

“Femicide: thorough
approach to its criminal
and international
protection”

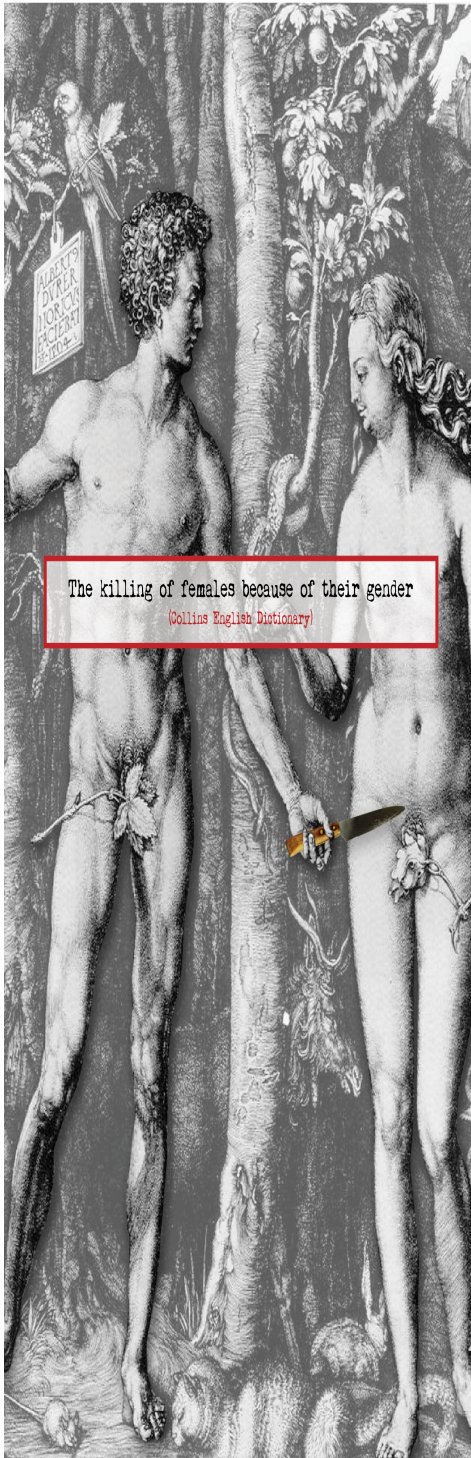
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The killing of females because of their gender
(Collins English Dictionary)

www.femicidio.net

*To my mother, to all the women:
never let anyone make you believe you are not worth, you
are all, always and unconditionally, worth.*

*Today another woman has been killed
and now another daughter cries,
a mother cries,
and another woman trembles
remembering the last beating,
because she could be next.*

*And all this happens in a country that is silent.
And if I know something about silence
is that it hurts as much as a blow;
and if I know something about a woman
is that I want her alive,
I want her dancing,
I want her.*

*Another woman has been killed
and his death hurts in my guts,
because it is a defeat for all
when a warrior flower
falls on the battlefield
having always been
so brave.*

*Translation of the poem in the book "Ahora que ya
bailas" of Miguel Gane.*

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I. INTRODUCTION

Worldwide, between 113 and 200 million women¹ disappear every year and between one and a half and three million women and girls lose their lives as a result of violence. As we all know, Violence Against Women comprises a wide range of acts, both physical and psychological. At the far end of this phenomenon is femicide: the murder of a woman². However, this concept implies much more than the mere murder of a woman, it has to do with the condition of woman itself.

Femicides take place in every country of the world, every day. However, the greatest concern related to this crime is that these murders continue to be accepted, tolerated or justified, enjoying impunity. Despite the real difficulties, my faith in a future effective international protection for women is based on the conviction that few issues are as important today in our societies –including the international one– as giving women the leadership and attention they deserve.

Some theorists defend that the inclusion of this separate criminal offence is useless and unnecessary. In the present work this issue will be addressed theoretically and legally in order to justify the proposal of the inclusion of the crime of “femicide” internationally and within the scope of the jurisdiction of the International Criminal Court.

For the first time, this concept affects “women” as a sex class, without a distinction in terms of race, economic class or culture. In this document, we will discover that cultural variations³ among various patriarchal societies can result in wide range of types of femicide. In that sense, if we recognize femicide as a global issue, we will be fighting for the end of the discrimination and inequality of women in the whole humanity, essential for the defence of the dignity of every person as a superior value already formulated by the Charter of the United Nations⁴.

¹ VLACHOVÁ, Marie; BIASON, Lea. *Making the World a more secure place: combating violence against women*.

² WORLD HEALTH ORGANIZATION. *Understanding and addressing violence against women: femicide*. [Visited February 7th, 2018]. Available in: http://apps.who.int/iris/bitstream/10665/77421/1/WHO_RHR_12.38_eng.pdf

³ RADFORD, Jill; RUSSELL, Diana. *Femicide: The politics of Woman Killing*. New York, Twayne Publishers, 1992. P. 8.

⁴ M. MARIÑO, Fernando; ALCOCEBA GALLEGU, Amparo; QUISPE REMÓN, Florabel. *Feminicidio: el fin de la impunidad*. Valencia, Tirant Lo Blanch, 2013. P. 11.

It is important to be aware that violence based on gender –and, in particular, femicide– implies a manifest violation of the Human Rights international regulation⁵. This is the reason why in the present document it is considered essential and reasonable the regulation of a separate international criminal offence⁶. There is not and there cannot be democracy meanwhile States do not recognize effectively the protection of their citizens' life.

In this project, firstly, a concept of femicide will be determined, for which historical, cultural and social references of femicides will be investigated. At a later stage, the proposal of the inclusion of a specific criminal offence will be developed. Finally, the consideration of an international protection of femicide will be issued.

Let us hope that publications like this, fighting for the inclusion of the specific offence of “femicide”, will be useful for women's human rights defenders, state authorities and the public in general in order to contribute to the greater goal of eradicating the most serious and extreme expression of discrimination against women, their murder.

⁵ Including the International Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the Declaration on the Elimination of the Violence Against Women.

⁶ Rashida Manjoo, Special Rapporteur of the United Nations for violence against women. February 15-16, 2010. Casa de América, Madrid.

II. CHAPTER 1. FEMICIDE: WHAT IS IT?

1. Contextualising female homicide

In order to understand the situation in which femicides are committed and the social, historical and economical reasons why they are perpetrated, it is crucial to start analysing a general approach of this phenomenon.

Firstly, we should be aware that the persistent presence of a “macho” culture through which institutionalized gender inequality serves as a basis for gender discrimination, helps legitimize women's subordination and differential treatment in their access to justice. As Marcela Lagarde says⁷: "violence against women is an offense to their dignity and a manifestation of historically unequal power relations between men and women".

The alarming crime levels are testimony of a culture of violence that creates an insecure environment, undermine the rule of Law and favour a cultural impunity⁸. As Segato⁹ says, "in an environment dominated by the patriarchal institution, less value is attributed to the lives of women and there is a greater propensity to justify the crimes they suffer". From this perspective, and we have to make it clear, the gender category is the fundamental motivation that guides the perpetrator of violence against women, in general, and, of femicide, in particular.

Due to the persistence of gender-based violence, which frequently turns into sexual violence, current International Public Law grants a bonus of protection to various types of women¹⁰ –refugees, indigenous, displaced...–. Furthermore, in many cases, we can be witness of the so-called “multiple discrimination”. This term implies that, in

⁷ LAGARDE, Marcela. *El feminismo en mi vida: hitos, claves y utopías*. Ed. Coordinación de Relaciones Públicas of the Government of Distrito Federal and the Instituto de Mujeres del Distrito Federal. Mexico D.F. 2012. P. 236. [Visited March 2nd, 2018]. Available in: www.inmujeres.df.gob.mx.

⁸ M. MARIÑO, Fernando, *op. cit.*, P. 17.

⁹ SEGATO, Rita Laura. *¿Qué es un feminicidio? Notas para un debate emergente*. Série Antropologia. Brasilia. 2006. P. 3. [Visited March 1st, 2018]. Available in: <https://www.nodo50.org/codoacodo/enero2010/segato.pdf>.

¹⁰ EDWARDS, Alice. *Violence against Women under International Human Rights Law*. Cambridge University Press, 2010. P. 10.

addition to being discriminated on the basis of gender, they are also discriminated because of ethnic, racial, religious or economic reasons¹¹.

However, to date, the United Nations has not adopted yet a resolution directly addressing gender-related killings, affecting all women. The declaration on the Elimination of Violence against Women¹² fails to include explicitly violence that can lead to death and consequently misses an indispensable component of violence against women.

Jill Radford¹³ points out that "one of the main strategies developed to obscure femicide is individualization: incidents are constructed as unusual and isolated events, and when patterns and connections are noted between a series of murders, then it is argued that they are the result of an isolated and maddened action of a psychopath and not a recurrent expression of male sexual violence".

Furthermore, he indicates that, in the ideological plane, an image of the woman is constructed as someone who deserved death. Through a reciprocal process between individualization and guilt of the victim, the existence of femicide is masked and, in this way, men and masculinity are protected whereas responsibility is displaced towards women. Therefore, in the case of the murders of women, underlining the massive and undifferentiated nature of the crimes would be necessary to give them visibility and place them in the public and political sphere that corresponds to them¹⁴.

The truth is that the phenomenon of femicide has aroused, in a certain way, social awareness in various countries as a result of the murders of women committed in "Ciudad Juárez" (Mexico) in the last decade of XX Century and the first decade of XXI Century, specially after the Recommendation 44/98 made by the Committee on the Elimination of Discrimination against Women, in January of 2005, to the State of

¹¹ EUROPEAN UNION. *Minorities and discrimination survey. Multiple discrimination*. [Visited February 14th, 2018]. Available in: <http://fra.europa.eu/en/publication/2012/european-union-minorities-and-discrimination-survey-main-results-report>.

¹² GENERAL ASSEMBLY OF THE UNITED NATIONS. Resolution 48/104: Declaration on the Elimination of Violence Against Women. New York. 85th Plenary Meeting, 20 December 1993. Article 1. [Visited March 2nd, 2018]. Available in: <http://www.un.org/documents/ga/res/48/a48r104.htm>.

¹³ RADFORD, Jill; RUSSELL, Diana, *op.cit.*, P. 666 and ff.

¹⁴ SEGATO, Rita Laura. *Femi-geno-cidio como crimen en el fuero internacional de los Derechos Humanos: el derecho a nombrar el sufrimiento en el Derecho*". 2011. P. 26. [Visited March 1st, 2018]. Available in: <http://femicidio.net/sites/default/files/femigenocidio.pdf>.

Mexico. In this document, the Committee¹⁵ denounces “the persistence and tolerance of the State of Mexico regarding the violations of women’s human rights shown by the continuation of a widespread and systematic violence against women materialised in the murder and disappearance of women as one of its most brutal manifestations”. After the phenomenon, the word gained such vigour that the androcentrism had to surrender to a destabilizing signifier of traditional disciplines¹⁶.

We can find a broad range of definitions regarding “femicide”. J. Radford¹⁷ defines it as “the murder of women committed by men, as a form of sexual violence”. On the other hand, Diana Russell¹⁸ completes this definition by pointing out that it is the “murder of women perpetrated by men due to the fact they are women”.

Marcela Lagarde, a mexican anthropologist, translated the term “femicide” for “feminicide” –“feminicidio”, in Spanish–, since she understood that “femicide” could be understood as the feminization of murder and, from her perspective, that included much less. For her, “feminicidio” could be defined as a “misogynist crime based on an enormous social tolerance of gender violence and in which the State is an active part that contributes to impunity¹⁹”.

2. Origin and development of the concept of “femicide”

2.1. The Anglo-Saxon origin

The author of reference, who is taken as a starting point in the study of this subject, is Diana Russell, who uses the term “femicide”. However, the author herself admits²⁰ that she did not create it, she had already heard the term previously.

¹⁵ COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN. Recommendation 44/98. 32nd Session. January 2005. Par. 258-262. [Visited March 2nd, 2018]. Available in: <http://www.un.org/womenwatch/daw/cedaw/cedaw32/CEDAW-C-2005-OP.8-MEXICO-E.pdf>

¹⁶ ATENCIO, Graciela. *Feminicidio: de la categoría político-jurídica a la justicia universal*. Madrid. 2015. Ed. Catarata. P. 20.

¹⁷ RADFORD, Jill; RUSSELL, Diana. *Op. cit*, P. 8.

¹⁸ RUSSELL, Diana. *Femicide: a global perspective*. New York. Teachers’ College Press. 2001. P. 101.

¹⁹ LAGARDE, Marcela. Conferencia en la Universidad de Oviedo de 12 de enero de 2006. *Ciudad de Mujeres*. 2006. [Visited March 3rd, 2018]. <http://www.ciudaddemujeres.com/articulos/Feminicidio>.

²⁰ RADFORD, Jill; RUSSELL, Diana, *op. cit*, Preface. P. 11.

In one of her investigations, she discovered that this expression had already been used in the Nineteenth Century. In 1801 it appeared in "A satirical view of London at the Commencement of the Nineteenth century", in which it was simply defined as "the murder of a woman". In addition, the Oxford English Dictionary of 1989 pointed out that the word "femicide" had appeared in the Wharton's Law Lexicon of 1848²¹, suggesting that it would be a punishable offense.

In the introduction of *Femicide: The Politics of Woman Killing* of 1992, the first book we can find that analyses the phenomenon, Jill Radford, Jane Caputi and Diana Russell clarify that by calling the murder of women "femicide" the veil of non-gendered terms like homicide or murder is lifted.

2.2. The development in Latin America

More than two decades ago, the city of Ciudad de Juárez, Mexico, began to register an alarming number of cases of women tortured, murdered or disappeared²² and the local press began to refer to the systemic murder of women and the impunity that was generated by the lack of investigation, being the case of these women murdered in Juarez unique in the criminal history, regarding the number of victims and the level of impunity²³.

In this context, we have to be aware that systematic femicide is the "coded murder of girls committed by men who use sexism and misogyny, generally linked to discrimination, poverty and patriarchal cultures"²⁴. To date, practically all these crimes, paradigmatic in terms of violence and discrimination against women, are unpunished and no one is looking for the disappeared women. As misogyny is installed in the

²¹ TIERNEY, Helen. *Women's studies encyclopedia: revised and expanded edition*. Westport. 1999. Greenwood Press. P. 468.

²² They used to be women workers in the make-up industries of North American companies located in the outskirts of Ciudad Juarez, many of them came from other States of Mexico and used to be very young and humble women belonging to the most vulnerable and unprotected sector of civil society. They lived in a climate of violence against women, present in social life and constantly and socially tolerated by the authorities, which created a perfect climate of impunity.

²³ RONQUILLO, Víctor. *Las muertas en Juárez: crónica de una larga pesadilla*. Mexico. 2004. Ediciones Temas de Hoy. P. 17.

²⁴ MONARREZ, Julia Estela. "La cultura del feminicidio en Ciudad Juárez". Mexico. 2000. Ed. El Colegio de la Frontera Norte. P. 103. [Visited February 28th, 2018]. Available in: <http://www.scielo.org.mx/pdf/fn/v12n23/v12n23a4.pdf>

institutions, the authorities responsible for the investigations devalue the problem and do not give it importance²⁵. In this situation, impunity is the norm.

In Latin America, the first to introduce the term was Marcela Lagarde, even if there are many other theorists, as we are about to discover. Although among the different authors we may find some differences regarding nuances about the term, all of them present a series of common points. We will have to focus in those in order to obtain a global definition of the term.

In the first place, they all concur in the causes that lead to commit these crimes. Julia Monárrez²⁶ says that "the murder of women requires a scientific analysis that allows knowing the cultural and structural causes that underlie a generically constructed group. In this case, men kill another group generically defined: women". Lagarde²⁷ points out that "the structural conditions are related to the inequality and oppression suffered by women, while the cultural ones refer to misogyny and the normalization of violence suffered by women".

On the other hand and finally, Rosa-Linda Fregoso and Cynthia Bejarano²⁸ define it basing on the following parameters. First, the term refers to the murders of women and girls characterized on a power structure based on gender. Secondly, it is gender violence whether it comes from a public or private actor. Thirdly, it includes both systematic generalized violence and interpersonal domestic one. Fourthly, it is a type of systematic violence that has its roots in social, political, economic and cultural inequalities.

3. Historical Background

Before entering the bottom of the matter, it is necessary to clarify that what we now call "male violence" and "femicide" has always existed, even though we ignore its

²⁵ MONARREZ, Julia Estela. "Trama de una injusticia. Femicidio sexual sistemático en Ciudad Juárez". Mexico. 2009. Ed. El Colegio de la Frontera Norte and Miguel Ángel Porrúa. P. 163.

²⁶ *Ibid.*, p. 89.

²⁷ LAGARDE, Marcela. *Antropología, feminismo y política: violencia feminicida y derechos humanos de las mujeres*. In *Retos teóricos y nuevas prácticas*. Ankulegi Antropologia Eukartegi. Donostia. 2008. P. 217. [Visited March 5th, 2018]. Available in: <https://www.ankulegi.org/wp-content/uploads/2012/03/0008Lagarde.pdf>.

²⁸ FREGOSO, Rosa-Linda; BEJARANO, Cynthia. *Terrorizing women: Femicide in the Americas*. United States. 2010. Duke University Press. P. 5.

real historical prevalence. The number of murders of women has generally remained at similar levels. However, what makes the difference between then and now is that they were not made public. It was a perfectly normalized situation.

In any case, although the murder of women has never been recognized as a serious crime and that in many places it was even allowed by the Law in certain circumstances, as we will analyse below, it has not been the norm in any society and, on the contrary, it has always been appreciated as a dysfunction, even in the most coercive patriarchates. Extreme gender violence has not been usual except in specific historical moments, such as wars or certain historical periods of social upheaval, especially when this upheaval affects gender relations²⁹.

A. ADULTERY

Adultery is one of the oldest crimes whose punishability goes back to the most remote centuries. In all towns and times, this criminal figure has been severely punished. In every single case, we can observe a discrimination based on the gender as, considering the woman property of the husband, only the wife was punished as an adulteress, while the extra-marital relations of the male with an unmarried woman were not understood as a crime.

Starting with³⁰ the Assyrian, Babylonian and Phoenician legislations, it may sound surprising that the exercise of religious prostitution was perfectly accepted and even imposed in some cases, whereas the adultery –of women– was severely punished, by burning the guilty in a bonfire.

In the primitive and pre-classical times³¹, adultery was one of the worst faults and it usually led to the death of the woman. As the wife was subject to the husband's *manus*, he could legitimately kill her in two cases. The first of these was adultery, as, if

²⁹ GIMENO, Beatriz. Femicidio por prostitución: el feminicidio invisible. In: Gabriela ATENCIO. *Femicidio: de la categoría político-jurídica a la justicia universal*. Madrid: Ed. Los libros de la Catarata and Fundación Internacional Baltasar Garzón, 2015. P. 91.

³⁰ VAELLO ESQUERDO, Esperanza. *Los delitos de adulterio y amancebamiento*. Barcelona. Ed. Bosch. 1976. P. 19-24.

³¹ OSABA GARCÍA, Esperanza. *El adulterio uxorio en la Lex visigothorum*. Madrid. Ed. Marcial Pons. 1997. P. 29.

the wife was caught committing this crime, she could be killed with impunity³². Besides, if the husband did not report the crime in the due time, he could be accused of *lenocinium*. The second exception was the so-called *ius occidendi* of the husband, that is, the hypothesis that the wife had drunk wine. For the Romans, wine would have abortive effects and gave women the ability to foresee the future³³. Finally and regarding abortion, it was severely punished as they considered that the women who performed it violated a fundamental right of the husband: the control over the wife and the offspring.

B. PROSTITUTION

Throughout history, "the women of the night" have always been considered as "beings" whose lives did not matter, reifications on which any act could be made with impunity because there was a generalized social consensus that they deserved it for their profession.

In medieval Europe, the aggressors, for whom a woman was either pure or public, were justified in their masculinity and in the acquiescence of their "gang". Thus, through rape, the young widow or the girl to be married was marked by making her fall socially³⁴. After these brutal and organized aggressions, the women that survived –those who had the chance not to die of infection, bleeding, trying to abort the possible child result of the rape or assassinated– were considered thereafter as depraved, pervert and profane. Consequently, no one dare to marry them and, in many cases, they had to end by devoting themselves to sell their body to the pleasure of others.

Therefore, prostitution was the situation that came to women who, having exceeded voluntarily or involuntarily the established social limits, had the need to subsist in some way. This situation has occurred incessantly throughout history and has been well reflected in literature, as clearly in the character of "Fantine" in the work of "Les Misérables" by Victor Hugo.

³² This was supported by the text of Cato, which has been transmitted by Aulus Gellio: "*in adulterio uxorem tuam si deprehendisses, sine iudicio impune necares*".

³³ CANTARELLA, Eva. *Instituciones e Historia del Derecho Romano. Maiores in Legibus*. Valencia. Ed. Tirant Lo Blanch. 2017. P. 266-271.

³⁴ ROSSIAUD, Jacques. *Amours Vénales: la prostitution en Occident XII-XVI siècle*. Ed. Flammarion. 2010. P. 153.

Historically, already in the most ancient civilizations, the use of prostitution has been justified in the sexual ideology that considered that men, by nature, needed more quantity and variety of sex than women. This assumption legitimated the compulsory virginity of women until the marriage and its absolute fidelity to the husband once married, thus to assure the legitimacy of the children and, therefore, the inheritance. Thereby, public women needed to exist for the use and enjoyment of all men when they were “in need”³⁵.

To reach the point of death, before being killed, the prostitutes were dehumanized and reified. This reification not only made it easier to kill them but also converted them into merchandise. With this use of the feminine body until death, men sought to assert their masculinity, their control over women³⁶.

C. HISTORICAL FEMICIDES

As we have already mentioned, femicide has never been analysed or quantified. Therefore, it makes it very hard to find historical evidences and particular cases of “femicides” throughout history.

At the end of the 19th century, a new crime against women had appeared: the “serial sexual murder”. This historical stage was inaugurated in 1888 with the famous killer "Jack the Ripper". It has been known that the murders were committed in the Whitechapel neighbourhood of London between August and November 1888, where other murders of women took place as well during that time –known as a whole as "The Whitechapel murders"–. Although it has not been proved that the women suffered rape, all of the five were beheaded and mutilated by removing their uterus and other abdominal organs.

There have been many other historical serial killings of women, all of them characterized by being sex-murders justified in the lust to kill women based on a

³⁵ *Ibid.*, p. 99.

³⁶ GIMENO, Beatriz, *op. cit.*, P. 96 and 97.

misogynist hate. All of these cases can be found in the book: “*Feminicidio: de la categoría político-jurídica a la justicia universal*”³⁷.

4. Classification

As we will be able to discover through this work, femicide can be manifested in many different ways and in many different circumstances. We can find that the victims of this crime are women in different developmental stages and social, racial, religious and economical situations. These aspects, motivated in the gender condition of the victim, are some of the distinguishing elements that separate these killings from other homicides.

In the juridical and theoretical development of the crime of femicide, we can find many different classifications. In this work, the categorization will be based on the Vienna Declaration on Femicide³⁸, but some specific aspects and nuances from other classifications will be added.

4.1. Femicide as a Result of Domestic Violence

In many cases, as it has been already explained, the killing is just the final act of a *continuum* of violence. This is especially a reality in the cases of intimate femicide committed by the husband, long-term partner, boyfriend, etc.

Intimate femicide regards basically the murder committed by a man with whom the victim had or had had a relationship or affective-sexual or intimate bond³⁹.

³⁷ ATENCIO, Gabriela. REBOLLEDO GÉNISSON, Laura. La era del terror sexual: el miedo de las mujeres a ser asesinadas. E.g. “The Monster of the Andes case” and “The Yorkshire Ripper case”. In: Gabriela ATENCIO. *Feminicidio: de la categoría político-jurídica a la justicia universal*. Madrid: Ed. Los libros de la Catarata and Fundación Internacional Baltasar Garzón, 2015. Pp. 149-156.

³⁸ ECONOMIC AND SOCIAL COUNCIL OF THE UNITED NATIONS. Commission on Crime Prevention and Criminal Justice. Vienna Declaration on Femicide. Twenty-second Session. Vienna, 22-26 April 2013. Par. 3. [Visited March 8th, 2018]. Available in: https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_22/_E-CN15-2013-NGO1/E-CN15-2013-NGO1_E.pdf

³⁹ WORLD HEALTH ORGANIZATION. *Understanding and Adressing Violence Against Women*. 2012. Publication reference number: WHO/RHR/12.38. P. 1. [Visited March 7th, 2018]. Available in: http://apps.who.int/iris/bitstream/10665/77421/1/WHO_RHR_12.38_eng.pdf?ua=1.

Statistics⁴⁰ show that the vast majority of gender-motivated killings of women are perpetrated by intimate partners or close family members. We have to be aware that domestic violence is prevalent across many countries and is widely accepted as a legitimate part of family life by both women and men. Thus, domestic violence is an “invisible” crime in which 90% of the abuse goes unreported⁴¹. Finally, in intimate femicides we can find that excessive violence, also called “overkill”, is exercised⁴².

4.2. Killing of Women and Girls in the Name of Honour

Honour killing is the most extreme form regarding honour-based crimes, which attempts to control female behaviour. Killings are generally perpetrated by members of the victim’s family or by a hired killer. However, honour killing is usually the last resort following other forms of honour-based violence including forced marriage, threats and harassment⁴³.

The fault committed by the victim regards the community standards of feminine behaviour that she is expected to accomplish with: choice of husband, clothing or sexuality. This last reference implies that the victims of rape are also frequently killed to restore their family’s honour⁴⁴. In general, these crimes are publicly performed⁴⁵ so that it may act as an influence in the behaviour of other women within the community⁴⁶.

⁴⁰ UNITED NATIONS OFFICE ON DRUGS AND CRIME. *Global Study on Homicide*. 2013. Vienna. P. 5. [Visited March 7th, 2018]. Available in: https://www.unodc.org/documents/data-and-analysis/statistics/GSH2013/2014_GLOBAL_HOMICIDE_BOOK_web.pdf

⁴¹ POGGIOLI, Silvia. *Italian Women Call For Action Against Femicide*. National Public Radio. 2012. [Visited March 7th, 2018]. Available in: <http://www.wbur.org/npr/165658673/italian-%20women-call-for-action-against-femicide>.

⁴² This implies the use of several cruel wounds and stabs in many different places –usually found in vital zones–, which implies the control maintained by the aggressor during the commission of the femicide. Furthermore, usually more than one method is used to kill, such as punches or kicks, followed by stabbing, blunt force together with strangulation or injuries from a knife and a gun (REGIONAL OFFICE FOR CENTRAL AMERICA OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR). *Latin American Model Protocol for the investigation of gender-related killings of women (femicide/feminicide)*. 2014. P. 73. [Visited March 13th, 2018]. Available in: <http://www.ohchr.org/EN/NewsEvents/Pages/EndingImpunityLAC.aspx>.

⁴³ EUROPEAN PARLIAMENT. Directorate General External Policies of the Union. *Honour killing: its causes and consequences*. Briefing paper. Brussels. 2007. P. 8. [Visited March 4th, 2018]. Available in: [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2007/385527/EXPO-JOIN_ET\(2007\)385527_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2007/385527/EXPO-JOIN_ET(2007)385527_EN.pdf).

⁴⁴ HONOUR BASED VIOLENCE AWARENESS NETWORK, INTERNATIONAL RESOURCE CENTRE. *Forms of Honour Violence*. [Visited March 5th, 2018]. Available at: <http://hbv-awareness.com/forms-of-hbv/>.

⁴⁵ The ways in which the killing is perpetrated depend on the country and the community at stake. Stoning, stabbing, beating, burning, beheading, hanging, throat slashing, lethal acid attacks, shooting and strangulation are all common methods for executing honour killings.

⁴⁶ MANJOO, Rashida. Human Rights Council of the United Nations. *Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/20/16*. 2012. Par. 45 and 46. [Visited March 7th, 2018]. Available in: http://www.ohchr.org/Documents/Issues/Women/A.HRC.20.16_En.pdf

4.3. Dowry-related Femicide

As we know, dowry is a cultural tradition in which the family of the bride provides money and presents to the family of the groom. The practice of the dowry system has deep cultural roots in all parts of the world, dating of the Greek and Roman times.

The dowry system still nowadays reinforces brutally discrimination against women in many countries, such as India or Bangladesh. This violence often increases when a family requests a larger dowry after marriage or shows dissatisfaction with the dowry they have received. In the case that the parents cannot provide any more dowry, the husband starts considering the woman an unsuitable wife and violence starts, ending in many times with her life⁴⁷. In these cases, marriage is seen as a business and the bride as merchandise and property.

4.4. Organized Crime related Femicide

Starting with the femicide for trafficking, it implies the murder of a woman as a consequence of their condition of victim of human trafficking, especially when they are used for sexual exploitation and forced marriages. In these cases, women are vulnerable orphan girls, refugees or displaced and they are caught and used for slavery, involuntary servitude or as debt bondage⁴⁸.

Secondly, as far as drug trafficking is concerned, we have to be aware that, in the last decades, an increase in the amount of drugs being trafficked has gone hand in hand with a rise in the killing of women. Many articles relate this to the ‘macho’ culture of drug trafficking that appears mostly in Latin-American countries, especially Mexico⁴⁹. In the drug trafficking environment, this patriarchal culture emphasizes the

⁴⁷ UN DIVISION FOR THE ADVANCEMENT OF WOMEN. “Strategies for Combatting the Culture of Dowry and Domestic Violence in India” in “Violence against women: good practices in combating violence against Woman”. 2005. Vienna. Pp. 9 and 10. [Visited March 8th, 2018]. Available in: <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/kishwar.dowry.pdf>

⁴⁸ THE UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC). Human trafficking: an overview. 2008. Vienna. Pp. 18-19. [Visited March 8th, 2018]. Available in: <https://www.unodc.org/documents/human-trafficking/2008/HumanTrafficking-AnOverview.pdf>.

⁴⁹ COUNCIL OF HEMISPHERIC AFFAIRS. The Rise of Femicide and Women in Drug Trafficking. 2011. *Council of the Hemispheric Affairs*. [Visited March 7th, 2018]. Available in: <http://www.coha.org/the-rise-of-femicide-and-women-in-drug-trafficking/>

appreciation in which women are perceived as property, easily disposable and easy to get rid of when they are no longer useful. For that reason, women are used for the sexual satisfaction of the male members and delegated “low-ranking, low-paying, high-risk positions”. Thus, women act as drug mules, swallowing or inserting the drugs into their bodies, which implies a very high risk of death⁵⁰.

4.5. Targeted Killing of Women at War

Firstly, it is essential to clarify the meaning of “targeted killing”. The UN⁵¹ has defined targeted killing as “the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator”. In that sense, what characterizes targeted killings is its premeditated nature, that is to say, the fact that the specific individual or group of victims are previously selected by the perpetrator.

As we will discover in Chapter 3, rape and sexual violence, in general, are one of the leading causes of death for many women in situations of war or internal conflict, whether or not it reaches the category of armed conflict. Women⁵² are traditionally seen, in the eyes of combatants, as a symbol of the enemy's personal property and honour. Thus, their bodies become territory to be occupied, as one more part of the spoils of war⁵³.

⁵⁰ UN TASK FORCE ON TRANSNATIONAL ORGANIZED CRIME AND DRUG TRAFFICKING AS THREATS TO SECURITY AND STABILITY. UN Women Policy Brief: “A gender perspective on the impact of drug use, the drug trade and drug control regimes”. 2014. P.2. [Visited March 9th, 2018]. Available in: [https://www.unodc.org/documents/ungass2016/Contributions/UN/Gender and Drugs - UN Women Policy Brief.pdf](https://www.unodc.org/documents/ungass2016/Contributions/UN/Gender_and_Drugs_-_UN_Women_Policy_Brief.pdf).

⁵¹ HUMAN RIGHTS COUNCIL OF THE UNITED NATIONS. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston. Study on targeted killings. 2010. P. 3. [Visited March 10th, 2018]. Available in: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

⁵² MANJOO, Rashida, *op.cit.*, P.13, Par. 51 and 52: “such violence is often used as a weapon of war, to punish or dehumanize women and girls, and to persecute the community to which they belong. Women and girls suffer from operations randomly or strategically targeting and terrorizing the civilian population, but also from summary and extrajudicial executions, imprisonment, torture, rape and sexual mutilations for fighting in resistance movements, for engaging in the search for and defence of their loved ones, or for coming from communities suspected of collaboration”.

⁵³ MOLLMANN, Marianne. *Violación en tiempos de guerra*. Política Exterior, n. 123, May/June, 2008. P.174 and ff.

4.6. Female Infanticide and Gender-Based Sex-Selective Foeticide

Female infanticide has been practised throughout history by many patriarchal societies in every continent. The son preference over daughter has been rooted in various social norms of most “macho” societies, such as those that regard inheritance, marriage systems or family formation. In countries like India, the State has established an increasing and suffocating pressure on families to fulfil the Government’s wish for sons, which has directly contributed to the perpetration of female infanticide and sex-selective foeticide⁵⁴. To do so, and during the centuries, many different forms of induced death of female children have been practised, such as suffocation, drowning, neglect and exposure to danger.

Regarding sex-selective foeticide, it implies the deliberate killing of a foetus, due to the simple fact that it is going to be female. These practices are just testimony of the extent of patriarchy and misogyny throughout the regions in which it is practised⁵⁵.

4.7. Genital Mutilation Related Femicide and the Killing of Women due to the Accusation of Witchcraft/Sorcery

A definition of Female Genital Mutilation or FGM has been given by the World Health Organization⁵⁶ and refers to “all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for nonmedical reasons”. Therefore, Genital Mutilation Femicide⁵⁷ implies the end of the life of a girl or a woman in which Genital Mutilation has been practiced.

⁵⁴ ASIAN CENTRE FOR HUMAN RIGHTS. Female Infanticide Worldwide: the case for action by the UN Human Rights Council. India. 2016. P.1. [Visited March 10th, 2018]. Available in: <http://stopfemaleinfanticide.org/files/Femalefoeticideworldwide.pdf>

⁵⁵ MANJOO, Rashida, *op.cit.*, P.20, Par. 78 and 79.

⁵⁶ WORLD HEALTH ORGANIZATION. Understanding and addressing violence against women: female genital mutilation. P. 1. [Visited March 11th, 2018]. Available in: http://apps.who.int/iris/bitstream/10665/77428/1/WHO_RHR_12.41_eng.pdf

⁵⁷ Female Genital Mutilation of any type has been recognized as a harmful practice and a violation of the human rights of girls and women, including the principles of equality and non-discrimination on the basis of sex, the right to life when the procedure results in death –femicide–, and the right to freedom from torture or cruel, inhuman or degrading treatment or punishment. (WORLD HEALTH ORGANIZATION with UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCHR, UNHCR, UNICEF, UNIFEM. Eliminating female genital mutilation. 2008. P. 9. [Visited March 10th, 2018]. Available in: http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf).

Especially, it is motivated to ensure premarital virginity and marital fidelity⁵⁸. Therefore, in order to be accepted socially and under the fear of being rejected by the community, families and victims feel morally and socially obliged to perpetuate this cruel and inhuman practice. In most cases, traditional exercisers use a variety of tools, such as non-sterilised razor blades and knives and generally they do not use anaesthetic. This implies that many girls are bled to death or die because of fatal infections⁵⁹.

On the other hand, as we are elaborating an international and global perspective of femicide, it is necessary to contemplate situations that, even if they are not usual in the majority of countries unlike intimate femicide, in others they are very common and cause thousands of unfair femicides every year. Therefore, we should also include in our definition the term of “femicide based on the accusation of witchcraft or sorcery”, which implies the killing of women who have been suspected/accused of causing harm to others by supernatural means.

In general, it is more frequent to be witness of these kinds of attacks in African countries, such as Ghana or Zimbabwe. In the majority of cases, witchcraft allegations are linked to personal jealousy and disputes between neighbours or family over land and other inheritance. The misogyny of the patriarchal societies is clear in the cases in which these women are accused of sorcery due to the fact that they live alone and do not depend on a male partner⁶⁰.

4.8. The Misogynist Slaying of Women

According to Cambridge University Press Dictionary⁶¹, the term of misogyny contemplates “the feelings of hating women or the belief that men are much better than women”. Misogyny becomes dangerous when that ideology and behaviour transform

⁵⁸ The communities believe that reducing a woman's libido they help her to resist extramarital sexual acts, as they finish by experiencing pain during sex or not having sexual satisfaction (WORLD HEALTH ORGANIZATION. Female Genital Mutilation. Fact Sheet. [Visited March 11th, 2018]. Available in: <http://www.who.int/mediacentre/factsheets/fs241/en/>).

⁵⁹ WORLD HEALTH ORGANIZATION. Understanding and addressing violence against women: female genital mutilation. P. 3. [Visited March 11th, 2018]. Available in: http://apps.who.int/iris/bitstream/10665/77428/1/WHO_RHR_12.41_eng.pdf.

⁶⁰ ACADEMIC COUNCIL OF THE UNITED NATIONS SYSTEM. Abuse and Femicide of the Older Woman. Vienna. 2017. P. 51. [Visited March 12th, 2018]. Available in: <https://acuns.org/wp-content/uploads/2017/11/Femicide-Volume-VIII-Abuse-and-Femicide-of-the-Older-Woman.pdf>.

⁶¹ CAMBRIDGE ENGLISH DICTIONARY. Misogyny. [Visited March 12th, 2018]. Available in: <https://dictionary.cambridge.org/es/diccionario/ingles/misogyny>.

into physical forms of violence. Furthermore, the crimes committed against women based on misogyny are the most brutal and cruel ones, as they are stimulated by a devaluation of women and their lives⁶².

Within this context, a culture of impunity facilitates and encourages these kinds of violations of Human Rights⁶³. The most evident case of misogynist femicide is the so-called “serial sexual femicide”. Taking into account the definitions of serial homicide⁶⁴ and sexual homicide⁶⁵, we can define serial sexual femicide as the murder of a woman guided by sexual motivations that takes place in the context of a series of femicides, two or more, committed by the same victimizer, in an extended period of “cooling-off”.

In real evidence, it implies a series of femicides in which there are systematic and concerted patterns on the part of the murderers that may include kidnapping, sexual violence, torture, and the murder of children and women, whereupon their bodies are, in general, abandoned in desert areas, empty lots, sewage ditches, or garbage dumps⁶⁶.

Finally, we cannot forget to include in this definition the “femicide for prostitution”, a widespread phenomenon. It implies the murder of a woman who practices prostitution, motivated by the hatred and misogyny that awakens the social status of the victim. Regarding this particular type of femicide, we can easily find in society a stigmatization and justification of the criminal act on the part of the perpetrator⁶⁷.

⁶² DOMAZETOSKA, Simona. “The misogynist Slaying of Women” in THE ACADEMIC COUNCIL OF THE UNITED NATIONS SYSTEM: *Femicide; a Global Issue that Demands Action*. Vienna. 2013. P. 82. [Visited March 12th, 2018]. Available in: http://www.genevadeclaration.org/fileadmin/docs/Co-publications/Femicide_A%20Gobal%20Issue%20that%20demands%20Action.pdf.

⁶³ COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN. Recommendation 44/98. 32nd Session. January 2005. P. 9. [Visited March 12th, 2018]. Available in: <http://www.un.org/womenwatch/daw/cedaw/cedaw32/CEDAW-C-2005-OP.8-MEXICO-E.pdf>.

⁶⁴ “Two or more homicides committed in a series over time with a so-called “cooling off” or latency period between each one” (SIMPSON, Philip. L. *Serial killing and Representation* in OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY. University of Oxford. Oxford. 2017. P. 2. [Visited March 13th, 2018]. Available in: <http://criminology.oxfordre.com/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-117?print=pdf>.

⁶⁵ “The intentional killing of a person during which there is sexual motivation by the perpetrator –before, during, after or throughout the act–” (KOOENRAADT, Frans. *Sexual Homicide*. Utrecht University. Utrecht. 2010. P. 116. [Visited March 13th, 2018]. Available in: <https://dspace.library.uu.nl/.../Koenraadt.Sexual%20Homicide.Tra>

⁶⁶ THE INTER-AMERICAN ALLIANCE FOR THE PREVENTION OF GENDER-BASED VIOLENCE. *Strengthening Understanding of Femicide*. Washington DC. 2008. [Visited March 13th, 2018]. Available in: https://www.path.org/publications/files/GVR_femicide_rpt.pdf

⁶⁷ UN WOMEN. Latin-American Protocol for Investigation of Femicide. Panama. 2014. P. 16. [Visited March 14th, 2018]. Available in: <http://www.un.org/en/women/endviolence/pdf/LatinAmericanProtocolForInvestigationOffemicide.pdf>.

In prostitution, we can discover that women are merchandised, reified and sexualised to the extreme. This implies a situation in which women sell their body and are only useful for the sexual satisfaction. They have to be passive, submissive and permissive. This situation emphasizes the situation of male superiority and control over women because, as they are paying a quantity of money for the service, they usually believe that they have the legitimacy to require the prostitute to practise or accept any action. Then, if she dares to deny, fury arises and in many cases ends with a fatal result. That is why femicides for prostitution, in general, are not premeditated but a result of an impulse.

5. Global concept

As we could have discovered after all the theoretical analysis, there are many different definitions and versions of femicide. In this situation, it would be advisable to give a general definition in which we can comprise all the elements and circumstances that we have already analysed. For that purpose, we can conclude that femicide is the killing of a woman based on account of her gender.

Therefore, for a case to be considered femicide there must be an implied intention to carry out the crime and a demonstrated connection between the crime and the gender of the victim.

Now that we are aware of the meaning of the epicentre of this investigation, we will analyse the necessity of its criminal acknowledgement as *lege ferenda* and its international recognition.

III. CHAPTER 2. DEFINITION AND CRIMINALIZATION OF THE TERM

1. Introduction

As we all know, the purpose of Criminal Law is to sanction the most serious behaviours in society. This is what we usually call “*ultima ratio*”, that is, the legal mechanism that operates when all other forms of social control have already failed. Consequently, in order to justify the intervention of Criminal Law, the behaviours that we are proposing to be punished by *lege ferenda* must seriously affect a certain legal right.

What we should make clear within this Chapter is that the regulation of femicide is not a whim but an effort to adapt the internal and international criminal norms to an effective compliance with Human Rights in order to guarantee all women, once and for all, a life free of violence.

However, we have to be aware that, in order to justify this idea, we need to fight against a core and basic problem: the fact that Law is masculine. It has been deeply analysed and justified by many authors that the ideals of objectivity and neutrality that the Law boasts are currently masculine values that have been taken as universal values. For this reason, the same practices mean different things to men and women because they are read through different discourses⁶⁸.

2. Extent of the term

2.1 Legal classification of the offence

2.1.1 Why?

The first statement we have to set is that, while all femicides can be classified as homicides under the terms of the current criminal legislation, not all homicides of women are eligible to be classified as femicides.

⁶⁸ LARRAURI, Elena. *Mujeres, Derecho penal y criminología*. Madrid. Siglo XXI de España Editores. 1994. P. 62.

At a first glance, it may seem difficult to find out whether the killing has been based on gender reasons or not. However, international law and comparative law provide us elements to identify and establish the existence of gender reasons in the commission of this crime. Thus, elements such as the context in which the death of the woman occurred, the way in which the body was disposed, the possible antecedents of violence between the victim and the perpetrator and the performance of acts of violence before, during and/or after the death of the victim, among others, are necessary to verify the presence of gender reasons⁶⁹.

All these factors that differentiate the crime of femicide from the homicide of a woman reveal that the aim of the perpetrator is to entrench and perpetuate the misogynist ideas about women –that we have already analysed during Chapter 1–: submission, weakness, delicateness and disrespect towards them and their life.⁷⁰

The deaths of women for reasons of gender account for a specific type of violence, because of the means used to provoke death and because of the suffering inflicted on victims prior to death, usually regarding several sexual assaults. This does not only affect their life, but also their physical and psychological integrity, their sexual freedom and indemnity, the inviolability of their bodies, besides regarding actions that constitute discrimination and subordination. Apart from that, we have been witnesses after analysing Chapter 1 that this discrimination is usually reflected in the lack of investigation of the crimes and the creation of an environment of impunity. For all these reasons, this specific way of killing cannot be completely captured by the existing criminal figures, even qualified homicide⁷¹ –this concrete factor will be further discussed later on–.

Undoubtedly, recognizing and understanding that the death of a woman can take place based on gender reasons would guarantee that the cases do not remain in impunity, that the families of the victims see the fulfilment of their rights to justice,

⁶⁹ UN WOMEN, Latin American Protocol for the investigation of Femicide, *op. cit.*, P. 35.

⁷⁰ MALONEY, Anastasia. *Brazil Passes Femicide Law to Tackle Rise in Gender Killings*. Reuters. 2015. [Visited March 20th, 2018]. Available in: <http://www.reuters.com/article/2015/03/10/us-brazil-femicide-women-s-rights-idUSKBN0M61WV20150310>.

⁷¹ GONZÁLEZ VELÁZQUEZ, Rocío. *Cuando el Derecho Penal no basta. Reflexiones en torno a la tipificación del feminicidio en Mexico*. Alegatos. Mexico. 2014. P. 287. [Visited March 20th, 2018]. Available in: <http://www.corteidh.or.cr/tablas/r33515.pdf>.

truth and reparation and that violence against women and its tolerance may be concluded and delegitimized.

In essence, the recognition of this crime and all its characteristics would allow guarantee, at last, material equality. In addition to proper recognition, specialized investigation of femicide cases is also necessary. In this way, the legislative recognition of the problem will indicate the seriousness of the issue and will provide the impetus for future progress in the investigation of the crimes.

2.1.2 How?

A. The offence

Analysing the legal systems in which femicide has been recognised, we can find many different approaches⁷². First of all, we can find the recognition of an aggravated specific offence within the existing crimes –in the case of this study, homicide and murder–. This approach justifies the greater penalty of specific crimes of violence against women, so that it does not constitute a violation of the guarantees of equality and non-discrimination –based on the consideration of other legal rights affected or in the “unjust plus” in these conducts–. Secondly, another alternative is the recognition of femicide within aggravating circumstances, such as in the case of crimes related to racist or ideological reasons.

In this sense, regarding aggravations, we have to take into account that women are not a homogenous group. They are not damaged in the same way by the multiple manifestations of violence and social injustices produced by patriarchal structures. The violence that affects women is not only based on their sexual and gender status but also by differences in terms of economic status, culture, religion, age or race. It is impossible to homogenize the profile of female victims of violence. Furthermore, we should be aware that we are referring to behaviours that affect more than half of society. In that

⁷² OFICINA EN MEXICO DEL ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS. Femicidio. Mexico D.F. 2009. P. 70-72. [Visited March 3rd, 2018]. Available in: http://www.infosal.uadec.mx/derechos_humanos/archivos/15.pdf

sense, aggravating these reasons in the same level that a religion or an ideology would also imply a subordination and minimization of women⁷³.

Thirdly, the next approach we can find refers to the maintenance of neutrality. This implies applying the generic offences, but including modifications in specific cases affecting women. Regarding this perspective, some countries have just defined femicide within the types of homicide and murder but keeping the same penalties. In this case, a specific criminal definition is foreseen but with identical response, so that it blurs or diffuses the specificity of the punishment of femicide since the legal system responds in an equivalent manner to acts of violence committed against another subject.

Finally, and we get to the perspective of this work, we can find the specific classification of the crime, in this case, femicide / feminicide.

Regarding the **objective** elements of the offence, as we have already anticipated, it would be advisable, according to our approach, to criminalize the killing of the victim when it took place “because of her condition as a woman”. Then, the sanctioned behaviour is the intended killing of a woman –on account of her gender–.

As far as the **subjective** elements of the definition are concerned, regarding the active perspective, the killing must be intentional, meaning that the perpetrator knew of and wanted the result of the woman’s death. Besides, the *mens rea* has to be based on account of her gender. For that matter, in the present analysis it is considered that the author, the perpetrator, does not need to be necessarily a man. It should be considered that, taking into account the variety of existing femicides –analysed in Chapter 1–, it would not be logical to limit authorship only to those caused by men, since there may be situations in which we are facing a murder based on gender when the author is not a man –for example, the cases of Female Genital Mutilation or foeticide–. In this sense, it would be advisable to use a generic expression –such as “the one that,” “whoever,” “to whom,”– to refer to the perpetrator, just as in the criminal definitions of homicide.

With regard to the passive perspective, as we may guess, the victim of the killing has to be necessarily a woman. In this sense, the Spanish Constitutional Court⁷⁴

⁷³ UN WOMEN, Latin American Protocol for the investigation of Femicide, *op. cit.*, P. 43.

⁷⁴ SPANISH CONSTITUTIONAL COURT. Judgement n. 59/2008, 14 May 2008. [Visited March 22nd, 2018].

states that “the unequal treatment contained in the criminal offense is not discriminatory nor does it affect the principle of formal equality, since the different treatment meets the requirements of a discernible and legitimate end”. The ruling also states that "it is not the sex itself of the active and passive subjects that the legislator takes into account with aggravating effects, but [...] the especially harmful nature of certain facts from the relational scope in which it occurs". In short, it is a judgment that supports the existence of unequal treatment that does not constitute discrimination in the criminal legal system, aimed at advancing in the achievement of material equality for women. In any case, we will focus deeper on the principle of equality later on.

In this sense, it is also necessary to consider that certain cases of femicide can constitute the sum of two or more crimes committed against the same victim – kidnapping, rape and homicide, for example– whose additional seriousness must be considered when establishing the penalties for these crimes –concurrency–.

Moreover, it would also be possible to introduce specific **aggravating factors** for example in the cases in which the victim was a minor, was pregnant, had any type of disability or was rendered for the purpose of human trafficking, among other possible circumstances.

Finally, regarding the **penalties**⁷⁵, the aggravation of penalties for the commission of femicide can be justified by the so-called “plus of the unjust”, by an increase in the unlawfulness of the behaviours that constitute it, as well as by the quality of the victim who suffers. First of all, femicide generally implies a series of actions that go beyond the mere deprivation of the life. Moreover, we have to take into account that, in general and due to historical and social roots, it is assumed that women are more vulnerable than men to any attack, not because of their capacity to defend themselves but due to the greater risk of danger. Additionally, these crimes and their impunity generate an environment that undermines the general welfare of the group of women, thus deteriorating other rights –such as freedom–. Finally, the purpose of the aggravation can also be justified under the perspective of general prevention, since the

Available in: <http://hj.tribunalconstitucional.es/ca/Resolucion/Show/6291>.

⁷⁵GONZÁLEZ VELÁZQUEZ, Rocío, *op. cit.*, P. 289.

norm would suppose a threat of greater penal severity to any potential delinquent, dissuading them more intensely from violating the norm.

Lastly, it would be advisable to clarify that this proposal is a very generic one and that it would be necessary to promote diverse approaches to the different forms of femicide depending on each State or region, so that they emphasize the phenomena that are most serious in them –for example, foeticide in India or sorcery in Africa–.

B. Investigation

As we already know, the different types of femicide account for different forms of violence against women, so that the preventive policies associated with criminal legislation and the criminal investigation processes should to be very different in each case.

There are many directions that should be followed by the authorities in charge of the investigation of suspected femicides. First of all, there has to be a gender perspective throughout the whole execution of the methodological plan for the investigation. Thus, it is essential to analyse the context of discrimination and the types of violence inflicted on the victim before and after the killing⁷⁶.

Secondly, the Latin American Protocol for the Investigation of Femicide recommends⁷⁷ classifying femicides into three categories in order to organize the different elements that emerge as part of the criminal acts and make the investigations much more effective. First, we can find intimate femicides, with the existence of a previous relationship between the victim and the perpetrator. Next, we have sexual femicides, which is based on the reification of women and the existence of sexual assaults before, during or after the killing. Finally, systematic femicides, that is, in a group context, more related to the roles of men and women in our patriarchal societies.

Moreover, the Federal Criminal Code of Mexico⁷⁸ has listed some of the evidences that can lead the investigator to reach the conclusion that a crime of femicide

⁷⁶ UN WOMEN, Latin American Protocol for the investigation of Femicide, *op. cit.*, P. 53.

⁷⁷ *Ibid*; P. 46.

⁷⁸ GONZÁLEZ VELÁZQUEZ, Rocío, *op. cit.*, P. 284.

has been committed. These are some of the circumstances: when the victim shows signs of sexual violence of any kind or has been inflicted with degrading injuries or mutilations, previous or subsequent to the deprivation of life, including acts of *necrofilia*; when there are records or data of any type of violence by the active subject against the victim; when between the active subject and the victim there has been a sentimental, affective or trusting relationship or when the body of the victim was exposed or displayed in a public place.

Overall, it is necessary that the agents responsible for the criminal investigation and prosecution receive a specialization in the causes and circumstances in which femicides are committed⁷⁹. The use of these guidances can make the investigation and classification of femicides effective and oust the criticism that defends that it is impossible or very difficult to guess when the *mens rea* of the perpetrator was based on gender reasons.

2.1.3 Challenges of the inclusion of the offence

2.1.3.1 Femicide and Symbolic Criminal Law

"Symbolic Criminal Law" implies to overcome the utilitarian limits that the teleological principle of penal sanction sets for criminal intervention. This happens when the mentioned effects are used to satisfy objectives that are not necessary to maintain the basic social order. This situation is generally related to the political pretension of giving the "impression of an attentive and determined legislator"⁸⁰.

The Criminal doctrine⁸¹ has established a series of situations in which a Law may be considered as symbolic. For example, when the norm at stake does not produce any behavioural change among those that it was proposed to generate or when it transmits an identification message with the victims but does not have material effects of compliance.

In this regard and from a personal point of view, the recognition of the crime of femicide is far from ending up as a symbolic legislative measure. First of all, it would

⁸⁰ GONZÁLEZ VELÁZQUEZ, Rocío, *op. cit.*, P. 294.

⁸¹ *Ibid.*

imply the institutionalised denunciation of the most serious form of violence against women, the one that implies the violation of the most important legally protected interest: life. This would mean to change the social and cultural values of our citizens and, therefore, the intimidation and socialization of possible offenders. In addition, it would guarantee the access to justice and would help the cases not to remain in impunity. Furthermore, by establishing higher penalties than for a standard homicide, we will also be in compliance with the social effects of the penalties, especially the preventive ones. In sum, introducing the specific crime of femicide would produce, as in other specific types or aggravations, material preventive and punitive effects in society. However, it should go hand in hand with a program of social education of offenders and society in general –in school, university, workplace, media, etc.–.

2.1.3.2. Legally protected interest

The second critic we have to fight against is the question if the inclusion of the offence of femicide is justified in accordance with the protection of a specific legal interest, different from the ones protected by homicide or murder.

We have to know that specific crimes are designed to address particular scenarios, which do not fit into the general types. In this sense, the arguments in favour of the so-called “minimum Criminal Law” should not be used to forbid the criminal incorporation of certain behaviours that do not want to be recognized. This situation usually happens regarding crimes against women, based on the patriarchal roots that we all have been brought up with.

First of all, and after the analysis of the several types of femicides all along Chapter 1, we can find that the various phenomena that are conceived as femicide in the sociological-theoretical sphere, when transferred to the legal-criminal one constitute complex, and in general, multi-offensive crimes, as they affect a plurality of legal assets. Thus, we can find the violation of several fundamental rights such as life, sexual and personal freedom or physical integrity⁸².

⁸² OFICINA EN MEXICO DEL ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS, *op. cit.*, p. 70.

But apart from this, much of the discussion in the criminal sphere about the specific criminal types regarding Violence Against Women lies in the question of whether they protect a different legal right that would justify their separate or independent existence from other criminal laws similar and neutral, such as homicide.

In this sense, the reasoning that has been given to justify the adoption of special criminal laws in this matter is that violence against women not only affects the life, physical integrity or sexual freedom of women, but it implies an implicit discrimination and subordination of the victims⁸³.

Moreover, it has been theorized by some of the doctrine that femicide implies the violation of the right of women to a have life free of violence⁸⁴, a legal right whose foundation and recognition is found in international treaties such as the Belém Do Pará Convention, and that includes, among others, the right of any woman not to suffer any harassment based on gender or to be discriminated against as a result of cultural patterns and gender stereotypes. For all these reasons, the inclusion of an individual type of femicide from the perspective of the legal protected interest is justified.

2.1.3.3. Principle of equality and non-discrimination

The last observation we have to dismantle refers to a possible violation of the principle of equality. This criticism firstly refers to the case in which the active subject of the offence only refers to men and, secondly, to the inclusion of a specific type of killing in which the passive subject can only be women.

A. Authorship

One of the controversial issues in relation to the existence of specific criminal types of Violence Against Women, including femicide, is whether these crimes can only be committed by men.

⁸³ *Ibid.*, p. 71.

⁸⁴ GONZÁLEZ VELÁZQUEZ, Rocío, *op. cit.*, P. 288.

In this case, regarding the possibility of only male authorship, it would constitute a case of the so-called “Offender-based Criminal Law”. This criticism acquires force especially when there is an aggravated penalty, compared with that which is foreseen for the same behaviours committed against men. In essence, this reasoning assumes that there is a violation of the presumption of innocence –and the principle of guilt– that the condition of man is transformed into a presumption of guilt or greater culpability in these crimes.

As we have already said, the cases of femicide do not require to be committed solely by men, but to be conducts against women based on their gender –as some types of femicide can be and usually are committed by women, as FGM–. Therefore, as we have already stated that the active subject offence should not only be men, this criticism is unfounded.

Furthermore, it could be foreseen a qualification in the case in which the perpetrator is a man. This would be justified in some types of femicides, such as intimate ones –in which the offender maintains or has maintained “a partner relationship” with the victim– or sexual ones. In this case, we can find jurisprudential foundation in the already commented judgement of the Spanish Constitutional Court that states that “it is not the sex itself of the active and passive subjects that the legislator takes into account with aggravating effects, but [...] the especially harmful nature of certain facts from the relational scope in which it occurs”.

B. Discrimination

In this sense, we have to analyse whether gender-specific crimes in general and, therefore, the crime of femicide in particular, generate unequal treatment between men and women, especially if more severe punishments are provided when the victim is a woman than when it is a man.

For that matter, the Judicial Power of the Federation of Mexico states⁸⁵ that “the inclusion of the crime of femicide, [...] meets the criteria of objectivity-constitutionality, rationality and proportionality that justifies the differentiated treatment and greater protection of the legal rights concerning life of women and their dignity, when they are in danger or are injured in certain circumstances, in contrast to what happens with the crime of homicide itself, hence the need and justification of its creation in order to prevent and combat such problematic with greater effectiveness. Therefore, femicide does not violate the principle of legal equality of men and women, because this principle should be understood as the constitutional requirement to treat equal to equal and unequal to unequal”.

We have to be aware that we start from a basis of inequality between men and women, a situation in which only women suffer from gender-based violence. In this sense, the recognition of this specific gender-related crime does not discriminate men but intends to guarantee material equality between men and women. In essence: it is not a matter of giving benefits to women but of guaranteeing that they can enjoy the protected goods for which they need reinforced protection, a situation that has already been contemplated in Criminal Law with respect to other discriminated groups in society –and that has not been so criticized–.

In conclusion, it is to be hoped that with an appropriate substantive and procedural legislation as well as with specialized institutions to investigate and prosecute femicides, we will not only eliminate impunity for these acts but also affect their prevention, consolidating, once and for all, real equality, non-discrimination and transparency in the public function, as well as effectiveness of the system of Justice in achieving its main goal: social peace. However, this internal and international legislative proposal has to go together with a program of social education and promotion of women’s rights and elimination of Violence Against Women. Only thus will we end with this situation of injustice, violence, subordination and impunity.

⁸⁵ SEMANARIO JUDICIAL DE LA FEDERACIÓN Y SU GACETA. Booklet XV, December 2012, Volume 2. [Visited March 24th, 2018]. Available in: <https://sjf.scjn.gob.mx/sjfsist/paginas/Reportes/ReporteDE.aspx?idius=2002307&Tipo=1> .

IV. CHAPTER 3. INTERNATIONAL DIMENSION OF FEMICIDE

1. International Law on Human Rights

1.1. Femicide and the duty of the State to typify conducts against Human Rights

As we all know, the right to life is a fundamental Human Right whose full enjoyment is a prerequisite for the enjoyment of all the other Human Rights. The obligation of the State to respect, protect and fulfil this right derives from Article 3 of the Universal Declaration of Human Rights⁸⁶.

Furthermore, according to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms of the General Assembly⁸⁷, each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms by adopting as much legislative, administrative and other steps as may be necessary to ensure those rights and freedoms are effectively guaranteed.

Human Rights are often ignored and violated in the case of women, starting with the right to life, the right not to be tortured or subjected to cruel or degrading treatment, right to freedom –sexual, specifically–, the right to health –including reproductive health– and economic, social and cultural rights –education, specifically–.

In her latest report to the UN Human Rights Council in May 2012, the Special Rapporteur on Violence Against Women, its causes and consequences, Mrs. Rashida Manjoo⁸⁸, denounced that “a significant component of the international human rights framework is the duty placed on States to prevent, investigate, punish and provide

⁸⁶ UNIVERSAL DECLARATION OF HUMAN RIGHTS. Adopted and proclaimed by the United Nations General Assembly. Resolution 217 A (III) of 10 December 1948. [Visited February 28th, 2018]. Available in: http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf.

⁸⁷ GENERAL ASSEMBLY OF THE UNITED NATIONS. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. A/RES/53/144. 1999. Article 2.2. [Visited March 2nd, 2018]. Available in: <http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf>

⁸⁸ MANJOO, Rashida, *op.cit.* Par. 85 and 88.

compensation for all acts of violence”. Furthermore, she remarked that “in other resolutions, the General Assembly has urged States to review or abolish all laws and regulations that discriminate against women or have a discriminatory impact on women and ensure that provisions of multiple legal systems comply with international human rights obligations, and to use best practices to end impunity and a culture of tolerance towards violence against women, including by evaluating and assessing the impact of legislation, rules and procedures regarding violence against women and reinforcing criminal law and procedure relating to all forms of violence against women, as well as by incorporating into law measures aimed at preventing violence against women”.

As long as the States continue to ignore the structural dimension of Violence Against Women as a form of gender discrimination, institutional response will not be appropriate or helpful. In that sense and, as the role of States in this crime is characterized by tolerance and impunity, it is necessary to bring femicide to the international level. Legislating the criminal type, this offence and its protection could be denounced in International instances and the States would be responsible for the lack of protection of their female civilians.

The ruling of the Inter-American Court of Human Rights in the Campo Algodonero (Mexico) case of November 16, 2009, is today the only instrument of international legal value, strictly mandatory, that contains a tangential reference to femicide⁸⁹. In its paragraphs 143 and 145 establishes:

*143. In light of the preceding paragraphs, in the instant case the Court will use the expression “gender-based murders of women,” also known as **femicide**.*

145. Regarding the deaths that occurred in the instant case, in the following sections the Tribunal will analyse whether, based on the evidence provided by the parties, they constitute gender-based murders of women.

In this sense, the Court noted that, “despite the State’s denial that there is any kind of pattern in the motives for the murders of women in Ciudad Juárez, they are all

⁸⁹ RODRIGO, J. Ángel; GARCÍA, Caterina. *Unidad y pluralismo en el Derecho Internacional Público y en la Comunidad Internacional*. Barcelona. Tecnos. 2011. P. 459.

influenced by a culture of discrimination against women based on the erroneous idea that women are inferior”.⁹⁰

The Court established that, although the obligation to prevent acts of violence is an obligation of means and not of result, this obligation⁹¹ includes the adoption of legislative, political and institutional measures to prevent these acts, with a view to protecting to women of the risks that increase their exposure to acts of violence. In particular, the Court refers to a strict and more rigorous due diligence obligation when it comes to reports of missing women in a context known by the State of disappearances and homicides, with respect to search actions during the first hours and days. Likewise, the Court emphasizes that the judicial ineffectiveness sends a message to the society of tolerance to violence against women, which in turn contributes to perpetuate it⁹².

Based on this duty of the States, we will propose, in the following pages, an international recognition of the crime of femicide.

1.2. Femicide and the international responsibility of the State in Human Rights violations

The Convention of Belém do Pará⁹³ has affirmed that violence against women is not only a violation of human rights but also an "offense against human dignity and a manifestation of historically unequal power relations between men and women". It transcends all sectors of society, regardless of class, race or ethnic group, income level, culture, educational level, age or religion.

As we have discovered in Chapter 1, the link between gender inequality, discrimination and economic disempowerment, among other factors, is the result of a systematic repudiation of women's rights and the States' deficiency to observe their

⁹⁰ INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case of González et al. ("Cotton Field") v. Mexico*. Judgment of November 16, 2009. Par. 132. [Visited February 28th, 2018]. Available in: http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf.

⁹¹ *Ibid.* Par. 283.

⁹² *Ibid.* Par. 378.

⁹³ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará). Brazil. 9 June 1994. P.1. [Visited February 28th, 2018]. Available in: <https://www.oas.org/es/mesecvi/docs/BelemDoPara-ENGLISH.pdf>

obligations with their female citizen⁹⁴. The principle of equality and non-discrimination is essential or core in the internal and international protection of Human Rights and it must be considered as a Human Right that empowers the other Rights⁹⁵.

Obviously, discrimination reaches its most perverse level when it comes to femicide. That maximum level of perversion is institutionalized when the corresponding State refuses to investigate, condemn and, where appropriate, apply the corresponding penalties to those directly responsible and those who did not fulfilled their obligations to investigate, prosecute and punish.

Marcela Lagarde⁹⁶ indicates that "regarding femicide, there is a criminal silence, omission, negligence and partial or total collusion of authorities in charge of preventing and eradicating these crimes, guided by their gender blindness or their sexist prejudices and misogyny about women". °

Moreover, according to the report of Rashida Manjoo⁹⁷ mentioned above, “the Declaration on the Elimination of Violence against Women spells out the obligation of States to exercise due diligence when gender-based violence occurs, whether perpetrated by the State or by private persons. In numerous resolutions relating to the intensification of efforts to eliminate all forms of violence against women, the Human Rights Council and the General Assembly have also urged States to act with due diligence when gender-based violence occurs, whether perpetrated by the State or by private persons”.

In this sense, Human Rights violations even when committed by individuals constitute a form of non-compliance with the Human Rights obligations of States. Notwithstanding, the responsibility of States depends on their ability to be aware of the situation and to comply with their obligations, and on if they have adopted a due

⁹⁴ M. MARIÑO, Fernando, *op. cit.* . P. 15.

⁹⁵ FELLMETH, Aaron Xavier. *Non discrimination as a universal human right. The Yale Journal of International Law.* 2009, vol. 27, 2, p. 588 and ff.

⁹⁶ LAGARDE, Marcela. *Antropología, feminismo y política: violencia feminicida y derechos humanos de las mujeres.* In *Retos teóricos y nuevas prácticas.* Ankulegi Antropologia Eukartegi. Donostia. 2008. P. 216. [Visited March 5th, 2018]. Available in: <https://www.ankulegi.org/wp-content/uploads/2012/03/0008Lagarde.pdf>

⁹⁷ MANJOO, Rashida, *op.cit.* Par. 85.

diligent position in order to prevent, investigate and punish the violations and the violators of Human Rights⁹⁸.

Through analysis of compliance with these obligations in the Cotton Field – Campo Algodonero– case, mentioned above, the Court⁹⁹ defined Mexico’s responsibility in regard to these obligations and found it responsible for Human Rights violations committed by individuals. The Court based the responsibility of the State of Mexico in the non-compliance of the obligation to respect, the obligation to guarantee – obligation to prevention and to investigation–, the obligation to non-discrimination and the obligation to special protection of children, as two of the three victims in the case were minors. Thus, the judges¹⁰⁰ considered that “the State is obliged to combat any situation of impunity by all available means, as it encourages the chronic repetition of human rights violations”.

1.3. International Criminal Law and femicide

International Crimes include those of gravity, transcendent to the International Community as a whole and which constitute threats to the peace, security and well-being of mankind. Genocide, War Crimes and Crimes Against Humanity are considered crimes of this category.

Unlike the crimes just mentioned, the international crime of femicide, considered as an internationally wrongful act attributable to a State or as an autonomous individual crime in International Law, lacks a separate conventional criminalization.

The Security Council itself observed in its Resolution 1820¹⁰¹, of June 19, 2008 that rape and other forms of sexual violence can constitute War Crimes, Crimes Against Humanity or a constitutive act of Genocide and highlighted the need for crimes of

⁹⁸ RED DE MESA DE MUJERES DE CIUDAD JUÁREZ, CLADEM. *Proposals for analysis and monitoring of the “Cotton Field” case sentence, regarding human rights violations committed by the Mexican State*. Mexico. 2010. P. 43. [Visited February 19th, 2018]. Available in: https://eu.boell.org/sites/default/files/uploads/2013/12/campo_algodonero_eng.pdf.

⁹⁹ *Ibid.* Pp. 43, 48 and 57.

¹⁰⁰ INTERAMERICAN COURT OF HUMAN RIGHTS, *op cit.*, Par. 454.

¹⁰¹ SECURITY COUNCIL. Resolution 1820, adopted on 19 June 2008. [Visited February 19th, 2018]. Available in: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf>.

sexual violence to be excluded from the provisions of amnesty in the context of conflict resolution processes. Furthermore, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda addressed in numerous proceedings the prosecution of rape and other sexual crimes as Crimes Against Humanity, War Crimes and Genocide¹⁰².

The Statute of Rome, which creates the International Criminal Court in 1998, includes for the first time within Crimes Against Humanity¹⁰³: "Rape, slavery, forced prostitution, forced pregnancy, forced sterilization or other sexual abuse of comparable severity." Likewise, in Article 8¹⁰⁴, regulating War Crimes, in its paragraph 2, xxii, considers that some of them may be produced by "acts of rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and any other form of sexual violence that constitutes a serious violation of the Geneva Conventions".

In the next sections, we will discover why femicide should not be included within these terms, but that it should be regarded as a separate one.

1.3.1.1. Genocide and femicide

As established in article 6 of the Statute of Rome, "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

¹⁰² OJINAGA RUÍZ, Rosario. *El tratamiento jurídico internacional de la violación y otras agresiones sexuales contra mujeres civiles en periodo de conflicto armado* in *Homenaje a Luis Rojo Ajuria: escritos jurídicos*. Santander. Universidad de Cantabria. 2003. P. 1021 and ff.

¹⁰³ INTERNATIONAL CRIMINAL COURT. Statute of Rome. Article 7. [Visited February 20th, 2018]. Available in: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

¹⁰⁴ *Ibid.* Article 8.

In that sense, Rita Laura Segato¹⁰⁵ highlights that femicide implies the murder of a generic woman, just because she is a woman in the same way that genocide is a lethal aggression to all those who belong to the same group ethnic, racial, linguistic, religious or ideological because of belonging to that concrete group. Both crimes are directed to a category, not to a specific subject.

At this point, it is important to make clear that femicide denotes something much deeper than the desire to eliminate a generic group of women, which could be included in the first types of acts regarding genocide. It is directed against women on account of their gender. Therefore, in this crime, the motivation that guides the perpetrator in order to commit the crime is determinant for the typing of the offence. The *animus* is not "the intention to eliminate totally or partially" the group of women, as in genocide. In femicide the determining factor is the categorization, visualization of women as an object of victimization.

What we have to bear in mind is that it would not be appropriate to take for granted that the crime of genocide includes femicide. This does not affect political, ethnic or religious groups, it affects women, more than half of humanity. That is why we should regulate a separate offence, in order to provide the specific penalties and preventive measures it demands. We need violence against women to be a matter of State in all countries around the world but we cannot fight against male, chauvinist violence without a clear political will and without international legislative measures. We are murdered for being women, a fact that it is not recognised by States that do not take the responsibility of guaranteeing the right of a life free of violence for women¹⁰⁶.

1.3.1.2. Crimes against humanity and femicide

Article 7 of the Statute of Rome, which regulates Crimes Against Humanity, states that "Crime Against Humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population,

¹⁰⁵ SEGATO, Rita Laura. *Territorio, soberanía y crímenes de segundo Estado: la escritura en el cuerpo de las mujeres asesinadas en Ciudad Juárez*. Brasilia. Série Antropología. 2004. [Visited March 7th, 2018]. Available in: https://www.forosalud.org.pe/territorio_soberania.pdf

¹⁰⁶ ACADEMIC COUNCIL OF THE UNITED NATIONS SYSTEM. Abuse and Femicide of the Older Woman. Vienna. 2017. P. 51. [Visited March 12th, 2018]. Available in: <https://acuns.org/wp-content/uploads/2017/11/Femicide-Volume-VIII-Abuse-and-Femicide-of-the-Older-Woman.pdf>

with knowledge of the attack: “(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”.

At first-glance, we could reach the conclusion that systematic femicides may be included in this definition, especially regarding acts (a) in relation with (g) and (h). In relation to this last one, the Statute refers to gender stating that “for the purpose of this Statute, it is understood that the term "gender" refers to the **two sexes**, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above”. In this sense, it ignores the material inequality and the reality regarding gender crimes –as the great majority affects only women, based on the patriarchal cultural and historical roots already analysed–.

It must be remembered that in order to build Crimes Against Humanity these acts must be carried out as part of a generalized or systematic attack against a civilian population and with knowledge of that attack¹⁰⁷. The problem of including femicide within Crimes Against Humanity lies in the fact that it has to be “generalized or systematic”, so that it would exclude the majority of the cases of femicide, especially those committed in the intimate or private sphere, in which it is difficult to find the intention to destroy a group or carry out a generalized attack. In these cases we are witness not of an attack against a civilian population but a sum of individual and autonomous attacks motivated by the same reason: the gender of the victims.

¹⁰⁷ AMBOS, Kai; WIRTH, Steffen. *The current Law of Crimes Against Humanity*” in *Criminal Law Forum*, 13, 2002. P. 14 and ff. [Visited February 28th, 2018]. Available in: http://www.department-ambos.uni-goettingen.de/data/documents/Veroeffentlichungen/epapers/CLF_02-1_CAH.pdf.

Apart from these cases, and although there is still the theoretical possibility of applying the model of Crimes Against humanity to the sanction of cases of systematic sexual femicide, it would imply to maintain the greatest part of femicides apart¹⁰⁸ and would lack the specific requirements needed for an effective investigation and punishment of gender-related crimes.

1.3.1.3. War crimes and femicide

Sexual crimes have also been expressly and autonomously included in the Statute as War Crimes, both in international conflicts and in internal conflicts. The behaviours and definitions are the same as those collected in Crimes Against Humanity. However, it is necessary to take into account that the context of its execution changes. In order to constitute a War Crime, the conduct must be carried out within the framework of an armed conflict, internal or international, against some of the people protected by the Humanitarian Law, being the facts necessarily related to the conflict¹⁰⁹.

As we could announce in Chapter 1, sexual violence has traditionally been used as an instrument of war in numerous internal and international conflicts, as a means to demoralize the enemy or cause terror or humiliation in the population, but in the 20th century¹¹⁰ it was also used as an instrument of ethnic cleansing, to become a true military strategy.

The Resolution of the Security Council of the United Nations n.1325¹¹¹ understood that special protection for women in times of war was essential and called on all parties to an armed conflict to take special protection measures to safeguard women and girls from violence reason of gender and all other forms of violence that can occur in situations of armed conflict. Moreover, in its Resolution 1820¹¹², of June 19,

¹⁰⁸ OFICINA EN MEXICO DEL ALTO COMISIONADO DE LAS NACIONES UNIDAS PARA LOS DERECHOS HUMANOS, *op. cit.*, p. 54.

¹⁰⁹ STATUTE OF ROME, *op. cit.*, article 8.

¹¹⁰ BASSIOUNI, M. Cherif; McCORMICK, Marcia. *Sexual Violence. An invisible weapon of War in Former Yugoslavia*. Chicago. International Human Rights Law Institut DePaul University College of Law.. 1996. P.3 and ff. [Visited February 28th, 2018]. Available in: <http://mcherifbassiouni.com/wp-content/uploads/Sexual-Violence-an-Invisible-Weapon-of-War.pdf>

¹¹¹ SECURITY COUNCIL. Resolution 1325, adopted on 31 October 2000. [Visited February 20th, 2018]. Available in: <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3CF6E4FF96FF9%7D/WPS%20SRES1325%20.pdf>.

¹¹² SECURITY COUNCIL. Resolution 1820, *op. cit.*

2008, the Security Council observed that "sexual violence, when it is used or made to be used as a tactics of war directed deliberately against civilians or as part of an attack widespread or systematic against civilian populations, can significantly exacerbate situations of armed conflict and in some cases constitute an impediment to the restoration of international peace and security".

However, from this perspective, as in the cases of the crimes of Genocide and Crimes Against Humanity, War Crimes provide a possible context in which femicides occur, such as armed conflict. In that sense, they all require the **concurrence of additional qualified elements** related to the context in which the crimes are committed. Thus, in practice, none of these types are useful to the prosecution of femicides, as they don't usually cover those reinforced elements –intention to destroy, in whole or in part, a national, ethnical, racial or religious group/ generalized or systematic killing / killing during war time–.

2. Proposal of an international recognition of the crime

As we could have discovered, the introduction of femicide among international crimes brings with it a much greater difficulty than the introduction of other crimes. It may seem that Genocide, Crimes against Humanity and War Crimes tacitly include women. However, this tacit inclusion is not enough. The main reason lies in the fact that we cannot use with the same force the customary norms and values that are used concerning the other international crimes. It is social, cultural and political conditions that create the perfect atmosphere for the commitment of crimes against women, as we could have found out all across this project.

Notwithstanding, the many similarities between recognized universal crimes and femicide may allow it to be considered a universal crime as well. Firstly, we can find the **individualization** of the victim: the woman as a depersonalized victim resembles the depersonalized victims of Crimes Against Humanity and Genocide. Secondly, we can identify the victim's **vulnerability**. Thirdly, associated with this vulnerability, the intervention, direct or indirect, of the **State**. Fourthly, we can include the **impunity** in which the perpetrators of crimes are usually kept at the national level. Finally, the last similarity is found in some of the **arguments** that are raised with respect to the crimes.

The arguments that allege, for example, the exceptionality of the Holocaust are also used with respect to the exceptional nature of some femicides¹¹³.

Rashida Manjoo¹¹⁴ understands that “the term of femicide could be usefully adopted when holding governments to account at the international level, as it highlights the impunity and the institutional violence aspect of such crimes, which are caused by States’ acts or omissions”. She adds that “a holistic approach in preventing gender-related killings must be emphasized in all the measures taken by States to investigate and sanction violence, especially in crafting, implementing and evaluating legislation, policies and national plans of action”.

In this sense, we should establish norms that typify as an internationally wrongful act of a State the extremely violent of death women on account of their gender, directly committed by organs or agents of the State or by third parties acting under total dependence on it, according to the doctrine established by the International Court of Justice¹¹⁵, or in an indirect way, as an omission.

However, as we have already said, a femicide committed in a specific case, to be classified and prosecuted as an international crime must occur in the context of a systematic or general –and with knowledge thereof– attack, that is the dimension that “elevates” certain femicides to be conceived as a crime against the International Community, precisely because of that **magnitude and structure**¹¹⁶. Women as such can be object of specific acts of violence in a specific country or conflict or by specific actors and all this in a dimension that is general or systematic¹¹⁷.

¹¹³ MESSUTI, Ana. La dimension juridical internacional del feminicidio. In: Gabriela ATENCIO. *Feminicidio: de la categoria político-jurídica a la justicia universal*. Madrid: Ed. Los libros de la Catarata and Fundación Internacional Baltasar Garzón, 2015. P. 47.

¹¹⁴ MANJOO, Rashida, *op. cit.*, Par. 28.

¹¹⁵ INTERNATIONAL COURT OF JUSTICE. Judgment in the case concerning military and paramilitary activities in and against Nicaragua. 1986. P. 111.

¹¹⁶ INTERNATIONAL LAW COMMISSION. *Draft Code of Crimes against the Peace and Security of Mankind*. 48th session. Geneva. 1996. [Visited February 26th, 2018]. Available in: http://legal.un.org/docs/?path=..//ilc/texts/instruments/english/draft_articles/7_4_1996.pdf&lang=EF.

¹¹⁷ GENERAL ASSEMBLY OF THE UNITED NATIONS. Resolution 56/83. Art. 40.2. [Visited February 26th, 2018]. Available in: http://www.un.org/es/comun/docs/index.asp?symbol=A/RES/56/83&referer=http://www.un.org/depts/dhl/resguide/r56_resolutions_table_es.htm&Lang=E.

For all these reasons, in the present work, it is proposed that, for the case of **systematic** attacks against women –such as Ciudad Juárez crimes or female infanticide in India– that cannot or should not be included within Genocide, Crimes Against Humanity or War Crimes, we should regulate a new international offence. In that sense, the attribution to a State of a femicide may derive from an acquiescence or consent to the acts of third parties. The proof of acquiescence is presumably based on the knowledge one has or should have of the facts and inaction against them. In a certain way, the State does not already know but "recognizes", even tacitly, the facts without acting against the presumed responsible parties –*patentia* and / or *receptus*–¹¹⁸. This would imply that, for example, foeticide or FGM femicides could be denounced in International instances making the States responsible for a direct or indirect human rights' violation.

On the other hand, for the **individual and autonomous femicides** –the most common ones, especially regarding intimate femicide– as they are singular cases, they won't be able to be applied in an international offence as they don't affect the international community as a whole. For that purpose, it would not only be convenient to internationally recognize femicide but, on the other hand, we should also approve a Convention that would oblige States to include femicide within their criminal jurisdictions and assume that the international norms regarded in that declaration set the standards for national norms.

As said before, the adoption of a specific international convention, even if not implying that the illicit act contemplated constitutes an autonomous international crime such as those contemplated in the Statute of the International Criminal Court, would give a boost to forms of universal repression that avoid impunity for major international crimes.

For that purpose, it would implement legal and forensic basic standards, obligations and instructions in order to make more effective the investigation and elimination of femicides and other types of Violence against Women. This would give an erga omnes effect to the prosecution of killings by reason of gender, so that it could

¹¹⁸ MESSUTI, Ana, *op. cit.*, pp. 47-48.

be alleged and used by judges, public officials, prosecutors, lawyers, politicians, legal medical experts, in the investigation and documentation of femicides around the whole world.

The Convention could include various practices of gender violence, such as torture, slavery, physical and psychological violence and other types of violence, identifying the various ways to carry it out. The essential thing is that, in any case, it is recognized as a determining element of this crime, whatever the conduct through which it is committed, that the reason for it, what led the author to commit it, is **the gender of the victim**.

Finally, it would be advisable to find support in the normative action of civil society and International Organizations competent in the protection of women's rights in the face of violence, such as the United Nations, especially regarding the adoption of a Declaration of the General Assembly.

V. CONCLUSIONS

In the present piece of work, we have had the chance to discover the phenomenon of femicide. Firstly, we have introduced the historical, cultural and social environment in which femicides take place, so that we can deeper identify its roots and, thereby, be able to understand it in order to be able to fight against it.

In that sense, after analysing the historical testimony of femicide, we have discovered that it has always existed and, in some specific cases, it enjoyed public tolerance and impunity from the authorities. Furthermore, after the analysis of different approaches and the different ways in which femicides can occur, we have brought about a general definition of femicide as “the killing of a woman based on account of her gender”.

Moreover, we have concluded that the patriarchal and “macho” values inserted in our societies serve as a basis for gender discrimination, thereby legitimizing women's subordination and the violation of their rights. With respect to this, we have reached the conclusion that a climate of impunity is set while investigating and punishing femicides, as the authorities responsible for the investigations accept and tolerate the murders and do not prosecute and condemn the perpetrators.

Then, in Chapter 2, we have been able to justify the specific inclusion of the crime of femicide. Firstly, we have given arguments in order to differentiate this crime from the general types of homicide and murder. Secondly, we have designed the proposal of the criminal offence and its characteristics regarding conduct, subjects, penalties and aggravations and described how a proper and effective investigation should be. After that, we have given reasons in order to fight against possible criticisms that may be found in the theoretical criminal study of the offence –Symbolic Criminal Law, an absence of a legally protected interest and the violation of the principle of equality and non-discrimination–. Finally, we have accomplished that the recognition of femicide would guarantee the prevention of these crimes, the cases not to remain in impunity and the reach of material equality.

Besides, in Chapter 3, we have observed that femicides are included into the international duty of the States to typify conducts against Human Rights and that they may lead a State to be responsible of Human Rights violations, even in an acquiescent way. Likewise, we have discovered reasons that justify femicide not to be included into the already recognized international criminal offences –Genocide, Crimes Against Humanity and War Crimes–, as they all require the concurrence of additional qualified elements related to the context in which the crimes are committed, thereby not being effective to the prosecution of femicides in practice and, furthermore, lacking the specific requirements needed for a proper investigation and punishment of gender-related killings.

Finally, it has been proposed that, on the one hand, we should incorporate a new international criminal offence regarding systematic femicides –as it can be seen as a international crime due to its magnitude as a threat to the international community– and, on the other hand, that we should define and recognize the individual crime of femicide in the heart of an international convention –preferably of the United Nations– that would force States to include femicide within their criminal codes and set directions for a proper and effective investigation, all along with measures of social education for the prevention of femicides.

In order to conclude, in the present project it has been tried to defend a deeper protection of all women, acting against deep-rooted inequality that condone or normalize the most extreme form of violence and discrimination against women: their killing. However, the current situation is not inevitable. With laws to protect women and prevent and punish perpetrators, ending violence against women and girls can become a reality. We just have to keep fighting.

“On the day when it will be possible for a woman to love not in her weakness but in her strength, not to escape herself but to find herself, not to abase herself but to assert herself, on that day love will become for her, as for a man, a source of life and not of mortal danger.”

–Simone de Beauvoir (1908 - 1986 †)–

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† You are not forgotten †