspect of why they are kept alive instead of being exterminated as a social group. Even lethal violence serves to send a message to society as it intimidates and threatens the women and girls who remain alive.[116] Based on Lemkin's approach, it is therefore not

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[110] Brownmiller also refers to anthropological examples where women are gang raped by villagers as a mechanism of social control. Susan Brownmiller, *Against Our Will* (Fawcett Columbine 1975) 284–288.

[111] Duncan Kennedy, *Sexy Dressing Etc., Essays on the Power and Politics of Cultural Identity* (Harvard University Press 1993) 141.

[112] Fregoso and Bejarano (n 11) 12.

[113] Claus Kress, 'The Crime of Genocide Under International Law' in Antonio Cassese et al. (eds), *International Criminal Law, Critical Concepts in Law* (Routledge 2015) 180.

[114] Raphael Lemkin, *Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposals for Redress* (Rumford Press 1944) 84.

[115] Ibid., 79.

[116] De Beauvoir (n 34) 8–9, 21 and 89; Andrea Dworkin, *Woman Hating* (Penguin Books 1974) 93.

far-fetched to conclude that the social subordination in femicide is a form of destruction which can be legally qualified.

Characteristics

The social oppression of a group of women and girls is characterized by humiliation, objectification, and instilment of fear. These aspects may overlap each other and should be considered as illustrative of the 'aim' of femicide.

Humiliation

The female social group's humiliation can be observed in relation to political protests. Throughout the demonstrations on Tahrir Square in Egypt and political protests in Atenco in Mexico, women and girls were randomly detained, stripped naked, sexually assaulted in public, and/or raped by state agents. Although such treatment is invariably humiliating, the degradation or humiliation women suffer is shaped by a cultural context where societal norms are violated. The forced removal of a women's hijab by the police may stigmatize her in her own community. Furthermore, occurring in the public space and often concerning the most intimate aspect of their lives, such humiliation may cause severe psychological harm.[117] Having been humiliated in public, women and girls might avoid further political confrontation, which restricts their fundamental democratic rights and equal political participation, and effectively strips them of their citizenship in a democratic society. Fearing more stigmatization through the judicial system, they may be reluctant to report violence.[118] Family members who try to have the authorities investigate the violence against their daughters and sisters may also be humiliated as authorities may blame them for exposing their loved ones to violence.[119]

Objectification

ISIS institutionalized the sexual enslavement of Yazidi women and girls, objectifying them as sexual objects and openly admitted to organizing and regulating a slave trade.[120] ISIS rules mark the female Yazidi population as *sabaya* (sex slaves). According to Rule 6.1, '[i]t is permissible to buy, sell, or

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[117] UN Entity for Gender Equality and the Empowerment of Women, Latin American Model Protocol for the Investigation of Gender-related Killings of Women (Femicide/Feminicide) (2004) 48.

[118] E.g., ECtHR, *M.C. v. Bulgaria*, App No 39272/98 (4 December 2003) para. 37.

[119] *Velásquez Paiz v. Guatemala* (n 41) para. 172; *López Soto v. Venezuela* (n 71) paras 262 and 264–267.

[120] Samar El-Masri, 'Prosecuting ISIS for the Sexual Slavery of the Yazidi Women and Girls' (2018) 22(8) *The International Journal of Human Rights* 1047–1066 at 1052.

give as a gift female captives and slaves, *for they are merely property*, which can be disposed of as long as that does not cause [the Muslim Ummah] any harm or damage.'[121] The rules are clear that, while Yazidi women and girls can be beaten, they should not be beaten to death or severely injured. This suggests that ISIS wants to use female slaves, but not physically destroy them.[122] As in many wars, the women and girls are trophies for fighters. They serve to attract new recruits, also from abroad.[123]

The objectification of women and girls has been theorized by various scholars. Pateman considers that, under the marriage contract, women and girls served as sexual slaves, since their husbands had, and sometimes still have, unlimited access to their sexuality.[124] In her work on pornography, MacKinnon argues that the objectification of women in pornography leads to and is caused by VAWG:[125] 'In pornography[,] women exist to the end of male pleasure.'[126] Her work illustrates that objectification is predominantly negative in femicide.[127] By contrast, Nussbaum maintains that 'objectification' of women (and men) may occur in a respectful intimate relationship. At the same time, she concedes that many forms of objectification are negative and violate women's autonomy.[128] Drawing on Nussbaum, Manne views the act of objectification as '"willful denial and self-aggrandizement" wherein the agent refuses to see himself as coming down in the social world in relation to women, or even to be at any risk of this happening.'[129] Much in line with these theories, in femicide, violence instrumentalizes women and girls as sexual objects to be (ab)used and objectified.[130]

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[121] Question 6. Mah-Rukh Ali, 'ISIS and Propaganda: How ISIS Exploits Women', *Reuters Institute Fellowship Paper* (University of Oxford 2015) 1–25 at 20. See also Dunya Mikhail, *The Beekeeper, Rescuing the Stolen Women of Iraq* (New Directions Paperbook 2018) 18 [emphasis added].

[122] Question 19: Is it permissible to beat a female slave? Ali (n 121) 20.

[123] Lizzie Dearden, 'ISIS Among Terrorist Groups Using Slaves to Recruit Rapists and Domestic Abusers' *The Independent* (9 October 2017), www.independent.co.uk/news/world/middle-east/isis-sex-slaves-yazidi-recruit-fund-terrorism-trafficking-boko-haram-report-hjs-libya-syria-iraq-a7991366.html.

[124] Pateman (n 11) 120–124.

[125] MacKinnon (n 96) 114.

[126] Catherine MacKinnon, *Feminism Unmodified* (Harvard University Press 1987) 158.

[127] MacKinnon (n 96) 114.

[128] Martha Nussbaum, 'Objectification' (1995) 24(4) *Philosophy and Public Affairs* 249–291 at 250.

[129] Manne (n 12) 86.

[130] MacKinnon (n 126) 158.

Instillment of fear

Fear instilled in the entire (female) population can cause women and girls to comply with their socially assigned roles with a subordinate social status. A Guatemalan woman who is beaten by her husband, may be aware that she is likely to be killed one day in certain places in Guatemala.[131] As a 'weapon of war,' rape targets women and girls to instill fear into communities.[132] Extreme cruelty and the public display of decapitated and mutilated bodies can cause so much fear that women and girls either learn to behave in line with social norms or flee the area.[133] Many women and girls who find themselves in the middle of such widespread violence, would likely be distressed, fearing that they would be the next victim.

Confronted with a choice of either behaving in certain ways, which will not guarantee survival, or meeting a similar fate, fear may prompt women and girls to comply with the patriarchal social order. Kennedy distinguishes between women who refuse to abide by the norms—who still go to work in the context of femicide—and 'end up paying the price,' and those who, 'by foregoing doing things they want to do,' can remain safe at the cost of losing their liberty and agency.[134] They may refrain from attending political events, going to work or walking by themselves at night.[135] Obeying the rules set by their potential abusers, women and girls may survive for some time. The behavior of this 'sensible woman' comes at a steep cost.[136] She must live a life where her wishes and desires remain unfulfilled and are subordinated to the patriarchal rule.[137] Women who try to challenge the so-called divine order often will be harmed or will have their children attacked as is the case in domestic violence. Alternatively, women and girls (and their families) may decide to flee from gender-based violence.[138]

Inequality

In the eyes of the law, the subordination of women and girls can be qualified as inequality—which in turn makes women and girls susceptible to violence.[139]

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[131] See e.g., the case of Rodi Alvarado in Cházaro et al. (n 20).

[132] Margareth Etienne, 'Addressing Gender-based Violence in an International Context' (1995) 18 *Harvard Women's Law Journal* 139–170 at 139.

[133] Rita Laura Segato, 'Territory, Sovereignty, and Crimes of the Second State' in Fregoso and Bejarano (n 10) 79.

[134] Kennedy (n 111) 141.

[135] Ibid.

[136] Ibid.

[137] Ibid.

[138] Ahmed (n 103).

[139] Goldblatt (n 33) 360.

The possible appearance of inequality in femicide is threefold: a fundamental context of structural inequality is the arena for femicide; state authorities fail to rescue women who are reported missing due to discriminatory attitudes and stereotypes; discriminatory treatment may arise after the woman's body is found, or when her next of kin actually denounces the violent acts in question or seeks assistance in investigating her case. These systemic forms of discrimination should be addressed under a theory which properly covers systemic inequality.[140] Formal equality strictly compares women's experiences with those of men. Such a comparison poses a problem where women's experiences are unique to women and therefore no male comparator exists. Substantive equality looks at the effect of an apparently neutral rule on a disadvantaged group. As theorized by feminist scholars, substantive equality functions well to tackle widespread violence stemming from systemic inequality.

Formal equality

Formal equality, which compares individuals in similar situations, is particularly ill-suited to address structural violence against the female social group.[141] Two significant objections can be raised to the use of formal equality to structural violence as it occurs in femicide.[142] First of all, formal equality is individualistic and relative in nature, unable to reach the structures of society.[143] Given their long history of being second-class citizens, women's experiences can hardly be comparable to those of men.[144] Abuses including rape and forced abortion are often systematically tolerated by state parties, which systemize violence against women.[145] Having the standard by which women's experience is measured, be male results in women being '[relegated to] a position

[140] See Samantha Besson, 'The Principle of Non-Discrimination in the Convention on the Rights of the Child' (2005) 13 *The International Journal of Children's Rights* 433–461. See also Maria Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (Brill 2017) 211.

[141] Kirsten Anderson, 'Violence against Women: State Responsibilities in International Human Rights Law to Address "Harmful Masculinities"' (2008) 26(2) *Netherlands Quarterly of Human Rights* 173–197 at 222; Alice Edwards, *Violence Against Women under International Human Rights Law* (Cambridge University Press 2011) 142.

[142] See Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11(4) *Human Rights Law Review* 707–738 at 711; Sandra Fredman, 'Engendering Socio-Economic Rights' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional, and National Law* (Cambridge University Press 2013) 224; MacKinnon (n 126) 33.

[143] Fredman (n 142) 224; MacKinnon (n 126) 33.

[144] MacKinnon (n 126) 33.

[145] MacKinnon (n 96) 73 and 76.

of inferiority indefinitely,' thus maintaining a hierarchy in which women rank below men.[146] Comparing women to men does not work in situations of pervasive violence against women and girls targeting them specifically, such as forced marriage.[147] Arguably, the treatment of female protestors, who were sexually assaulted and insulted, could be compared to similarly situated male protestors who were not harassed in the African Commission's *Interrights* case.[148] However, no suitable male comparator at risk of forced marriage could be found in *Equality Now*, which led the Commission to conclude that forced marriage by abduction was not discriminatory and not gender-based.[149] Since the formal equality approach is prone to neglect women and girls' experiences, it is inadequate to cover violence against the female social group.

Substantive equality

'[T]he socially situated subjection of women'[150] in femicide must be assessed with a substantive equality approach. Substantive equality considers the social factors which place women in a disadvantaged position and addresses the root causes for violence by considering structural problems which facilitate and perpetuate the domination of women and girls, such as an inadequate state response to reports about missing women and girls.[151] Fredman and MacKinnon's approaches to substantive equality, the transformative framework and the dominance approach, are well suited to tackle the female social group's oppression in femicide.[152] Fredman's versatile four-dimensional substantive equality framework— constituted of the redistributive dimension, the recognition dimension, the transformative dimension, and the participative dimension—operates on a horizontal level rather than in a hierarchy.[153] Especially Fredman's recognition dimension, which deals with 'stigma, stereotyping, humiliation and violence on the grounds of gender' is relevant to the

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[146] Edwards (n 141) 164; Fredman (n 142) 223–224.

[147] MacKinnon (n 96) 74.

[148] *Interrights v. Egypt* (n 5) paras 143–149.

[149] See *Equality Now v. Ethiopia* (n 42) paras 145–146. See also Sjöholm (n 140) 339.

[150] MacKinnon (n 126) 36–37.

[151] See Fredman (n 3) 712 and 728; Fredman (n 142) 223–224.

[152] A vivid debate between these scholars touched on the issue of substantive equality. MacKinnon argued that Fredman's framework is impractical and merely theoretical. Fredman responded that her framework is well suited to address structural inequality on all levels and that certain common parameters between her and MacKinnon's approach to discrimination are present. See the debate in: Fredman (n 3); Catherine MacKinnon, 'Substantive Equality Revisited: A reply to Sandra Fredman' (2016) 14(3) *International Journal of Constitutional Law* 739–746.

[153] Fredman (n 3) 728.

impunity in femicide.[154] A hierarchical approach like MacKinnon's dominance approach, where violence is used to relegate women to an inferior social status, ideally captures the substantive equality at stake in femicide.[155] The social status awarded to women because they belong to the female gender, '[is one] in which [women] can be used and abused and trivialized and humiliated and bought and sold and passed around and patted on the head and put in place and told to smile so that [they] look as though [they are] enjoying it all.'[156] The gender hierarchy envisioned by MacKinnon includes 'the systemic failure to protect women in their homes from violence by men with whom they are close.'[157] At this stage, it is necessary to point out that women and girls are oppressed in many ways depending on cultures which are not comparable to the white-feminist experience.[158]

Substantive equality is also reflected in human rights instruments. CEDAW is an asymmetric instrument which envisions special protection for women and girls and understands discrimination in substantive terms. Article 1 CEDAW operates on a horizontal level, looking at how women are excluded based on sex.[159] At the regional level, discrimination provisions are crafted in relatively vague terms and could principally encompass substantive equality approaches.[160] Human rights bodies usually allow for both formal and substantive approaches to identify gender-based harm. In relation to domestic violence, the ECtHR still seeks a comparator in a similar situation.[161] Incorporating the dominance approach, the IACtHR indicated that 'every situation where a group is treated superior, and thus is awarded privileges, or vice-versa when a group is deemed inferior and consequently treated with hostility […] discriminates

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[154] Fredman (n 142) 223–224 and 227; ibid., 749.

[155] Catherine MacKinnon, 'Substantive Equality: A Perspective' (2011) 2 *Minnesota Law Review* 1–27 at 12; MacKinnon (n 126) 36–37.

[156] MacKinnon (n 126) 36–37.

[157] MacKinnon (n 155) 13.

[158] Sylvia Tamale, *Decolonialization and Afro-Feminism* (Daraja Press 2020) 69.

[159] *Equality Now v. Ethiopia* (n 42) para. 144. On the asymmetric approach of discrimination under CEDAW, see Rikki Holmaat, 'The CEDAW: A Holistic Approach to Women's Equality and Freedom' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional, and National Law* (Cambridge University Press 2013) 99. The CEDAW Committee has made clear that CEDAW interprets discrimination broadly to include both formal and substantive equality. See CEDAW, General Recommendation No 28, paras. 9, 16, 20 and 24; Edwards (n 141) 161.

[160] Art. 14 ECHR; Art. 1(1) ACHR. See also Art. 24 ACHR; Arts 2–3 African Charter (the latter equality before the law).

[161] *Talpis v. Italy* (n 47) para. 145.

against the group.'[162] The IACtHR consistently evokes the Preamble of the Belém do Pará Convention to assert that violence against women is entrenched in unequal power relations.[163] This approach compellingly captures the inferior position of women in femicide, as it recognizes the group-related aspect of discrimination.

Specialized instruments on violence against the female social group appear to embody MacKinnon's approach. The 1993 UN Declaration on Violence against Women and the 1995 Beijing Platform view violence against women as 'a manifestation of the historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of women's full advancement.'[164] They conjoin the theoretical concept of subordinate social status with legal approaches to discrimination law relevant to femicide. Even though they are soft law declarations and therefore not legally binding, regional human rights instruments similarly mention 'historically unequal power relations between women and men' as causes of VAWG.[165] The substantive equality in such instruments and treaties can thus be interpreted to cover the substantive discriminatory component in femicide.[166]

IMPUNITY

A defining aspect of femicide is the impunity with which crimes against women and girls are treated. I argue for a broad understanding of access to justice in the context of femicide, in the sense that victims or their next of kin are regularly unable to obtain help from the State, meaning that the perpetrator is not brought to justice. This could be the case when a perpetrator commits suicide after he has killed a woman and/or her children. In other cases, crimes committed by perpetrators are never investigated by the authorities. In any form, impunity translates into violations of the victim's access to justice rights as national authorities may not respond after a woman is reported missing, failing to save her or even to conduct an investigation while she is still

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[162] E.g., *Velásquez Paiz v. Guatemala* (n 41) para. 173 [unofficial translation by the author].

[163] E.g., ibid., para. 175.

[164] Bejing Platform for Action (n 15) para. 118. See also Preamble DEVAW.

[165] Preamble Belém do Pará Convention; Preamble Istanbul Convention. The Maputo Protocol does not mention unequal power relations, perhaps because it relates to women's rights more generally.

[166] See Vanessa Munro, 'Violence Against Women, "Victimhood" and the (Neo) liberal State' in Margeret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013) 239.

alive.[167] Passiveness in domestic violence cases, where police remain inactive or attempt to reconcile perpetrators and victims, as well as state authorities' failure to rescue enslaved Yazidi women and girls in Syria or abducted girls in Nigeria, also result in impunity.[168] Such inaction in response to violence based on sexist views sends the message to society and potential perpetrators that they can commit violence with impunity and that there is 'a clear absence of democratic rule of law in relation to women.'[169] It also discourages women from approaching the judicial system for help.[170] Finally, impunity creates the widespread context in which femicidal violence occurs,[171] as it 'stems from the inaction, insufficiency, or complicity of state institutions with gender inequality.'[172] To end impunity for femicide at the domestic level, States must be held responsible for failing to act in the face of violence against the female social group.

OUTLOOK: THE CONCEPT OF FEMICIDE IN PRACTICE

Attacks against female social groups receive increasing attention all over the world.[173] In the wake of #MeToo, #NiUnaMenos, and similar campaigns, the women's rights movement can use this momentum to create the political will necessary to codify femicide. In the following, I discuss three possible avenues for the proposed femicide concept to work in practice. A first possibility and ideal answer to femicide is the enactment of a specialized multilateral treaty on femicide, inspired by the Genocide Convention in its architecture. A treaty on femicide appears justified due to its severity and its consequences for humanity

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[167] Cházaro et al. (n 20) 104–105.

[168] See Bring Back our Girls Campaign, https://bringbackourgirls.ng/. E.g., *Volodina v. Russia* (n 4) para. 91; *Opuz v. Turkey* (n 4) paras 69–70. See Mikhail (n 121).

[169] Lagarde y de los Rios (n 10) xxi.

[170] See *Gladys Espinoza Gonzáles v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Serie C No 289 (20 November 2014), para. 280.

[171] Segato (n 133) 79.

[172] Lagarde y de los Rios (n 10) xxi.

[173] Sarkin (n 2) 2–3; In September 2019, South Africa experienced one of its deadliest months for women. Robin-Lee Francke, 'Thousands Protest in South Africa over rising Violence against Women' *The Guardian* (5 September 2019), www.theguardian.com/world/2019/sep/05/thousands-protest-in-south-africa-over-rising-violence-against-women. See also Amnesty International, 'Switzerland: One in five women is a victim of sexual violence' (21 May 2019), www.amnesty.org/en/latest/news/2019/05/switzerland-one-in-five-women-is-a-victim-of-sexual-violence/; Charlotte Alter, 'Someone is Finally Starting to Count "Femicides"' *TIME* (18 February 2018), https://time.com/3670126/femicides-turkey-women-murders/.

similar to efforts to establish a treaty on crimes against humanity.[174] Another possibility is a universal treaty on VAWG, including a provision on the femicide concept. Such a treaty effort is currently being lobbied internationally, spearheaded by the *Every Woman Treaty Coalition*.[175] Similarly, regional women's rights instruments could be amended to include a provision on femicide.[176] Finally, until a treaty is enacted, the most straightforward approach to femicide would be for human rights bodies to apply and reinterpret existing human rights law. They could view aspects of femicide through the feminist lens when they apply the human rights framework directly. Some limitations to the practical application of the framework exist in the sense that human rights bodies must be aware of the framework at their disposal and identify relevant provisions in specialized regional treaties from a feminist perspective.[177] With the present work, I hope to make a valuable contribution to this effect. Arguably, the direct application of treaty provisions would be challenging in some areas, where human rights bodies do not have jurisdiction over regional women's rights treaties. The CEDAW provides an interim answer to this issue. Its definition of gender-based violence can serve as a catch-all provision for undefined acts of femicide. Human rights bodies may rely on international criminal courts' case law, for example, to define the widespread contextual element and rape in line with *Akayesu*.[178]

The application of the femicide concept will face challenges. Little political will to apply this concept may be present where States condone widespread violence against women and girls. At the same time, some States may be more proactive as femicide impacts on migration flows and economy. Femicide has caused women from Honduras, Guatemala, Ethiopia, and other countries

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[174] See Madaline George, 'Prospects for a Convention on the Prevention and Punishment of Crimes against Humanity' *OpinioJuris* (8 October 2019), http://opiniojuris.org/2019/10/08/prospects-for-a-convention-on-the-prevention-and-punishment-of-crimes-against-humanity/.

[175] In 2019, the coalition—comprised of female activists, lawyers, and academics from around the world—created a core platform for a proposed treaty on VAWG of all ages. EveryWomanTreaty, https://everywoman.org/. A personal disclosure: the author was involved in drafting a core platform on VAWG under the leadership of the EveryWomanTreaty coalition.

[176] Art. 19 Belém do Pará Convention allows States to propose amendments of the Convention.

[177] Daniela Nadji, '"Bridging the Divide:" An Interview with Professor Rashida Manjoo, UN Special Rapporteur on Violence Against Women' (2015) 23 *Feminist Legal Studies* 329–347 at 343.

[178] See e.g., *M.C. v. Bulgaria* (n 118) where the ECtHR relied on *Kunarac* (n 65) paras 104–105, fns 160 and 205.

to evade FGM or forced marriage by fleeing and seeking asylum abroad.[179] States inundated with asylum seekers may embrace the femicide concept and either support the States of origin in combating femicide, or bring inter-state complaints before regional human rights bodies to curb asylum influx, since women and girls may be able to claim asylum on the basis of being part of a 'particular social group.'[180]

[179] See US Department of Justice, Executive Office for Immigration Review, Written Decision of the Immigration Court, 13 April 2009 (merits case file, volume XIII) (relating to the asylum claim of the Ramos Monárrez family, the relatives of one of the disappeared victims in the *Cotton Field Case* [n 10]); Swiss Asylum Law Commission, Case LCH/VEM, 9 October 2006 (concerning the repeated rapes and abduction for purposes of forced marriage of an Ethiopian girl who subsequently sought asylum in Switzerland).

[180] UNHCR Guidelines; Art. 45(1) ACHR; Arts 47–54 African Charter; Art. 24 ECHR. For the modalities of inter-state complaint procedures, see Scott Leckie, 'The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?' (1988) 10(2) *Human Rights Quarterly* 249–303.

10. No more impunity: Femicide and state responsibility

INTRODUCTION

As the previous chapters have revealed, acts of femicide, such as domestic violence, are mainly committed by private perpetrators in the private sphere. To determine state responsibility for acts committed by non-state actors, human rights bodies apply the *Osman* test, originally developed with respect to the right to life in the case law of the European Court of Human Right (ECtHR).[1] The test requires that States knew or ought to have known of a real and immediate risk of violence against women and girls, and that they failed to take adequate preventive measures to avert that risk. Femicidal violence often encounters impunity under the current interpretation of the *Osman* test for two reasons. Firstly, *Osman* does not primarily envision collective risks. It was devised for an individual threat,[2] with its target being described by the ECtHR as 'individuals identifiable in advance.'[3] Secondly, although the Court has described domestic violence as 'systemic,' the ECtHR seems to neglect this widespread context in its discussion on state responsibility for domestic violence.[4] A concerning double-standard exists as to what extent human rights bodies apply the *Osman* test to endangered groups: On the one hand, they have recognized state responsibility for contexts which endanger the lives or safety of a specific group collectively—such as journalists, villagers, and racial groups— because of the presence of historical or other tensions; On the

[1] See European Court of Human Rights (ECtHR), *Osman v. UK*, App No 23452/94 (28 October 1998), para. 116; General Recommendation No 28, para. 13. See also *Velasquez Rodríguez v. Honduras*, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 4 (29 July 1988), para. 172; Jeremy Sarkin, 'A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Levels of Violence Against Women Around the World' (2018) 40(1) *Human Rights Quarterly* 1–36.

[2] *Osman v. UK* (n 1) para. 116; General Recommendation No 28, para. 13.

[3] ECtHR, *Mastromatteo v Italy*, App No 37703/97 (24 October 2002), para. 69.

[4] ECtHR, *Talpis v. Italy*, App No 41237/14 (2 March 2017), paras 101, 107-108 and 145.

other hand, human rights bodies have not applied the test in the same way to collective threats to the female social group.[5] For an individual risk to arise for endangered female groups, human rights bodies insist that the victims or their family members must notify and warn the state authorities about imminent threats.[6] Such prior individualized fears or harassment which would allow a woman to notify State authorities, are either uncommon in contexts of widespread violence or concern daily sexual harassment. For example, a woman in Ciudad Juarez may not know herself that she will be abducted the next day, and a girl in Albania may be unaware that she will be a victim of an acid attack. The *Osman* test should be reinterpreted to hold States to the same standard for femicide as for other types of violence. The existence of a pattern of widespread violence against the female social group, evidenced by reports and statistics, should suffice to prove States' knowledge about widespread violence against the female group. Furthermore, the risk in femicide ought to be considered real and immediate, since acts of femicide are both continuous (and can materialize at any time)[7] and widespread (thus threatening any woman or girl belonging to the targeted female social group). This is especially so where States have contributed to the risk by failing to punish perpetrators, thereby creating a widespread context of violence against women and girls. Once the risk exists, States must take urgent legislative, policy, and budgetary measures to stop the violent practices endangering women and girls.

'OMISSION' AS WRONGFUL CONDUCT

State responsibility arises for both unlawful actions and omissions imputable to a State. For example, when guards and other state officials subject female detainees to forced nudity, or when they force women and girls to undergo gynecological exams, state responsibility is engaged on account of state

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[5] Ibid., para. 101; ECtHR, *Opuz v. Turkey*, App No 33401/02 (9 March 2009) (domestic violence); ECtHR, *Aydin v. Turkey*, App No 57/1996/676/866 (25 September 1997), paras 129–130.

[6] The ECtHR and the CEDAW Committee now require States to intervene and prevent any further violence when a woman calls the police because her husband hits her. E.g., *Talpis v. Italy* (n 4) *Goekce et al. v. Austria*, Communication No 25/2005, CEDAW/C/39/D/5/2005, 6 August 2007. Similarly, the IACtHR held that, by informing the police, the relatives of an abducted woman had complied with their obligations under the *Osman* test to inform the State of violence committed by a third party. *López Soto v. Venezuela*, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 36 (26 September 2018).

[7] ECtHR, *Kurt v. Austria* [Grand Chamber, GC], App No 62903/15 (15 June 2021), para. 175.

actions.[8] In line with historical and cultural practices, States have turned a blind eye to private persons committing acts of femicide;[9] they must be held responsible for their passivity in the face of femicide, with the burden of proof being lowered where States have created the conditions for violence by failing to punish perpetrators. The omission is the relevant wrongful state conduct in femicide, behavior which engages state responsibility akin to its counterpart of state action, as exhibited by the French term 'fait,' which reflects that active as well as passive conduct can trigger state responsibility.[10] As the Draft Articles on State Responsibility (Draft Articles)'[11] note, '[c]ases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two.'[12] The nexus between the State which fails to act in a context of femicide and the female genital mutilation (FGM) of a girl committed in this context is more direct than the one achieved through acquiescence. Concepts emerging in the state responsibility doctrine, such as complicity, a notion used in relation to genocide and originating in (international) criminal law, and acquiescence, comprising both state action and inaction in relation to enforced disappearance imply that the State partially contributes to a private actor's conduct and thus to some extent shares its responsibility with the non-state actor who committed the act. State responsibility by omission means that the State itself fails to respond in a situation where it should have helped women and girls who are harmed.[13]

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[8] Celina Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' (1993) 6 *Harvard Human Rights Journal* 87–125 at 90 and 98–100. See Carin Benninger-Budel, *Due Diligence and Its Application to Protect Women from Violence* (Brill 2008) 11.

[9] Rosa Ehrenreich Brooks, 'Feminism and International Law: An Opportunity for Transformation' (2002) 14 *Yale Journal of Law and Feminism* 345–361 at 349–355.

[10] See Arts 1(8) and 2(4) Draft Articles (*infra* n 11).

[11] The Draft Articles are drafted by the International Law Commission (ILC), an expert body codifying rules on state responsibility. Art. 1(1) Draft Articles: 'These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts.' Report of the International Law Commission on the Work of its 53rd session, Draft Articles on State Responsibility (2001) UN Doc A/56/10.

[12] Art. 2(4) Draft Articles.

[13] For complicity as a notion based on international criminal law, see Marko Milanovic, 'State Responsibility for Genocide' (2006) 17(3) *The European Journal of International Law* 553–604. For the concept of acquiescence, see Marthe Lot Vermeulen, *Enforced Disappearance Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (Intersentia 2012) 425. For a discussion on complicity, see Bonita Meyersfeld, *Domestic Violence and International Law* (Hart Publishing 2011) 206.

The omission must be internationally wrongful to engage state responsibility and such conduct is attributable to the State under the Draft Articles.[14] Conduct is internationally wrongful when it breaches an international obligation, i.e., a treaty provision or a customary norm.[15] Acts of femicide in principle constitute internationally wrongful acts as the human rights breached in femicide include (1) the right to be free from gender-based violence, (2) the prohibition of torture or the right to life, and (3) the right of access to justice/fair trial, protected under various treaties and/or customary international law (CIL). Various regional treaties, the Maputo Protocol, the Belém do Pará Convention, and the Istanbul Convention, prohibit gender-based violence. The Convention on the Elimination of Discrimination Against Women (CEDAW) Committee even considers gender-based violence to be prohibited under CIL. Even though state practice may only be developing with respect to some, but not other acts of violence against women, the argument can be made that a regional CIL norm exists.[16] Any further doubts as to whether acts of femicide fall under CIL, can be resolved by reference to their severity: acts of femicide often breach the prohibition of torture.[17] Even though States may not have an intent to harm women and girls, the human rights violations inherent in femicide constitute international wrongful conduct.[18]

ATTRIBUTION

Conduct of private persons must not only be 'wrongful' in accordance with international legal standards, it must also be attributable to the State for it to incur state responsibility.[19] Only where States fail to prevent violence committed by private perpetrators, such conduct can be attributed to the State. The International Court of Justice (ICJ) carved out the criteria applicable to

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[14] Art. 1 Draft Articles.

[15] Art. 2 Draft Articles.

[16] Customary international law (CIL) denotes 'evidence of a general practice accepted as law.' CIL requires 1) opinio juris and 2) state practice. Opinio juris is likely not the problem at issue, considering the plethora of international instruments condemning violence against women in both human rights law and international criminal law. For regional CIL, see Conclusion 16 of the CIL, International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries A/73/10 (2018).

[17] Benninger-Budel (n 8) 3.

[18] Art. 2(10) Draft Articles. See Maame Efua Addazi-Koom '"He beat me, and the state did nothing about it:" An African perspective on the Due Diligence Standard and State Responsibility for Domestic Violence in International Law ' (2019) 19 *African Human Rights Law Journal* 624–652.

[19] Art. 2(12) Draft Articles.

determine when omissions, contrary to an international treaty or customary obligation, are attributable to the State in *United States Diplomatic and Consular Staff v. Tehran* (*US v. Iran*). This standard was further developed by the Inter-American Court of Human Rights (IACtHR) in *Velásquez Rodriguez v. Honduras* with the due diligence standard. It was refined in *Osman v. United Kingdom* by the ECtHR, triggering state responsibility for lack of prevention of private violence. Gender-biased omissions by the police and other state authorities must likewise attract state responsibility.

Militia Attack on US Embassy

The ICJ attributed state responsibility for omission in the *US v. Iran* case, where the Court held Iran responsible for having remained inactive during the hostage-taking of US citizens by private persons, be they militants or students. The ICJ's analysis is particularly interesting for femicide as it can be transposed to the case of a woman (US consular staff), who is attacked by private actors (students) and where the State (Iran) fails to help her. In 1979, mainly student militants attacked and occupied the US Embassy in Tehran, Iran. They took US diplomatic and consular staff hostage and pillaged the Embassy and consular premises.[20] Since the students acted independently and were not state agents, Iran was not responsible for direct action.[21]

The ICJ examined whether Iran could be held responsible for the attack on the Embassy and the hostage-taking on the grounds of inaction. Iran did not prevent violent acts against US diplomatic personnel despite its awareness of the hostage situation. As the ICJ noted, such inaction was not grounded in 'negligence or a lack of appropriate means.'[22] Although the Iranian authorities had only remained inactive, not preventing the Iranian security personnel, responsible for protecting the Embassy from leaving, Iran's religious leader publicly commended the militia for its action.[23] Moreover, the government had been under an obligation to protect the Embassy based on the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 on Consular Relations (Vienna Conventions). The ICJ found that Iran failed 'to take any steps either to prevent this attack [on the US Embassy] or to stop it before it reached its completion,' despite being aware of it.[24] By failing to protect the

[20] *United States (US) Diplomatic and Consular Staff in Tehran* (Judgment) ICJ Reports 1980 [hereinafter *US v. Iran*], paras 63 and 67. For attribution by omission, see also the *Corfu Channel*, Merits, Judgment, ICJ Reports 1949, paras 4 and 22–23.
[21] *US v. Iran*, ibid., para. 58.
[22] Ibid., para. 62.
[23] Ibid., paras 17, 20–21 and 59.
[24] Ibid., paras 62–63.

Embassy, Iran had encouraged non-state actor violence, which engaged its responsibility by omission.[25] The ICJ's ruling against Iran for failing to act in the face of violence against US personnel set an important precedent regarding state responsibility by omission.

Velásquez Rodríguez's Kidnapping

In 1981, the University student and activist Manfredo Velásquez Rodríguez was kidnapped in a parking lot in Tegucigalpa, Honduras. He was likely interrogated and tortured on state premises in connection with his political activities contrary to the interests of the regime.[26] His abductors, presumably state agents, remained unidentified and wore civilian clothing.[27] Mr Velásquez has remained missing since then.[28] The IACtHR established that around 150 persons had disappeared in Honduras between 1981 and 1984, at the time Mr Velásquez went missing.[29] The IACtHR noted that Mr Velásquez had disappeared in a widespread context of disappearances 'at the hands of or with the acquiescence of those officials,' and that the Honduran government had failed to prevent human rights violations against him.[30] Because some doubt remained as to whether Mr Velásquez was abducted by state officials in disguise or other actors, the Court examined Honduras' responsibility for human rights violations committed by unidentified actors.[31]

The IACtHR argued that, under Article 1 American Convention on Human Rights (ACHR), States have a duty to ensure that every person can freely exercise their rights under their jurisdiction, i.e., to create the conditions for individuals to be protected from human rights abuses.[32] *Velásquez Rodríguez* abandons the idea that the State should not intervene in individuals' freedom, shifting to the premise that States also have a guarantor function, that they have a duty to protect people from human rights violations. This requires that States address human rights abuses committed by non-state actors[33] as:

> [a]n illegal act which violates human rights and which is initially not directly imputable to a state […] can lead to international responsibility of the State, not because

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25 Ibid., paras 62–63, 68 and 93.
26 Ibid., paras 3, 107 and 147.
27 Ibid., paras 3 and 107.
28 Ibid., para. 10.
29 Ibid., para. 147.
30 Ibid., para. 148.
31 Ibid., paras 147(b) and (ii), 148 and 169–172.
32 Ibid., para. 166.
33 Benninger-Budel (n 8) 11. See also Victor Abramovich, 'Responsabilidad Estatal por Violencia de Género: Comentarios Sobre el Caso "Campo Algodonero"

> of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [ACHR].[34]

The Court at least implied that widespread contexts, such as 'a practice of disappearances […] between 1981 and 1984 [in which] the Government of Honduras failed to guarantee the human rights affected by that practice' meant that Honduras knew about the human rights violations committed. This reasoning could be transposed to cases where women and girls live in a context of widespread gender-based violence.[35] Adjudicating femicide cases in this way matters as the Court did not require individuals to alert the State about threats of soon being kidnapped in *Velásquez Rodríguez*. Moreover, as Honduras failed to investigate the acts, and enforced disappearances as a serious human rights violation, the IACtHR applied a very low burden of proof, allowing for 'circumstantial and presumptive evidence.'[36] The Court relied on witness testimonies, press clippings, and NGO reports, also considering 'public and well-known facts [of disappearances] which, as such, do not require proof.'[37] The Honduran government was aware that Mr Velásquez went missing in this pattern of enforced disappearances, but it had taken no action to prevent violence against him.[38] *Velásquez Rodríguez* signals that States' awareness of patterns of violence engages their duty to take preventive measures. The Court may have taken this progressive route as it suspected that state officials, military and police had kidnapped people in Honduras in the early 1980s.[39] The precedent could apply to femicide, which is characterized by state impunity but is not presumed to be committed by state actors.

Another important contribution was the IACtHR's call for preventive measures. The Court stated that 'the State has a legal duty to take reasonable steps to prevent human rights violations' and to identify the culprits and punish them.[40] The Court established that the preventive duty must include 'legal, political, administrative and cultural' measures, cautioning however[41] that '[i]t is not possible to make a detailed list of all such measures since they vary with the law and the conditions of each State Party.'[42] The IACtHR thus left the

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en la Corte Interamericana de Derechos Humanos' (2010) 6 *Anuario de Derechos Humanos* 167–182 at 170.

34 *Velásquez Rodríguez v. Honduras* (n 1) para. 172.
35 Ibid., para. 148.
36 Ibid., paras 129 and 131.
37 Ibid., para. 147.
38 Ibid.
39 Ibid., paras 147 and 147.c.
40 Ibid., para. 174.
41 Ibid.
42 Ibid., para. 175.

preventive measures relatively undefined, with the stipulation that States must not tolerate situations of impunity.[43] *Velásquez Rodríguez* influenced human rights law well beyond the Inter-American human rights system, conclusively establishing that state responsibility is engaged for human rights violations committed by unidentified and/or non-state actors.[44] Questions about which circumstances trigger States' duties to prevent non-state actors from committing human rights violations were answered by the ECtHR in *Osman v. United Kingdom (UK).*

Osman's Murder

A schoolteacher had continuously harassed and intimidated 15-year-old Ahmet Osman, his friends, and his family.[45] Aware of the situation, the UK school authorities had discussed the issue with the teacher concerned, the police interviewed him, and a psychologist administered various assessments.[46] More than a year after making his initial threats, the teacher severely injured Ahmet and killed his father.[47] Ahmet argued before the ECtHR that the authorities had known about the death threats but still failed to take adequate measures to prevent violations of his and his father's right to life.[48] Although the Court recognized that UK police officials were informed of the schoolteacher's disturbing behavior, the ECtHR held that the UK could not have explicitly known that the schoolteacher would harm Ahmet or his family and posed a life-threatening risk (i.e., a 'real and immediate risk') to them. Therefore, the Court found no violation of the right to life under Article 2 of the European Convention on Human Rights (ECHR).[49]

Osman established a limited set of clearly defined circumstances for holding States responsible when they fail to prevent non-state actor human rights violation, such as those committed against women and girls.[50] The ECtHR was careful about not opening pandora's box so that States would not be held responsible for every human rights violation committed in their territory by private individuals, citing the 'difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which

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[43] Ibid., paras 176–177.
[44] See e.g., African Commission, *Egyptian Initiative for Personal Rights and Interrights v. Egypt*, Communication No 323/06, 1 March 2011, para. 205.
[45] *Osman v. UK* (n 1) paras 11–12 and 14.
[46] Ibid., paras 21, 27 and 42.
[47] Ibid., paras 10 and 56.
[48] Ibid., para. 103.
[49] Ibid., paras 121–122.
[50] Ibid., paras 115–116.

must be made in terms of priorities and resources.'[51] Under the *Osman* test, states' responsibility is only engaged if:

> [t]he authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[52]

The *Osman* test has been upheld and endorsed by international human rights bodies, including the African Commission, the CEDAW Committee, and the IACtHR—also in cases concerning femicide.[53]

ENDING IMPUNITY FOR FEMICIDE

Overlooked, and dismissed as insignificant, many acts of femicide encounter impunity, and therefore seemingly fall outside the purview of state responsibility.[54] In the current political climate—with the #MeToo movement and similar campaigns—the time is ripe for human rights bodies to hold States accountable for condoning atrocities against groups comprising women and girls.[55] However, the method used to determine state responsibility, the *Osman* test, is not primarily devised to apply, and has not been applied, to group-related risks to women's lives and integrity. Currently, human rights bodies narrowly interpret the *Osman* test in relation to widespread, group-related risks against women and girls. They only recognize harm insofar as it concerns women and girls' individually and do not yet hold States responsible for structural risks such as those of systemic violence which does not individually threaten

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[51] Ibid., para. 116.

[52] Ibid.

[53] See, for enforced disappearances, *Pueblo Bello v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 140 (31 January 2006), and for femicide, *Veliz Franco et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 277 (19 May 2014); *González et al. v. Mexico (Cotton Field Case)*, Preliminary Objection, Merits, Reparations, and Costs, Inter American Court of Human Rights Series C No 205 (16 November 2009) (femicide cases); African Commission*, Equality Now and Ethiopian Women Lawyers Association v. Federal Republic of Ethiopia,* Communication No. 341/2007, 25 February 2016, para. 127.

[54] Sarkin (n 1) 10.

[55] Farnush Ghadery, '#Metoo—has the "Sisterhood" Finally become Global or Just Another Product of Neoliberal Feminism?' (2019) 10(2) *Transnational Legal Theory* 1–23, see Abramovich (n 33) 169.

women and girls, even if they do consider the systemic context.[56] Accordingly, they remain ambiguous, at times uncertain, about whether acts of femicide are widespread and whether the risk situation threatens women and girls collectively. Akin to its application to other groups, the *Osman* test can be interpreted to cover collective risks against women and girls, which would make it easier for human rights bodies to adjudicate the ever-so-often unreported threats of femicide.

Femicide: Real and Immediate Risk

The group-related risks in femicide emerge from a climate of impunity, a context which creates the conditions for widespread violence against women and girls. For the *Osman* test to become operable for crimes committed against women and girls, its key notions of 'real and immediate risk' must be interpreted in line with the nature of the slow-death risk in femicide. The terms real and immediate risk are ambiguous as human rights bodies rarely separate the two elements, and even use them interchangeably.[57] In the literature, the term real refers to 'a significant likelihood that the risk will materialize unless preventative measures are taken,' and a risk is immediate when 'the result of the risk must be expected to materialize at any time.'[58] Ebert and Sijniensky suggest to drop the immediacy requirement, and simply to retain the real aspect of the *Osman* test to describe the risk, as States would only need to take preventive 'measures of medium urgency' to avert it.[59] However, whether medium urgency could forestall widespread risk situations is questionable considering that preventive measures must be expedient to reduce a life-threatening risk. This standard may also lead to uncertainty about the scope of preventive measures of medium urgency. As the ECtHR's Grand Chamber clarified in *Kurt v. Austria*, the term 'immediacy' in the context of domestic violence must take account of the consecutive cycles of domestic violence, and that a record of domestic violence points to its immediacy.[60] At the same time, the Court referred to Article 52 of the Istanbul Convention, and its Explanatory Report,

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[56] E.g., See *Talpis v. Italy* (n 4) paras 101, 107-108 and 145; ECtHR, *Volodina v. Russia*, App No 41261/17 (9 July 2019).

[57] Franz Christian Ebert and Romina Sijniensky, 'Preventing Violations of the Right to Life in the European and the Inter-American Human Rights Systems: From the Osman Test to a Coherent Doctrine on Risk Prevention' (2015) 15(2) *Human Rights Law Review* 343–368 at 258; *Osman v. UK* (n 1) para. 121. See e.g., Meyersfeld (n 13) 215.

[58] See Ebert and Sijniensky, ibid., 358–359.

[59] Ibid., 366.

[60] *Kurt v. Austria* [GC] (n 7) para. 175.

which notes that 'harm is imminent or has already materialized and is likely to happen again.'[61]

As such, the risk in femicide can be classified as being immediate. Considering the ongoing nature of human rights violation in femicide—e.g., when a girl is abducted and forcibly married by Boko Haram, she may suffer from its consequences over many years—the risk of more violence may materialize at any time. Predictably, other women and girls abducted under the same circumstances are likely subjected to the same situation. Thus, a pattern of violence in femicide puts any woman who belongs to the targeted group at a real risk of being harmed. Finally, when States contribute to the real and immediate risk by condoning a climate of impunity for acts of femicide, evidentiary standards should be lowered. Accordingly, it would be enough for the victim to show that a pattern of violence existed of which the violence against her was part. She would no longer be required to show that she had previously alerted the authorities about an individual threat.

Group-related risks

Group-related risks are already recognized by human rights bodies in cases relating to social groups more generally, precedents on which a recognition of risks for female groups could build. In *Mastromatteo v. Italy*, the ECtHR established in this regard that society in general was at risk from a convict who had absconded and killed someone while on leave from prison and that the State must protect the public from threats deriving from violent convicts on day leave.[62] Similarly, the Court appeared to consider contexts of violence sufficiently immediate in enforced disappearances cases against social groups, especially concerning political activities. In *Avsar v. Turkey*, the Court carefully examined the context which endangered civilians in South-East Turkey:

> [Si]nce approximately 1985, serious disturbances have occurred in the south-east of Turkey, involving armed conflict between the security forces and the members of the PKK. By 1996, the violence had claimed, according to the Government, the lives of 4,036 civilians and 3,884 members of the security forces. Since 1987, ten of the eleven provinces of south-eastern Turkey have been subject to emergency rule.[63]

The context which endangers the lives or safety of a specific population can be described both in terms of increasing (historical) tensions and the number of victims. In *Avsar*, the ECtHR identified the targeted population broadly

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[61] Ibid.

[62] *Mastromatteo v. Italy* (n 3) para. 69. See also ECtHR, *Choreftakis and Choreftaki v. Greece*, App No 46846/08 (17 January 2012), paras 48 and 50.

[63] ECtHR, *Avsar v. Turkey*, App No 25657/94 (10 July 2001), para. 285.

as civilians.[64] In *Kilic v. Turkey*, the Court identified the targeted population as journalists and found the structural violence against them in south-east Turkey to present an immediate risk in relation to a Kurdish journalist who was attacked by the police in a context of counter-terrorist violence against the PKK.[65] Although no specific threats had been recorded against Mr Kilic, the Court considered that he 'belonged to a category of persons who ran a particular risk of falling victim to a disappearance or murder' and that 'his risk could in the circumstances [the violence against Kurdish journalists in south-east Turkey] be regarded as real and immediate.'[66] Hence, the widespread context of violence against an identifiable group plays a significant role in the real and immediate risk, and in attributing state responsibility.[67]

Going one step further, the IACtHR considered the group-related threats to specific communities to meet the *Osman* test.[68] In *Pueblo Bello*, private groups invaded a village and abducted and presumably killed the male villagers.[69] The state authorities, i.e., the Colombian military, assisted the guerrilla fighters by letting them pass through military checkpoints with the abducted men. Colombia had encouraged the creation of self-defense groups in the first place, thereby contributing to the risk for the villagers.[70] The IACtHR held that Colombian authorities were evidently aware of the attack on Pueblo Bello village, and that the State had failed to prevent the risk of individuals being subjected to human rights abuses.[71] Hence, the Court recognized that the *Osman* test applies beyond an individual threat to a social group collectively at risk of enforced disappearance.[72] In *Wallace de Almeida v. Brazil*, the Court considered young Afro-descendant men 'an especially vulnerable social group due to its racial and social condition,' i.e., its historic subordination and the prevalence of police violence against Afro-descendant youth.[73] Accordingly, the Court held that the extrajudicial killing of the young Afro-descendant

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64 Ibid.

65 ECtHR, *Kilic v. Turkey*, App No 22492/93 (28 March 2000), paras 66–68.

66 Ibid., para. 66.

67 Vermeulen (n 13) 408.

68 On indigenous groups, see *Sawhoyamaxa Indigenous Community v. Paraguay*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 140 (29 March 2006).

69 *Pueblo Bello v. Colombia* (n 53) paras 95.25–44.

70 Ibid., paras 95.36–37 and 138.

71 Ibid., paras 138–140.

72 Ibid., para. 126.

73 *Wallace de Almeida v. Brazil* (20 March 2009) Case 12.440, Report No 26/09, para. 146.

Wallace de Almeida in the outskirts of Rio de Janeiro triggered Brazil's responsibility for violations vis-à-vis the social group.[74]

The case law reveals that the contextual element—i.e., widespread violence, historical discrimination, military presence, and general unrest—is an essential factor in considering the group-related risk in enforced disappearances. Two issues must be highlighted. First, the above cases predominantly concern men: male villagers in Pueblo Bello, Afro-descent male adolescents in Brazil, and presumably male journalists in Turkey. Furthermore, in *Pueblo Bello*, a close link is present between the State and the perpetrators, where the former facilitated the creation of armed groups and their passage through checkpoints. This may have been a factor in human rights bodies' readiness to establish state responsibility by inaction through structural risks. The *Osman* test peculiarly, does not appear to extend to violence against the female social group in similar circumstances.

Widespread risks

Widespread risks against female groups can only be covered by the *Osman* test when the group is clearly delimited (see Chapter 9). The IACtHR identified female social groups and the dangerous situation for women and girls in *Cotton Field*, *Veliz Franco*, and *Velásquez Paiz*. However, the Court held that the State could not have known that the women themselves were in a widespread risk situation by virtue of belonging to the targeted social group.[75] The IACtHR's reasoning is inconsistent, as it finds no state responsibility for structural risks of femicide, but still discusses preventive measures in respect of the widespread context of violence.[76] While one explanation for its discussion of preventive measures vis-à-vis structural risks may lie in its relation to the individual risk (for which it engaged state responsibility), this fails to convince since the Court also discusses preventive measures with regard to the individual risk.[77] The IACtHR missed an opportunity to hold States responsible for widespread violence against women and girls (VAWG). This suggests that the Court either views the structural risk as second-class, or it encountered difficulties in pinning down the nature and context of widespread violence.

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[74] Ibid.

[75] *Cotton Field* (n 53) para. 282; *Velásquez Paiz v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 307 (19 November 2015), para. 120.

[76] *Velásquez Paiz v. Guatemala*, ibid.

[77] E.g., *Cotton Field* (n 53) para. 286.

The African Commission has been most vocal about widespread risks against female social groups. As mentioned in *Equality Now*:

> the Respondent State had not been prosecuting perpetrators of abduction and rape. Had it been doing so, the ripple effect of arrests and prosecution of perpetrators could have long operated as an effective deterrent as it did when [the girl]'s abductor was arrested the first instance.[78]

The Commission acknowledged that Ethiopia contributed to the creation of the risk of forced marriage by abduction by failing to punish perpetrators. The widespread risk affected the young female population in a province where 'girls were under the continuing threat of being abducted, raped and forcibly married in the area where the practice was rampant.'[79] This receptivity to group-related human rights violations may be due to the African human rights systems' espousal of collective human rights violations evident from its focus on human and peoples' rights. Accordingly, the Commission found that forced marriage by abduction constituted a group-related threat to girls in the region where the applicant lived,[80] the widespread practice of forced marriage putting all similarly situated Ethiopian girls in harm's way.[81] Thus, some precedents exist which recognize widespread risks to female social groups.

Recurring risks

That the human rights violations in femicide are recurring in nature, is recognized by some human rights bodies.[82] Femicide is characterized by a pattern of violence, creating ongoing risks, which should be qualified as serious and 'immediate' under the *Osman* test.[83] Femicidal harm does not necessarily follow a predictable pattern, a timeline according to which violence materializes. As Manjoo stated, '[w]omen subjected to continuous violence and living under conditions of gender-based discrimination and threat are always in fear of execution.'[84] In *Talpis*, the ECtHR recognized that domestic violence committed over a period of more than a year, on account of which Ms Talpis's son was eventually killed when he tried to intervene to protect his mother, created a situation of a real and immediate risk to Ms Talpis and her son's

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78 *Equality Now v. Ethiopia* (n 53) para. 129.
79 Ibid., para. 126.
80 Ibid.
81 Swiss Asylum Law Commission, Case LCH/VEM, 9 October 2006.
82 See, most recently, *Kurt v. Austria* [GC] (n 7) para. 175.
83 Ebert and Sijniensky (n 57) 358–359.
84 UNGA, 'Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences' (16 May 2012) UN Doc A/HRC/20/16/Add., para. 31.

right to life.[85] The authorities had remained inactive regarding a domestic violence situation, thereby 'creating a situation of impunity conducive to the recurrence of [domestic violence].'[86] The Court placed particular value on the series of violent acts which constitute, and the particular context of, domestic violence.[87] The Grand Chamber confirmed this in *Kurt v. Austria*, where it considered 'an increase in frequency, intensity and danger over time' as characteristics of domestic violence.[88] The Latin American Model Protocol lays down that femicidal violence is 'continuous and sustained over time.'[89] In the same vein, the IACtHR recognized in *López Soto* that a reported abduction automatically poses a real and immediate risk.[90] As human rights violations that are committed over time and may leave lifelong wounds, acts of femicide inevitably constitute a real and immediate risk to the victims' rights.

Crucially, femicide cases may target a victim's next of kin, such as their parents, children, and other loved ones in order to harm the woman. In this sense, those close to the targeted woman must be protected from recurring risks. For example, the CEDAW Committee found that a child was killed '[in a] context of domestic violence which continued for several years.'[91] The ECtHR's landmark case on domestic violence, *Opuz v. Tukey*, also concerned violence committed not only against the applicant herself, but also against her mother who was eventually killed by the perpetrator.[92] Therefore, the risk assessments in femicide must consider the recurring dynamics of violence in their social contexts.

To make it more responsive to harm to women and girls, Judge Pinto de Albuquerque of the ECtHR has proposed that the *Osman* test be amended, and the immediacy requirement expanded to include ongoing risks.[93] Albuquerque's 'present (but not yet imminent)' risk standard conveys the message that, since they are merely present, such risks are less serious than other non-state actor committed violence, and less urgent as a result. However, acts of femicide are

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85 *Talpis v. Italy* (n 4) paras 107–108.

86 Ibid., para. 117.

87 Ibid., para. 122.

88 *Kurt v. Austria* [GC] (n 7) para. 175.

89 UN Entity for Gender Equality and the Empowerment of Women, Latin American Model Protocol for the Investigation of Gender-related Killings of Women (Femicide/Feminicide) (2004), paras 132, 238 and 248.

90 *Cotton Field* (n 53) para. 283; *Veliz Franco v. Guatemala* (n 53) paras 148–149.

91 *Angela Gonzalez Carreño v. Spain*, Communication No 47/2012, CEDAW/C/58/D/47/2012, 16 July 2014, para. 9.2.

92 *Opuz v. Turkey* (n 5) para. 153.

93 Judge Albuquerque's Dissent in ECtHR, *Valiulienė v. Lithuania*, App No 33234/07 (26 March 2013).

severe enough to meet the real and immediate risk standard by themselves.[94] The Court seemed to have accepted this in *Kurt v. Austria*, where it confirmed that domestic violence constitutes a continuous risk.[95] The recognition of recurring harm as meeting the *Osman* test represents the first step in attributing state responsibility for structural risks.

Continuous risks of domestic violence can be discerned based on standardized risk assessment tools, which flag lethal and non-violent risks for victims, as brought to the fore by *Kurt*. The following indicators point to high risks of lethal violence: separation/break-ups, previous violence, psychological problems of the perpetrator, prior restrictive measures, addictions, unemployment, threats to abduct or kill children and/or the victim, sexual violence, access to firearms and suicide threats.[96] A reinterpreted *Osman* test should require States to rely on standardized tools, including the Spousal Assault Risk Assessment (SARA) and the Dynamic Risk Analysis System (DyRiAs), which are scientifically developed and designed for persons dealing with domestic violence risk assessments, to delimit and prevent continuous risks in domestic violence.[97] These tools can also counter implicit bias on the part of domestic authorities in domestic violence cases, and would ensure that family members, often targeted in femicide, as well as socio-economic and cultural factors would be included. For other acts of femicide, such as honor-based killings, forced marriage and FGM, similar scientifically researched standards exist, and should be applied and invoked by human rights bodies for a full understanding and prevention of these recurring risks.[98]

State Contribution

The threshold for the real and immediate risk should be lowered when States contribute to the risk of femicide. Manjoo shed light on Moldova's contribution to the risk: '[D]omestic violence in particular is widespread, largely condoned by society and does not receive appropriate recognition among officials, society, and women themselves, thus resulting in insufficient pro-

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[94] See Abramovich (n 33).

[95] *Kurt v. Austria* [GC] (n 7) para. 175; See ECtHR, *Volodina v. Russia* (n 56) para. 86.

[96] See GREVIO's third-party submission in *Kurt v. Austria* [GC], ibid. paras 140 and 167.

[97] See Dyrias, https://www.dyrias.com/en/module/intimate-partners.htm; SARA, Spousal Risk Assessment Guide, https://downloads.mhs.com/saRA/SARA_TechBrochure.pdf. All online sources were accessed 30 October 2021.

[98] See, e.g., Dundee and Angus Multi-Agency Protocol for Forced Marriage, http://www.avaw.org.uk/ForcedMarriageProtocol.pdf, 25–30.

tective infrastructure for victims of violence.'[99] Hence, the State's neglect of violence expressed through impunity amplifies violence against women and creates the immediate risk for the female social group to be subjected to violence.[100] Relatedly, state leaders endorsing a sexist climate where VAWG is socially acceptable, may also contribute to the risk situation. Filipino President Duterte is infamous for his sexist remarks on rape and sexually harassing women. Duterte is said to have ordered soldiers to mutilate female guerrillas, has boasted of sexual assault of a housekeeper, forced a woman to kiss him in public, and stated that 'rape was inevitable as long as there were beautiful women.'[101] In the IACtHR's *Atenco* case, high state officials publicly asserted that female protestors had engaged in indecent behavior and that claims that they suffered sexual violence were untrue, even before the State authorities had investigated the facts.[102] Such misogynist political cultures, normalized or endorsed by state leaders, may contribute to the widespread risk situation.[103]

State Awareness

The *Osman* test requires that States are aware about a risk situation for state responsibility to arise. This means that victims or their family members must report that they are about to be killed to create state knowledge about the dangerous situation. However, in a context of systemic violence, the onus should not be on the victim to report such violence.[104] Cultural practices, such as FGM, may be implicitly endorsed by the judicial system, which remains indifferent to, or fails to address harm against women and girls. Analogously, where the State is unwilling or unable to grant protection, an asylum seeker cannot be expected to seek said protection.[105] A girl who suspects that she will

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[99] UNGA, 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences' (8 May 2009) UN Doc A/HRC/11/6/Add.4 [hereinafter Etürk Report 2009], 18.

[100] See ibid., 67.

[101] Jason Gutierrez, '"Duterte" infamous for his sexist jokes signs law against sexual harassment' *New York Times* (16 July 2019), www.nytimes.com/2019/07/16/world/asia/duterte-sexual-harassment.html.

[102] *Women Victims of Sexual Torture in Atenco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 371 (20 November 2018), para. 73.

[103] See Daniela Bandelli, *Feminicide, Gender and Violence: Discourses and Counterdiscourses in Italy* (Palgrave Macmillan 2017) 65–69.

[104] *Cotton Field* (n 53) para. 279; *Velásquez Paiz v. Guatemala* (n 75) para. 111. *Veliz Franco* remains ambiguous about the States' knowledge of the risk situation, but appears to imply such knowledge. *Veliz Franco v. Guatemala* (n 53) para. 135.

[105] Martina Caroni et al., *Migrationsrecht*, 4th edition (Stämpfli 2018) 449–450.

be subjected to forced marriage, in an area where such marriages are prevalent, may not ask the police for help because she reasonably suspects or knows that the police will not protect her. Considering that the justice system is unlikely to respond to their claims, and may even make a situation worse, women and girls may be reluctant to appeal for assistance in structural contexts of violence.[106] As the IACtHR has held, women and girls may have a 'persistent mistrust in the system for the administration of justice,' knowing that authorities regularly fail to respond to crimes against female members of society.[107]

Currently, under the *Osman* test, a State's responsibility would not be engaged for acid attacks in the streets, such as those committed by strangers and husbands, in the absence of an individual threat.[108] Accordingly, in *Ebcin v. Turkey* and *Tershana v. Albania*, the ECtHR did not consider States responsible for the substantive aspect of Article 3 ECHR in an acid attack committed by unidentified individuals.[109] Ms Ebcin had not filed a complaint about an imminent threat or possible intimidation of which the authorities should have had knowledge which would have allowed them to take action.[110] The ECtHR noted that Turkey therefore could not have known that she would be attacked, despite the applicant's attempt to adduce statistics on the prevalence of acid attacks in south-east Turkey.[111] Without having been subjected to a specific threat prior to her ending of her relationship, Alba Chiara could not have alerted the authorities about an imminent risk to her life.[112]

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[106] Etürk Report 2009 (n 99) 20.

[107] *Miguel Castro-Castro Prison v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 160 (25 November 2006), para. 280.

[108] Saeed Kamali Deghan, 'Acid Attacks in Isfahan have nothing to do with the Hijab, say Iranian Officials' *The Guardian* (20 October 2014), https://www.theguardian.com/world/iran-blog/2014/oct/20/acid-attacks-isfahan-hijab-iran-young-women-motorbikes; Human Rights Watch, 'What Hell Feels Like, Acid Attacks in Cambodia' (4 February 2019), www.hrw.org/report/2019/02/04/what-hell-feels/acid-violence-cambodia.

[109] The ECtHR found procedural violations of Articles 3 and 8 ECHR, since the criminal and administrative investigations into the acid attacks were lengthy. ECtHR, *Ebcin v. Turkey*, App No 19506/05 (11 May 2001), para. 55.

[110] *Ebcin v. Turkey*, ibid., paras 45–47. See also *Tershana v. Albania*, paras 153–162.

[111] *Ebcin v. Turkey*, ibid.

[112] Valentina Avon, 'Femminicidio, si dimette sindaco di un paese in Trentino: impossibile ricordare la vittima' *Repubblica* (24 May 2018), www.repubblica.it/cronaca/2018/05/24/news/sindaco_tenno_trentino_femminicidio-197246726/; Dafne Roat, '"Voglio suicidarmi": lei accorre ma il fidanzato le spara e si uccide' *Il Corriere della Sera* (31 July 2017), www.corriere.it/cronache/17_luglio_31/trento-colpi-pistola-casa-trovati-due-giovani-morti-436fccb0-75fd-11e7-bcc9-f72f41c1edd8.shtml?refresh_ce-cp; Margherita Bettoni, 'Liebe mich oder Stirb' (2019) 45 *Reportagen* 18–37.

Even without police reports, States would generally be aware of group-related risks against the female social group. In this sense, in *Velásquez Rodríguez*, the IACtHR was satisfied that general knowledge of patterns of human rights violations was enough to hold Honduras responsible for Mr Velásquez Rodríguez's disappearance, even though he had not previously denounced any threats.[113] Abramovich reasons that the existence of VAWG occurring over an extensive time period and according to a pattern, 'make[s] it impossible for the State not to know [about widespread VAWG].'[114] The argument could naturally be made that States in contemporary society know about the historical inequality underpinning violence against women and girls and the risks associated with being female. Such an extensive approach to state responsibility would arguably be excessively far-reaching and disproportionate. The affected female group could instead be identified through various demographic and ethnographic criteria.

Structural violence against an identifiable female social group could be revealed by a States' own statistical evidence. Having ratified CEDAW, a State would be required to undertake some form of data collection under Article 18 CEDAW and produce reports on their compliance with CEDAW.[115] Similarly, in the inter-American context, Article 8(h) Belém do Pará Convention directs States to gather statistics and perform research 'relating to the causes, consequences and frequency of violence against women.'[116] NGOs' 'shadow reports,' providing an alternative account of the States' human rights compliance, would make the State aware of prevalent women's rights violations. Based on Article 8 Optional Protocol to CEDAW, the CEDAW Committee can also undertake missions where serious human rights violations are alleged and issue an informative report on the situation, such as its report about the femicide in Ciudad Juarez.[117] The Committee's pronouncements on the States' human rights compliance would ensure that a State knows about patterns of VAWG in its territory. The IACtHR considered that Guatemala was aware of the widespread gender-based violence against the female social group on account of a state official having written a report about the situation in

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[113] *Velásquez Rodríguez v. Honduras* (n 1) paras 174(c) and 188.

[114] Abramovich (n 33) 174.

[115] Art. 18(2) CEDAW.

[116] Art. 8(h) Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará Convention) (adopted 9 June 1994, entered into force 3 May 1995).

[117] Art. 8 CEDAW. Committee on the Elimination of Discrimination Against Women (CEDAW), Report on Mexico under Article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, UN Doc CEDAW/C/2005/O 8/MEXICO, 27 January 2005.

Guatemala City and Escuintla.[118] In complying with their international obligations, States should even try to discover whether any widespread structural violence occurs which targets a segment of their female population.[119] Should States not systematically register cases on the nature and extent of femicide, should women be reluctant to report violence, and/or should the States' statistics fail to differentiate between violence which is gender-based and other violent acts, reputable national or international NGOs and news outlets could draw up reports to make States aware about the situation.[120] Considering the many reports available in situations of extreme violence against women and girls, human rights bodies should be able to establish the extent of state awareness.

Preventive Measures

In September 2019, France's Prime Minister, Edouard Philippe, formally recognized that France has a femicide problem, thereby signaling the State's awareness that women and girls are at great risk of being harmed or killed.[121] Does that mean that France bears international responsibility for the hundreds of women who are killed under its jurisdiction? The *Osman* test's response to this question is that States which take adequate preventive measures to address the risk, can no longer be blamed and relinquish their international responsibility for femicide.[122] The Prime Minister also announced that France would implement new policies to address the issue of femicide. Among the French emergency measures are the establishment of 1,000 shelters for women, an 'audit of 400 police stations to see how women's complaints are handled,' and the pledge to budget five million euros to tackle the issue of femicide.[123] Are France's efforts to alleviate the dangerous situation sufficient to satisfy its obligations under the *Osman* test? And how comprehensive must these measures be for a State to comply with its obligations to eliminate femicide? Finally, what if a State does not have enough financial or other resources to address femicide? There are a few avenues States might explore, with the caveat that the issue of preventive measures requires further exploration.

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[118] *Velasquez Paiz v. Guatemala* (n 75) para. 111.

[119] See Abramovich (n 33) 174.

[120] Similarly, in *Velásquez Rodríguez* (n 1) paras 38 and 106, the Court was satisfied that NGO reports (by Amnesty International) testified to the practice of enforced disappearance between 1981 and 1984 in Honduras.

[121] AEP, 'France Announces Anti-feminicide Measures as 100th killing recorded' *BBC* (3 September 2019), https://www.bbc.com/news/world-europe-49571327.

[122] *Osman v. UK* (n 1) para. 116.

[123] AEP (n 121).

The *Osman* test provides vague directions about the scope of preventive measures, mandating that States take measures to comply with their international obligations 'within the scope of their powers […] reasonably judged.'[124] The ECtHR usually requires 'effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression, and punishment of breaches of such provisions.'[125] The Court focuses on the existence of an adequate legal framework, as well as specific measures designed to protect individuals against infringements of their human rights, such as standardized risk assessment tools.[126] The IACtHR remains deliberately vague as preventive measures may vary depending on specific situations,[127] but did specify that States should adopt measures on 'juridical, political, administrative and cultural' levels.[128] A holistic response is required but the States are given the flexibility to design their own preventive measures.[129] The adoption of preventive measures can be challenging for States as provisions on such measures, mostly relating to discrimination as opposed to violence, are scattered throughout treaties and case law.

Having identified the main preventive measures, I divide the minimum measures States ought to take to prevent femicide into three categories: (1) legislative measures; (2) policy measures; and (3) budgetary measures.[130] The proper design of the most adequate measures to prevent femicide is an area which merits further research. Questions remain open regarding the timing and extent of the measures which States must take to combat femicide. Is it enough for a State to enact a single law tackling domestic violence, instead of a generalized legal framework? At what point in time must States take preventive measures? Are they required to recognize risks of violence against women when they begin to develop, and before they materialize in individual cases?

The *Osman* test requires state measures which can be 'judged reasonably' to mitigate the risk situation. What is reasonable could be determined in line with states' duty to investigate human rights violations, which is 'an obligation of means and not of results.'[131] However, such state efforts should be conducted

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[124] *Osman v. UK* (n 1) para. 116. See General Recommendation No 28, para. 13.

[125] *Osman v. UK*, ibid., para. 115.

[126] See *Kurt v. Austria* [GC] (n 7) para. 172.

[127] *Velásquez Rodríguez v. Honduras* (n 1) para. 175.

[128] *Veliz Franco v. Guatemala* (n 53) para. 135. See also *Velásquez Rodríguez*, ibid., para. 175.

[129] *Velásquez Rodríguez*, ibid.

[130] See along similar lines, Rashida Manjoo, 'The Continuum of Violence Against Women and the Challenges of Effective Redress' (2012) 1(1) *International Human Rights Law Review* 1–29 at 25.

[131] *Veliz Franco v. Guatemala* (n 53) para. 183.

'in a serious manner and not as a mere formality preordained to be ineffective' and thus be well-intentioned and painstakingly designed to diminish the risk.[132] Should States have taken legal, policy, and budgetary measures, well designed to reduce a risk situation, responsibility for contextual (not necessarily individual violence) may subside immediately—even if the high-risk situation persists in the short term.[133] From the moment that domestic authorities and reputable NGOs disseminate statistics and reports on the prevalence of femicide, States can put their preventive campaign in motion. This implies that state responsibility for widespread violence—not requiring reports of previous threats—is triggered only when the risk relating to systemic violence against the female social group has already materialized. In other words, violence must have reached the required threshold of severity to engage State responsibility—i.e., the violence has risen to the level of torture. Moreover, for NGO reports to be published, and statistics to be available, the violence usually will have taken place over a substantial time period. While the State response may come relatively late, States must take legal, budgetary, and policy measures to eradicate femicide at its source. Even so, it is in the States' interest to curb developing violence at as early a stage as possible to avoid its international responsibility for individual abductions and domestic violence in the future.

Other challenges include States which claim to be unable, or which are openly unwilling, to address femicide. Concepts of unwilling and unable States also exist in international humanitarian law (IHL) and international refugee law. IHL, which requires States to either provide humanitarian assistance themselves or allow international organizations to help, may inspire the determination of the conditions for when States should seek international assistance if they cannot discharge their obligation to prevent violence.[134] Asylum law distinguishes between unwilling and unable States, whose law enforcement and judicial systems either are unavailable to the persecuted person or fail to properly protect the person.[135] An unable State may claim to have insufficient resources to combat femicide because of external factors, such as armed conflict or natural disasters. Before it can relinquish state responsibility, the State must take every measure at its disposal to address femicide.[136] Many States should be able to cost-effectively enact relevant laws criminalizing violence

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[132] *Velásquez Rodríguezs* (n 1) para. 177; *Veliz Franco v. Guatemala*, ibid.
[133] See Abramovich (n 33) 174.
[134] Arts 17, 23, 38 and 59 Geneva Convention IV. See also Rule 55 CIL IHL.
[135] Caroni et al. (n 105) 449.
[136] See Statement of the CESCR, An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' Under an Optional Protocol to the Covenant, UN Doc E/C.12/2007/1 (2007), para. 4.

at the domestic level.[137] To save costs in designing preventive policies, States may cooperate with relevant NGOs and make a request for international assistance to protect a female social group from femicide.[138] Such international financial assistance is likely available, as some economically stable States list the elimination of gender-based violence as a top priority on their foreign policy agendas—Sweden pursues a feminist foreign policy and sponsors NGOs working on gender issues.[139] States could also approach UN agencies and/or NGOs familiar with the country's cultural and legal context to help address femicide.[140] Accordingly, States ought to have attempted to take an array of measures before claiming an inability to address femicide.

An unwilling State which facilitates gender-based violence or remains inactive because it does not perceive structural violence against women and girls as a priority, must be held responsible for femicide without exception. After Russia decriminalized domestic violence in 2017, perpetrators could hit their wives with impunity, as a result of which domestic violence rates reportedly steeply increased.[141] Despite the CEDAW Committee's *O.G. Case* and the ECtHR's *Volodina v. Russia Judgment*, Russia refuses to change its legislation.[142] Such overt unwillingness engages state responsibility.[143]

Legal framework

The international human rights law framework, including regional women's rights treaties, requires States to adopt criminal law and other measures in the family and private sphere that punish perpetrators of femicide.[144] For example,

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[137] Abramovich (n 33) 174.

[138] General Recommendation No 28, para. 29.

[139] Government Offices of Sweden, 'Ministry of Foreign Affairs, Handbook, Sweden's Feminist Foreign Policy', 73 and 87, https://www.government.se/492c36/contentassets/fc115607a4ad4bca913cd8d11c2339dc/handbook---swedens-feminist-foreign-policy---english.pdf.

[140] Ibid.

[141] Human Rights Watch, 'I could kill you and no one would stop me!' (25 October 2018), www.hrw.org/report/2018/10/25/i-could-kill-you-and-no-one-would-stop-me/weak-state-response-domestic-violence.

[142] See Andrew Higgins, 'Russia's Police Tolerate Domestic Violence. Where Can Its Victims Turn?' *New York Times* (11 July 2019), www.nytimes.com/2019/07/11/world/europe/russia-domestic-violence-european-court-of-human-rights.html.

[143] *Volodina v. Russia* (n 56) para. 85.

[144] Art. 7(c), (e) and (h) Belém do Pará Convention; Art. 18(3) Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (adopted 7 April 2011, entered into force 1 August 2014); Art. 4(b) Additional Protocol to African Charter on Human and Peoples' Rights (Maputo Protocol) (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

the Declaration on the Elimination of Violence Against Women (DEVAW) stipulates that States should 'develop penal, civil, labor and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence.'[145] Manjoo considers that these legislative measures also require States to adopt constitutional provisions on gender equality.[146] While it is evident that States must become active on the legislative front, questions remain about the scope of these measures. A broad interpretation was used by the ECtHR in the context of domestic violence, where it held that 'the Court needs to be satisfied, from an overall point of view, that the legal framework was adequate to afford protection against acts of violence by private individuals in any given case.'[147] For States to merely criminalize violence against women and girls, such as rape, or even femicide, is insufficient. Certain acts of femicide, such as rapes and domestic criminal definitions of killings as acts of femicide, must be defined appropriately to cover gendered harm, which would allow States to collect data and monitor such extreme violence. Concerning killings as acts of femicide, this would require paying careful attention to how criminal law can identify gendered murders, e.g., through so-called overkilling characterized by extreme violence[148] As regards rape, non-consent—not physical resistance—should be the key element of rape.[149] The Istanbul Convention requires States to criminalize rape and mandates that '[c]onsent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances,' thus incorporating the International Criminal Tribunal for the former Yugoslavia (ICTY)'s *Kunarac* standard on rape.[150] While CEDAW itself does not define rape, in *Vertido*, the CEDAW Committee recommended that the Philippines ensure that lack of consent is the defining element of rape.[151] Coercive contexts must be adequately considered in domestic legal provisions on sexual violence and other acts of femicide, since a victim cannot consent to sexual intercourse in situations of widespread violence.

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[145] Art. 4(c) and (d) DEVAW. ECtHR, *M.C. v. Bulgaria*, App No 39272/98 (4 December 2003), paras 150–153.

[146] Manjoo (n 130) 18.

[147] *Kurt v. Austria* [GC] (n 7) para. 179.

[148] See also on the need to define femicide domestically and to gather statistics, European Institute for Gender Equality, 'Measuring Femicide in the EU and Internationally: An Assessment' (2021), https://eige.europa.eu/publications/measuring-femicide-eu-and-internationally-assessment.

[149] ECtHR, *Z. v. Bulgaria*, App No 39257/17 (28 May 2020) para. 67.

[150] Art. 36 Istanbul Convention. *Prosecutor v. Kunarac et al.* (Judgment) ICTY-96-23 and 23/1 (11 February 2001), paras 645–646.

[151] *Vertido v. the Philippines*, Communication No 18/2008, CEDAW/C/46/D/18/2008, 16 July 2010 para. 8.9.b.

Besides rape, States must also criminalize FGM and forced marriage under the Istanbul Convention[152] and the Maputo Protocol.[153] The Belém do Pará Convention identifies specific forms of violence—i.e., rape, sexual abuse, torture, trafficking in persons, forced prostitution, and abduction—but remains silent on States' obligations to criminalize them.[154] It is thus clear whether the State complied with this duty to enact the necessary criminal law framework. An example is Russia's recent decriminalization of domestic violence, contrary to Russia's obligations under CEDAW, which the State had ratified in 1981.[155] Manjoo even claims that states' failure to ratify a regional women's rights treaty or CEDAW constitutes a breach of its preventive legislative obligations.[156] Her contention must be relativized as States cannot be legally forced to ratify treaties. However, to the extent that gender-based violence is part of CIL, States must combat such violence regardless of prior treaty ratification.[157] Should a State have ratified the relevant treaty, it must align its domestic laws with the relevant treaty provisions.[158]

Moreover, the relevant legal framework might closely relate to the risk at issue. For example, in a domestic violence case, it is crucial that domestic laws provide for protection orders that extend to children's schools. This was consequential in *Kurt v. Austria*, where the domestic framework did not provide for barring orders to automatically extend to schools, and which the Grand Chamber regrettably failed to consider as insufficient—thereby neglecting the nature of acts of femicide.[159]

However, the existence of a legal framework is not enough to prevent femicide. For example, France's failure to implement laws to protect women would normally trigger its responsibility.[160] The ECtHR decided in an (arguably outlier) case, that Italy had implemented its legal framework and the

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[152] See for the definition of FGM, Art. 38(a) Istanbul Convention.

[153] Arts 5(b) and 6(a) Maputo Protocol; Arts 37–38 Istanbul Convention.

[154] Arts 1(b) and 7(b) Belém do Pará Convention.

[155] See on ratifications of CEDAW, UN Treaty Collection, Convention on the Elimination of All Forms of Discrimination against Women, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en.

[156] Rashida Manjoo, 'State Responsibility to Act with Due Diligence in the Elimination of Violence against Women' (2013) 2(2) *International Human Rights Law Review* 240–265 at 243.

[157] CEDAW General Recommendation No 35 considers gender-based violence to be CIL. However, States still condone acts of FGM and etcetera, which would mean that gender-based violence has yet to become CIL.

[158] Manjoo (n 156) 243.

[159] *Kurt v. Austria* [GC] (n 7) paras 88 and 209–210.

[160] See Monique El-Faizy, 'A Woman is killed by her Partner or Ex every three days in France. Activists want change' *Los Angeles Times* (22 October 2021), https://www.latimes.com/world-nation/story/2021-10-22/france-women-killed-by-partners-exes.

police had acted speedily, thus Italian authorities had adequately responded to a domestic violence claim.[161] The Court should not have limited its analysis to the existence of a legal framework, but examined whether Italy had taken other preventive measures, such as policy measures, to optimally address the underpinning culture fueling acts of femicide.

Policy measures

Policy measures should attempt to neutralize sexist and patriarchal societal contexts.[162] Article 2 CEDAW mandates that States 'pursue a policy to end discrimination,' and Article 5(a) CEDAW obligates States to:

> modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices, and customary and all other practices, which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for men and women.[163]

Similarly, the three regional human rights treaties relevant to VAWG require States to address social and cultural patterns through educational measures, including teaching materials on the equality between women and men.[164] The Istanbul Convention and the Maputo Protocol consider the cultural context of violence to be rooted in discrimination; the Belém do Pará Convention explicitly recognizes that the cultural context 'legitimize[s] or exacerbate[s] violence against women.'[165]

Another theme which policy measures can address, is the disregard with which law enforcement and the judiciary treat reports about crimes against women. To combat impunity, States should adopt a gender perspective in designing policy measures relating to the investigation of crimes against women.[166] The Istanbul Convention speaks of 'gender sensitive policies,' required to 'implement policies of equality between women and men.'[167] Under the 'right to sustainable development,' the Maputo Protocol obliges States to include a gender perspective in national development plans.[168] The Belém do

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[161] ECtHR, *Rumor v. Italy,* App No 72964/1024 (May 2014), paras 64 and 76.

[162] Manjoo (n 130) 17.

[163] Art. 5(a) CEDAW; General Recommendation No 28, para. 9.

[164] Art. 1(2) Maputo Protocol; Art. 8 Belém do Pará Convention; Arts 12 and 14 Istanbul Convention.

[165] Art. 8(b) Belém do Pará Convention.

[166] *Dos Erres Massacre v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 211 (24 November 2009), para. 141. See Concurring opinion Judge Ramón Cadena Rámila.

[167] Art. 6 Istanbul Convention.

[168] Arts 1(c) and 9(a) Maputo Protocol.

Pará Convention does not discuss the gender perspective, but the IACtHR has put forward criteria for investigations into potentially gender-based acts, such as the consideration of sexual violence and the ways women and girls were killed.[169] A gender perspective also means that States train police officers and judges to effectively identify and respond to acts of VAWG.[170] Similarly, the dynamics of gender-based violence must be borne in mind at all times. For example, coordination between different agencies, such as child protection authorities, the police, the health care, educational facilities and social workers are crucial to prevent domestic violence.[171] Overall, States have considerable flexibility in designing their own policies and programs to prevent VAWG.[172] While domestic authorities may be best placed to assess what policy measures are effective in their territory, this national discretion may overwhelm States without the financial means to design their own policy measures.

Budgetary measures

Financial means are indispensable to effectuate legal and policy change. Underfunded agencies and programs combatting VAWG may be ineffective.[173] A potential tool to ensure that legal and policy measures are undertaken in a serious manner, is gender budgeting, which considers 'the manner in which governments' revenues and expenditures affect "women and men, girls and boys."'[174] The term gender budgeting can also be understood to refer to the feminist method, the woman question: what is the impact of the State's financial plan on issues mainly affecting the female social group?[175] Once femicide as an issue concerning women and girls is reflected in States' budgets, resources may be allocated towards the protection of the female social group.[176]

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[169] See among others, *Velásquez Paiz v. Guatemala* (n 75) para. 196. *Dos Erres Massacre v. Guatemala* (n 166) para. 141; *Gladys Espinoza Gonzáles v. Peru*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights Series C No 289 (20 November 2014), para. 281; *Cotton Field* (n 53) para. 455.

[170] Art. 8(c) Belém do Pará; 8(d) Maputo Protocol; Art. 15 Istanbul Convention.

[171] *Kurt v. Austria* [GC] (n 7) paras 177–180.

[172] *Volodina v. Russia* (n 56) para. 79; *Mudric v. Moldova*, App No 74839/10 (16 July 2013), para. 48; *Kurt v. Austria* [GC] (n 7) para. 182.

[173] Manjoo (n 130) 18.

[174] Ashwanee Budoo, 'Gender Budgeting as a Means to Implement the Maputo Protocol's Obligations to Provide Budgetary Resources to Realise Women's Human Rights in Africa' (2016) 9(3) *African Journal of Legal Studies* 199–219 at 208.

[175] Katharine Bartlett, 'Feminist Legal Methods' (1990) 104(4) *Harvard Law Review* 828–888 at 837 and 852.

[176] Budoo (n 174) 215.

Financial resources must be allocated to the prevention of gender-based violence under regional VAWG treaties. Under Article 4(i) Maputo Protocol, States should establish 'adequate budgetary and other resources for the implementation and monitoring of actions aimed at preventing and eradicating violence against women.' More specifically, Article 10(3) Maputo Protocol mandates that States 'take the necessary measures to reduce military expenditure significantly in favour of spending on social development in general, and the promotion of women in particular.' Particularly vocal on economic measures to combat violence against women and girls, the Protocol also clarifies in Article 26 that States must take budgetary measures to address every right enshrined in the Convention. Article 8 Istanbul Convention specifically asks States to 'allocate appropriate financial and human resources for the adequate implementation of integrated policies, measures, and programmes to prevent and combat all forms of violence.'[177] The Belém do Pará Convention does not expressly mention budgetary measures, yet its educational and awareness-raising measures as well as its specialized services for victims inevitably require a sufficient budget.[178] The amount required to combat femicide is case-specific and depends on the policy and legal measures enacted. Femicide may also compete with other pressing issues, such as climate and other disasters as well as pandemics. Further studies are needed to investigate how States could prioritize their resources in such circumstances and whether state responsibility would be engaged if a State's good faith budget does not achieve the end objective.

CONCLUDING REMARKS

Does state responsibility extend to femicide? Most acts of femicide (FGM, forced marriage, rape, and others) are committed by non-state actors. Across the world, family members, (ex-)partners, terrorist organizations, and private militia harass, rape, sell, and kill members of the female social group. Although international law has traditionally closed its eyes to these acts, States are directly responsible under international law when they remain passive in such cases. The *Osman* test limits state responsibility to situations where the State had been aware about a risk situation for women and girls, and failed to take preventive measures to address that risk. The argument that the risk in femicide is 'real and immediate' is far from implausible since acts of femicide are serious and continuous on the one hand, and widespread and group-related on the other hand. The real and immediate threshold should be low because

[177] Art. 8 Istanbul Convention.
[178] E.g., Art. 8 Belém do Pará Convention.

States contribute to the risk situation in femicide by either failing to prevent and punish crimes against women or creating a socio-political climate where violence against the female social group is normalized. Furthermore, state awareness can be triggered based on official statistics as well as NGOs' reports which show that an identifiable female social group is being targeted.[179] Such a reinterpretation of the *Osman* test entails the critical consequence that victims or their family members would no longer be required to report that they are individually at risk. Furthermore, the respective State would be required to adopt adequate legal, policy, and budgetary measures to prevent femicide.

This reinterpretation of the *Osman* standard for widespread risks could easily be adopted by human rights bodies. To ensure that States do not merely pay lip service to their international obligations, human rights bodies should inquire whether States have adopted immediate measures designed to mitigate the risk situation, and if necessary, whether they sought international assistance.[180] As such, state responsibility could be established through human rights bodies exposing a crime to be part of a larger pattern of widespread violence against the female social group. This would cover the specific ways in which women and girls are victimized in femicide, namely without previous threats, as part of a historically marginalized and discriminated group. Finally, the proposed approach to *Osman* could serve advocates, survivors, and family members in their search for justice.

[179] See on the need to gather data on femicide: European Institute for Gender Equality, 'Measuring Femicide in the EU and Internationally: An Assessment' (2021), 30 https://eige.europa.eu/publications/measuring-femicide-eu-and-internationally-assessment.

[180] See General Recommendation No 28, para. 29.

CONCLUSION TO PART III

The proposed human rights-centred concept of femicide combines a doctrinal analysis of select cases with feminist legal theory. I have taken human rights bodies' and scholars' most daring thoughts about feminism and the law to propose this concept. Femicide should be conceptualized in human rights law for many reasons. For one, the social and historical phenomenon of femicide continues unabashed. The term femicide 'denote[s] an old practice in its modern development,' as Lemkin mentioned with respect to genocide.[1] The analysis in this book has revealed that femicide consists of widespread and serious violence which targets a female social group on the basis of their gender, in order to objectify, humiliate, and/or instil fear in women and girls, ultimately placing them in a subordinate social status, where such violence remains unpunished by the State. Femicide has four main aspects: (1) the human rights violations in femicide are widespread and gender-based; (2) they rise to the level of torture and/or killings; (3) they concern the female social group; (4) state authorities fail to react to femicide, creating impunity.

The proposed femicide concept resembles the crime of genocide in terms of its group-related goal and draws on crimes against humanity as regards the kinds of femicidal violence. Femicide consists of many gender-based acts, such as forced marriage, sexual slavery, and rape. These underlying acts form a widespread context, created by state impunity for crimes against women and girls. Consequently, this element is crucial in establishing state responsibility for femicide. The female social group is the exclusive victim of femicide. This social group is not static, but rather a malleable unit greatly influenced by criteria such as race, ethnicity, nationality, sexual orientation, geography, and other factors. Men and boys are likely to benefit from the aim of femicide, the social subordination of the female social group, but women and girls can commit sex-selective killings and FGM as well. The aim of femicide, the subordination of women and girls to a social status where their lives and/or physical and mental integrity are considered worthless, is achieved via objectifying, humiliating and/or inflicting fear in the female social group. The violence in femicide

[1] See Raphael Lemkin, *Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposals for Redress* (Rumford Press 1944) 79.

is used to ensure that women and girls remain in their socially assigned role. The social context—i.e., post-conflict violence, economic harm, sexist political climates, and armed conflict—may contribute to misogynist violence, which serves to keep the existing power (im)balance intact.

My second finding is that femicide falls within the bounds of international law. To clarify that States are indeed responsible for acts of femicide, even if the acts are committed by non-state actors, the *Osman* test can be reinterpreted to encompass structural, group-related risks, affecting female social groups. I reinterpret the *Osman* test in such a way that the risk in femicide would always be real and immediate as femicide is (1) an ongoing human rights violation and (2) a widespread human rights violation. As a State contributes to the structural risk in cases of femicide, at least by failing to stop such violence, it should be held responsible. States may relinquish this responsibility by taking preventive legal, policy, and budgetary measures. Adequate legal measures criminalize violence and include a consent-based rape definition which takes account of coercive circumstances. The sexist culture underlying femicide can be dismantled by policy measures. Finally, financial means must be made available to prevent femicide. Only after they have tried to neutralize the risk situation, States may claim inability to address femicide.

This work has demonstrated that the international community ought to urgently and adequately respond to femicide to protect the lives and social existence of women and girls as equal human beings to men and boys. The book should be seen as a resource for States and human rights bodies to address, prevent and potentially adjudicate femicide. Finally, through this research, I hope to have made a contribution to the protection of women and girls worldwide.

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