

# FEMICIDE AS GENDER PERSECUTION

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## I. INTRODUCTION

“Femicide”—frequently defined as the killing of a woman because she is a woman or the gendered killing of women<sup>2</sup>—is a problem in times of war and peace alike and, in many places, “take[s] place in a general climate of indifference and impunity.”<sup>3</sup> In its recent report on “Gender Related Killings of Women and Girls (Femicide/Feminicide),” the U.N. Office on Drugs and Crimes called violence against women (“VAW”)<sup>4</sup> “the most pervasive human rights violation rooted in gender inequality and discrimination” and “the gender-related killing of women and girls [as] the most brutal and extreme manifestation of such violence.”<sup>5</sup> This Article argues that not only are femicide and other gendered killings grave, discriminatory human rights violations, but, in some cases, they may constitute crimes under international

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<sup>2</sup> Unless otherwise indicated, this Article uses the term “woman” to describe any person who identifies as a woman. For a discussion of the evolution of the terms femicide and feminicide in theory and law, see *infra* Part II.

<sup>3</sup> Matthias Nowak, *Femicide: A Global Problem*, SMALL ARMS SURV. 1, 1–3 (2012) (“About 66,000 women and girls are violently killed every year, accounting for approximately 17 per cent of all victims of intentional homicides . . . . In countries marked by high levels of lethal violence, women are more frequently attacked in the public sphere, including by gangs and organized criminal groups; in this context, femicides often take place in a general climate of indifference and impunity.”).

<sup>4</sup> Violence against women is defined in a variety of ways in international human rights and domestic laws. The U.N. Fourth World Conference on Women defined it as:

[A]ny act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Accordingly, violence against women encompasses but is not limited to the following:

- a. Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- b. Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- c. Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

U.N. Fourth World Conference on Women, *Platform for Action*, ¶ 113, U.N. Doc. A/CONF.177/20/Rev.1 (Sept. 1995), <https://www.un.org/womenwatch/daw/beijing/platform/violence.htm> [<https://perma.cc/2R86-VQLQ>].

<sup>5</sup> U.N. Women and the U.N. Office on Drugs and Crime estimate that, consistent with figures from the last decade, some “81,100 women and girls were killed intentionally in 2021,” the majority by “intimate partners or other family members,” although they note that the estimates are almost certainly too low. U.N. OFFICE ON DRUGS & CRIME & U.N. WOMEN, GENDER-RELATED KILLINGS OF WOMEN AND GIRLS (FEMICIDE/FEMINICIDE): GLOBAL ESTIMATES OF GENDER-RELATED KILLINGS OF WOMEN AND GIRLS IN THE PRIVATE SPHERE IN 2021, at 3–5 (2022), <https://www.unwomen.org/sites/default/files/2022-11/Gender-related-killings-of-women-and-girls-improving-data-to-improve-responses-to-femicide-feminicide-en.pdf> [<https://perma.cc/Q4GL-EQAM>].

criminal law (“ICL”). Further, it contends that femicide is best approached in ICL, at least at the International Criminal Court (ICC), under existing international crimes. Further, it argues that, although the appropriate international charge will depend on the particular factual circumstances involved, the crime against humanity of gender persecution goes a long way in capturing the gendered dynamics at the heart of femicide.

Although the term “femicide” first made its appearance in feminist sociological theory, it has gained momentum as a legal concept in recent years. Almost all Latin American countries have made femicide a crime or an aggravating circumstance in homicide cases.<sup>6</sup> The European Institute for Gender Equality has issued a report proposing improved legal responses to femicide in the European Union, which canvasses arguments in favor of recognizing a specific crime of femicide.<sup>7</sup> Even in the United States, where femicide is not a part of the legal vernacular,<sup>8</sup> a Justice of the Massachusetts Supreme Judicial Court recently used the concept in a concurring opinion discussing a killing in the wake of a rape.<sup>9</sup>

A number of international human rights organizations—both governmental and non-governmental—have framed femicide as a gross violation of women’s human rights. Regional and international human rights and development bodies have spent the last decade working with countries in Latin America to criminalize femicide and promote investigation and prosecution.<sup>10</sup> The first part, passing laws, countries are often happy to do, some say as a cheap way of demonstrating a commitment to address the severe problem of killing of women.<sup>11</sup> Prevention and enforcement, however, remain vexing challenges.<sup>12</sup>

By contrast, in the place where human rights and criminal law intersect on the international stage—international criminal tribunals—femicide is not,

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<sup>6</sup> Caroline Davidson, *Speaking Femicide*, 71 AM. U. L. REV. 377, 389 (2021).

<sup>7</sup> EUR. INST. FOR GENDER EQUAL., IMPROVING LEGAL RESPONSES TO COUNTER FEMICIDE IN THE EUROPEAN UNION: PERSPECTIVES FROM VICTIMS AND PROFESSIONALS 9–10 (2023), <https://eige.europa.eu/publications/improving-legal-responses-counter-femicide-european-union-perspectives-victims-and-professionals> [<https://perma.cc/39FF-HBVF>].

<sup>8</sup> Davidson, *supra* note 6, at 381.

<sup>9</sup> *Commonwealth v. Paige*, 177 N.E.3d 149, 160 (Mass. 2021) (Cypher, J., concurring) (discussing the term femicide and using it, despite its absence from case law, to describe “the context in which the rape occurred,” in a precedent she condemned, wherein the court had determined there was insufficient evidence of rape preceding a murder in the absence of physical evidence such as “torn clothing or injured genitalia” and arguing that “[w]hen a killing takes place following a rape, the victim no longer can testify about the absence of consent in the sexual encounter,” and that the victim “effectively has been silenced” such that in such cases “the jury must be permitted to infer from the evidence of a killing that the sexual encounter was nonconsensual”).

<sup>10</sup> See discussion *infra* Part II.C.

<sup>11</sup> Davidson, *supra* note 6, at 441.

<sup>12</sup> *Id.*; see, e.g., Tom Phillips and Lillian Perlmutter, ‘Femicide Nation’: Murder of Young Woman Casts Spotlight on Mexico’s Gender Violence Crisis, GUARDIAN (Apr. 26, 2022), <https://www.theguardian.com/society/2022/apr/26/murder-young-woman-mexico-femicide> [<https://perma.cc/PFF7-XHK3>] (discussing the state’s lack of action in preventing and following up on the murders of women).

as its name might suggest, recognized as a form of genocide. Nor is it its own international crime.<sup>13</sup> Activists and scholars have criticized international tribunals, most recently the ICC, for failing to consider the role of gender in mass violence and for failing to conduct gender-sensitive investigations and prosecutions. International tribunals, including the ICC, have in many ways heeded this call and made efforts to be more sensitive to gender dynamics in investigating, prosecuting, and judging crimes.<sup>14</sup> They have also put effort into identifying the gender dimensions of violence, particularly when it comes to sexual violence. These tribunals, however, have been less attentive to the role of gender in killings and other gross human rights violations.

This Article endeavors to situate femicide within the rubric of ICL and argues that the ICC can best address femicide through existing international crimes, particularly the crime of gender persecution. Given that the Office of the Prosecutor at the ICC has recently issued a policy statement on the crime of gender persecution, this is an apt moment for gender justice advocates to put femicide on the Prosecutor's radar.<sup>15</sup> This Article argues that there is value—expressive and strategic—in the ICC taking up the issue of femicide through existing crimes, including the crime against humanity of gender persecution. The ICC is uniquely positioned to draw attention to the issue of femicide and other gendered killings and to communicate the gravity of the crimes. The ICC is also well-equipped to provide assistance to domestic jurisdictions struggling with the issue and to motivate state officials to take action on neglected crimes through the threat of an ICC prosecution.

Approaching femicide as gender persecution rather than as its own stand-alone crime has its disadvantages. In particular, it means substituting the international community's estimation of how best to characterize a harm over the view of at least some groups, including women's rights activists, in some affected communities. This approach also fails to center the particular

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<sup>13</sup> See ANGELA HEFTI, CONCEPTUALIZING FEMICIDE AS A HUMAN RIGHTS VIOLATION 80 (2022) ("Femicide is not defined in international criminal law (ICL), let alone recognized as a sub-form or method of genocide."). Hefti posits that a teleological reading of the Genocide Convention and some evidence from customary international law arguably support the argument gender could be a protected group for the purposes of genocide but ultimately concludes that genocide is not the right framing for femicide anyway, since "[c]ontrary to the group's physical destruction in genocide, the subordination of women and girls in the patriarchal social order is the objective in femicide." *Id.* at 94–98, 101, 103.

<sup>14</sup> See discussion *infra* Part III.A.

<sup>15</sup> Press Release, Office of the Prosecutor, The Office of the Prosecutor Launches Public Consultation on a New Policy Initiative to Advance Accountability for Gender Persecution under the Rome Statute (Dec. 20, 2021), <https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability> [<https://perma.cc/7KUY-S4ZF>] ("Prosecutor Khan stated: 'gender persecution as a crime against humanity takes many forms, and is indeed linked to other crimes under the Rome Statute. I am firmly committed to ensuring that my Office systematically addresses sexual and gender-based crimes, and takes a deeper and focused approach to investigating and prosecuting gender persecution. This latest policy paper initiative is another commitment to this necessary objective.'").

gendered dynamic at issue in femicides (fatal, discriminatory violence against women) in a context of impunity.

However, this approach offers significant advantages over insisting that femicide be tackled as its own international crime. It is more likely to be feasible due to the difficulty of creating a new international crime, particularly at the ICC. Moreover, it communicates the gravity of the violence by situating femicide within the long-recognized crime against humanity of persecution. Viewing femicide through the lens of gender persecution may also highlight the broader array of discriminatory gender dynamics, as well as discriminatory forces at play beyond gender. Finally, by avoiding insistence on the gender binary, which is more or less inherent in the concept of femicide, the label “gender persecution” has the benefit of greater inclusivity and avoiding perpetuating stereotypes about women as helpless victims.

The Article proceeds in four parts. Part I introduces the Article’s thesis that femicide can amount to an international crime worthy of the ICC’s attention and that the ICC could best address femicide through existing crimes like gender persecution. Part II describes the concept of femicide and its criminalization in Latin America. It also describes the international human rights community’s embrace of the term and support for Latin American efforts to criminalize femicide. Finally, it details the Inter-American Court of Human Rights’ engagement with the issue of femicide but preference for the term “gender-based murder.” Part III examines the treatment of sexual and gender-based violence (“SGBV”) at international criminal tribunals, and, in particular, the ICC, and identifies femicide’s closest analogues in ICL. Part IV explores arguments for femicide to be recognized as a form of genocide or a new genocide-like crime and argues that recognizing femicide as gender persecution or other existing international crime is the best path toward criminalization of femicide in ICL, at least at the ICC.

To be clear, this Article is not arguing that domestic jurisdictions with femicide statutes should change their femicide laws. Nor is it arguing that domestic jurisdictions adjudicating a mixture of international and domestic crimes should necessarily favor a gender persecution framing over a femicide one. Rather, it aims to offer anti-femicide advocates a roadmap for situating their arguments in ICL and, potentially, tools for calling on the assistance of the ICC. Further, drawing on lessons from the law and theory of femicide, it seeks to offer the ICC some guidance in thinking about ICL and gendered killing.

## II. FEMICIDE IN THEORY, IN LAW, AND IN INTERNATIONAL HUMAN RIGHTS DISCOURSE

The term “femicide” arose as a concept in feminist theory, but in recent years, it has been translated into law in a number of Latin American countries. Galvanized by brutal killings of women and girls in Ciudad Juarez,

Mexico, and by prosecutorial and police indifference to the ongoing killings of women and girls throughout the region, Latin American activists and community members fought to bring attention to understanding these crimes as femicide and feminicide.<sup>16</sup> The criminalization of femicide is in part a product both of feminist mobilization in the region and of pressure from international human rights organizations to persuade countries to take the phenomenon seriously, including by enacting femicide laws. This Part offers a brief overview of the trajectory of the terms femicide and feminicide and their criminalization.<sup>17</sup>

### A. *Femicide in Theory*

Feminist scholar Diana Russell first introduced the concept of femicide in the 1970s.<sup>18</sup> She originally employed the term to emphasize one gendered aspect of the killing—the “hate killing of women.”<sup>19</sup> Explaining her thinking at the time, Russell has written:

When I testified about femicide at the International Tribunal, I defined it implicitly as a hate killing of females perpetrated by males. For example, I stated that: “From the burning of witches in the past, to the more recent widespread custom of female infanticide in many societies, to the killing of women for so-called honor, we realize that femicide has been going on a long time.” Just as murders targeting African Americans and/or other minority groups, are differentiated by those that are racist and those that are not, so must murders targeting females be differentiated by those that are femicides and those that are not. When the gender of the victim is irrelevant to the perpetrator, the murder qualifies as a non-femicidal crime.<sup>20</sup>

Subsequently, Russell shifted the gender framing of the concept by emphasizing men’s aggression against women:

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<sup>16</sup> See Davidson, *supra* note 6, at 387–89.

<sup>17</sup> See generally Davidson, *supra* note 6 (providing a more detailed explanation of this trajectory). Russell was the first to develop the term, but she credits Diane Orlock with inventing it. Russell has explained that Orlock was planning to write a book on femicide, but never pursued it, and welcomed Russell’s adoption of the term. Diana Russell, *The Origin and Importance of the Term Femicide* (Dec. 2011), [https://www.dianarussell.com/origin\\_of\\_femicide.html](https://www.dianarussell.com/origin_of_femicide.html) [https://perma.cc/CW7P-A6TD].

<sup>18</sup> See generally FEMICIDE: THE POLITICS OF WOMAN KILLING (Jill Radford & Diana E.H. Russell eds., 1992) (providing example of early use of “femicide”).

<sup>19</sup> Monique Widyono, *Conceptualizing Femicide*, in PATH, INTERCAMBIOS, MED. RSCH. COUNCIL FOR S. AFR., & WORLD HEALTH ORG., STRENGTHENING UNDERSTANDING OF FEMICIDE 7 (2008) (noting that, although Russell herself had not defined “femicide” when she used the term in the Tribunal on Crimes Against Women, “[i]n 1992, Russell and Jill Radford defined femicide as ‘the misogynistic killing of women by men,’ and Radford specifically identified it as a form of sexual violence”).

<sup>20</sup> Russell, *supra* note 17.

I finally defined it very simply as “the killing of females by males *because* they are female.” I’ll repeat this definition: “the killing of females by males *because* they are female.” I use the term “female” instead of “women” to emphasize that my definition includes baby girls and older girls.<sup>21</sup>

Russell thus very consciously defined femicide with respect to the genders, or perhaps even more narrowly, sexes,<sup>22</sup> of the perpetrator and the victim and only included within the concept the killing of women by men. The crime was defined and framed by the killing and the man-on-woman binary nature. According to gender specialist Monique Widyono, Russell’s adapted definition was intended to highlight femicide in the context of unequal gender relations and the notion of male power and domination over women.<sup>23</sup> Or, as Angela Hefti, a contemporary proponent of the term femicide, puts it, “asymmetric injustice [rooted in historic inequality between men and women] affecting women and girls” is “what the term ‘femicide’ intends to capture.”<sup>24</sup>

Some have tweaked the definition or employed different terms for similar types of gendered violence. Certain conceptions of femicide include within it all killings of women, regardless of the motivation or focus, often focusing on intimate partner femicide.<sup>25</sup> Others preferred other terms over femicide. The feminist writer, Andrea Dworkin, for example, instead used the term “gynocide” to describe sexist violence against women. Although she does not offer a tidy definition of the term, she devotes chapters in her book, *Woman Hating*, to “gynocide” in relation to the practice of footbinding and persecution of witches.<sup>26</sup> The term, “gynocide,” seems to place the

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<sup>21</sup> *Id.* (arguing that “[e]xamples of femicide include the stoning to death of females (which I consider a form of torture-femicide); murders of females for so-called ‘honor’; rape murders; murders of women and girls by their husbands, boyfriends, and dates, for having an affair, or being rebellious, or any number of other excuses; wife-killing by immolation because of too little dowry; deaths as a result of genital mutilations; female sex slaves, trafficked females, and prostituted females, murdered by their ‘owners,’ traffickers, ‘johns’ and pimps, and females killed by misogynist strangers, acquaintances, and serial killers” and excluding from femicide “the increasingly widespread practice of aborting female fetuses, particularly in India and China,” preferring the term “*female feticide*” “for this sexist practice”).

<sup>22</sup> It is a little unclear from these writings whether Russell is intending to define femicide in terms of sex or gender. She states that she uses the term female instead of women to make it clear that she includes within the victim class “baby girls and older girls.” *Id.* Thus, her use of “female” here may be intended to connote people who identify as women, baby girls and older girls, as opposed to only biological females. Of course, Russell was writing at a time when the concepts of gender and sex were less developed than they are today.

<sup>23</sup> Widyono, *supra* note 19, at 7 (“In 2001, Russell adapted her definition to ‘the killing of females by males because they are females.’ She intended to highlight femicide in the context of unequal gender relations and the notion of male power and domination over women.”).

<sup>24</sup> HEFTI, *supra* note 13, at 98.

<sup>25</sup> Widyono, *supra* note 19, at 7 (citing Jaqueline Campbell and Runyan’s 1998 work).

<sup>26</sup> ANDREA DWORKIN, *WOMAN HATING* 95–151 (1974).

focus on the part of the woman Dworkin deems most relevant to the hating of women, in her words, “the cunt.”<sup>27</sup> Her emphasis is on sexist violence, not killing, necessarily, since, per Dworkin, men still needed women alive to reproduce and “men prefer to fuck cunts who are nominally alive.”<sup>28</sup> Dworkin also situates rape in war as part of this broader gynocidal war against women.<sup>29</sup>

Not long after the term femicide appeared on the scene came a proposal to call attention to gendered homicides in a manner that contemplated gendered violence beyond that directed at women alone. In 1985, in a book discussing sex selection, Professor Mary Anne Warren proposed a gender-neutral conception of gendered killing: gendercide. She explained her preference for “a sex-neutral term” because “sexually discriminatory killing is just as wrong when the victims happen to be male.”<sup>30</sup> She also emphasized that the term gendercide still foregrounded the lethal consequences of gender prejudice.<sup>31</sup> Unsurprisingly, some have criticized the term gendercide for its failure to acknowledge that, in reality, the victims in such cases are almost always women, and for its potential to perpetuate structural inequalities between men and women.<sup>32</sup>

Even in its early days, proponents of the label “femicide” very consciously drew from the rhetoric of ICL. The selection of “femicide” as a term not only sits in juxtaposition to the word “homicide,” but also seems intended to convey gravity by analogy to “genocide,” ICL’s “crime of crimes.”<sup>33</sup> Moreover, Russell first used the term at a mock international tri-

<sup>27</sup> See *id.* at 55–64.

<sup>28</sup> *Id.* at 93–94 (“That women have not been exterminated, and will not be (at least until the technology of creating life in the laboratory is perfected) can be attributed to our presumed ability to bear children and, more importantly no doubt, to the relative truth that men prefer to fuck cunts who are nominally alive.”).

<sup>29</sup> *Id.* at 94 (“[I]n any war, in any violence between tribes or nations, a specific war crime is perpetrated against women—that of rape. Every woman raped during a political nation-state war is the victim of a much larger war, planetary in its dimensions—the war, more declared than we can bear to know, that men wage against women.”).

<sup>30</sup> MARY ANNE WARREN, GENDERCIDE: THE IMPLICATIONS OF SEX SELECTION 22 (1985).

<sup>31</sup> *Id.*

<sup>32</sup> See HEFTI, *supra* note 13, at 98–99 (“The term gendercide is susceptible to advancing and maintaining a male-controlled structure of society which disregards and undervalues the systemic violence which has affected women for centuries.”). See generally Christine Overall, *Critical Notice*, 17 CAN. J. OF PHIL. 683 (1987) (reviewing WARREN, *supra* note 30).

<sup>33</sup> For language singling out the particular gravity of genocide, see *Prosecutor v. Krstić*, Case No. IT-98-33-A, Partial Dissenting Opinion of Judge Shahabuddeen to Judgment, ¶ 95 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004) (“Genocide is the ‘crime of crimes.’ The Appeals Chamber has said, correctly, that it ‘is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent.’”). As to femicide’s analogy to genocide, see Shalva Weil, *Making Femicide Visible*, 64 CURRENT SOCIO. 1124, 1129–30 (2016). Russell herself notes the comparison to genocide, but does not explicitly link the two concepts or at least not any more than she does other “cides.” See Russell, *supra* note 17 (“Some people might wonder why I decided to use the invented word femicide instead of some other term like gender-



bunal, the International Tribunal for Crimes Against Women (“Tribunal”) held in Brussels in 1976, the name of which again seems intended to evoke comparison to the International Military Tribunal at Nuremberg (IMT).<sup>34</sup> The Tribunal brought together women from all over the world to give accounts of violence against women. The Tribunal ultimately issued a Report on Violence Against Women, which included a subpart entitled “Femicide.” The introduction to testimony given by witnesses from the United States and Lebanon states:

We must realize that a lot of homicide is in fact femicide. We must recognize the sexual politics of murder. From the burning of witches in the past, to the more recent widespread custom of female infanticide in many societies, to the killing of women for “honor,” we realize that femicide has been going on a long time. But since it involves mere females, there was no name for it until Carol Orlock invented the word “femicide.”<sup>35</sup>

The “women’s tribunal,” like the term femicide, simultaneously evokes and rejects legal forms (perceived as masculine). The introduction of the Report notes, for example, that “[u]nlike a traditional Tribunal[,] there was no panel of judges at the International Tribunal on Crimes Against Women. We were all our own judges. Moreover, the women present completely rejected patriarchal definitions of crime; all man-made forms of oppression were seen as crimes.”<sup>36</sup> Additionally, unlike in a conventional trial in which lawyers ask questions aimed at establishing the elements of crimes, the tribunal sought to hear women’s stories in their own voices, as the organizers thought it would be a superior way of “politicizing and motivat[ing women] to struggle” against oppression, particularly “as a first step in moving [their] struggle into an international context.”<sup>37</sup>

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discriminatory-murders. First of all, gender discrimination is not specific about which gender is a victim of discriminatory murder. In addition, the prefix ‘fem’ connotes female, and ‘icide’ connotes killing—as in terms like homicide, suicide, genocide, patricide, matricide, infanticide. More importantly, the excitement I felt when I first heard the new word femicide caused me to intuit that other feminists would likely share my response.”).

<sup>34</sup> It may instead have been inspired by Bertrand Russell’s unofficial tribunal on U.S. crimes in Vietnam, but both seem styled on or in juxtaposition to the IMT. In the Report on the Crimes Against Women Tribunal, Russell writes: “While none of us at the International Tribunal workshop in Frankfurt talked specifically about the Bertrand Russell Tribunal on Crimes Committed by the U.S. in Vietnam, I believe some of us had assimilated this event into our consciousness. It helped to spark the idea that oppressed peoples have the right to dissociate themselves from those definitions of crimes which have been developed by their oppressors to serve their own interests.” *CRIMES AGAINST WOMEN: PROCEEDINGS OF THE INTERNATIONAL TRIBUNAL* 219 (Diana E.H. Russell & Nicole Van de Ven eds., 1984).

<sup>35</sup> *Id.* at 144.

<sup>36</sup> *Id.* at xv.

<sup>37</sup> *Id.* (“Personal testimony was emphasized because of the belief that it is through sharing our personal experiences of oppression that we become politicized and motivated to struggle against that oppression and the societal conditions producing it, rather than by

Although interest in the concept waned in the Anglo-American world,<sup>38</sup> in the 1990s, Latin American feminists seized on the concept as a way of addressing rampant gender violence, most infamously in Ciudad Juárez, Mexico,<sup>39</sup> and refined it. Latin American feminist scholars discussed the concept of femicide in their particular societal contexts, also emphasizing patriarchal hierarchies of dominance and a widespread acceptance of violence against women.<sup>40</sup> Moreover, Mexican anthropologist and politician Marcela Lagarde y de los Ríos argued for recognition of a new concept—*feminicide*—the gendered killing of women in a context of state impunity for it.<sup>41</sup> Her objective in inventing the concept of feminicide was to implicate state responsibility and flag the societal conditions contributing to the killings, including structural inequality and state indifference to the violence.<sup>42</sup>

Other Latin American feminists joined the push to bring attention to widespread gendered and often fatal violence against women and a culture of impunity through promotion of the concept and criminalization of femi-

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engaging in abstract theoretical debates divorced from our personal experiences. This focus seemed even more appropriate as a first step in moving our struggle into an international context.”).

<sup>38</sup> Davidson, *supra* note 6, at 385 (citing Diana E. H. Russell, *Preface, in FEMICIDE: THE POLITICS OF WOMAN KILLING* xiv (Jill Radford & Diana E. H. Russell eds., 1992)).

<sup>39</sup> See Alicia Gaspar de Alba & Georgina Guzman, *Feminicidio: The “Black Legend” of the Border*, in *MAKING A KILLING: FEMICIDE, FREE TRADE, AND LA FRONTERA* 1 (Alicia Gaspar de Alba & Georgina Guzman eds., 2010) (“Since May 1993, over five hundred women and girls have been found brutally murdered on the El Paso/Juárez border, and thousands more have been reported missing and remain unaccounted for, making this the longest epidemic of femicide violence in modern history.”).

<sup>40</sup> See Davidson, *supra* note 6, at 406–07 (noting that explanations for femicide and feminicide typically focus on structural inequalities and patriarchy, but that the particular gendered dynamics and the contexts in which femicides occur vary place to place).

<sup>41</sup> Marcela Lagarde y de los Ríos, *Preface: Feminist Keys for Understanding Feminicide, in TERRORIZING WOMEN: FEMINICIDE IN THE AMÉRICAS* xv–xvii (Rosa-Linda Fregoso & Cynthia Bejarano eds., 2010); see also GRACIELA ATENCIO, *FEMINICIDIO-FEMICIDIO: UN PARADIGMA PARA EL ANÁLISIS DE LA VIOLENCIA DE GÉNERO* [FEMINICIDE-FEMICIDE: A PARADIGM FOR THE ANALYSIS OF GENDER VIOLENCE] 3 (2011), <https://feminicidio.net/wp-content/uploads/2020/06/paradigma-feminicidio.pdf> [<https://perma.cc/LT77-PYZM>]; KATHLEEN STAUDT, *VIOLENCE AND ACTIVISM AT THE BORDER: GENDER, FEAR AND EVERYDAY LIFE IN CIUDAD JUAREZ* 82 (2008) (“Mostly ignored . . . mourning mothers began to share personal stories about their daughters’ tragic deaths and their own experiences with the police: sent from office to office; asked for bribes to pursue cases; told that evidence was lost or misplaced; and worse yet, threatened . . . . Symbols, slogans, and sharp discourse began to emerge. *Ni una más* became a rallying cry at marches and on signs. ‘Femicide’ became the language of choice to refer to female murders, evoking more emotional response than the word ‘homicide’ (the official label among law enforcement institutions for murder of men or of people generally), suggesting that misogyny drove women-killing and perhaps reminding people of another stark word, ‘genocide.’”).

<sup>42</sup> See Lagarde, *supra* note 41, at xix–xxi (defining feminicide through the failure of state institutions to intervene and through “the hegemony of a patriarchal culture that legitimates despotism, authoritarianism, and the cruel, sexist—macho, misogynist, homophobic, and lesbophobic—treatment reinforced by classism, racism, xenophobia, and other forms of discrimination”).

cide or feminicide.<sup>43</sup> In Latin America, the effort to translate theory to action has relied on three key strategies: “naming, bringing attention to (‘visibilizar’), and conceptualizing.”<sup>44</sup>

As renowned Argentine anthropologist Rita Segato has observed, femicide as a term gained acceptance in Latin America in part by women’s sheer insistence on using it.<sup>45</sup> Bit by bit, the gambit worked: the terms, femicide, and its cousin, feminicide, are now widely used to describe gendered killing of women in the region,<sup>46</sup> and femicide, albeit defined in varying ways, has

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<sup>43</sup> Former Chilean president Ricardo Lagos wrote an op-ed in *El País* lamenting high rates of femicide and impunity for it in Latin America. See Ricardo Lagos, *Femicide is a Crime Against All Humanity*, *EL PAÍS* (Aug. 11, 2019), [https://english.elpais.com/elpais/2019/08/11/inenglish/1565517120\\_175804.html](https://english.elpais.com/elpais/2019/08/11/inenglish/1565517120_175804.html) [https://perma.cc/K342-WQ7Y] (“My region is home to 14 of the 25 countries with the highest rates of femicide in the world, where a woman or girl is killed because of her gender. In Latin America and the Caribbean, 12 women and girls are killed every day. However, 98% of cases go unprosecuted . . . In Latin America, we have a culture of high tolerance towards violence against women and girls. Violence has become normalized. It is seen as a part of life for women, especially for those in socially and economically disadvantaged communities where levels of education and development are low.”).

<sup>44</sup> Dora Inés Munévar M., *Delito de feminicidio. Muerte violenta de mujeres por razones de género [Femicide: Violent Deaths of Women as Gender-Specific Crime]*, 14 *REVISTA ESTUDIOS SOCIO-JURÍDICOS* 135, 143 (2012) (Colom.) (“De entre los entramados de esta composición estructural, emerge el potencial contestatario de un trabajo teórico-político orientado a problematizar las estructuras sociales, que suele recurrir a tres verbos muy presentes por configurar los fundamentos de acciones en clave feminista: nombrar, visibilizar y conceptualizar.” / “Within the framework of this structural makeup, there emerges the responsive potential of a theoretical-political work directed at problematizing social structures, which tends to turn to three verbs very central to constructing the basis for feminist actions: naming, bringing attention to (‘visibilize’), and conceptualizing.”).

<sup>45</sup> Rita L. Segato, *Femi-geno-cidio como crimen en el fuero internacional de los Derechos Humanos: el derecho a nombrar el sufrimiento en el derecho [Femi-geno-cide as a Crime Under International Human Rights Law: The Right to Put a Name to the Suffering Under the Law]*, in *UNA CARTOGRAFÍA DEL FEMINICIDIO EN LAS AMÉRICAS [A CARTOGRAPHY OF FEMICIDE IN THE AMERICAS]* (Rosa-Linda Fregoso & Cynthia Bejarano eds., 2010) (“En el caso de los feminicidios, que he trabajado en estos últimos años, se percibe claramente una economía circular, de doble mano: ante la negativa de los cuerpos jurídicos y de los juristas y jueces que tendrían la capacidad de crear jurisprudencia o de influir en la formulación de normativas, las mujeres han pasado a usar el término “feminicidio” como si ya existiera en el derecho, alzándose, de esa forma, contra la resistencia de las autoridades a acoger la categoría que las consagra como demandantes a pesar de que ésta ya, de hecho, existe plenamente en los criterios de la población y es acatada por los medios.” / “In the case of feminicides, on which I have worked in recent years, one sees clearly a circular economy, a two way street: in the face of the negation of the juridical bodies and the jurists who would have the capacity to create doctrine or to influence in the creation of regulations, women have moved on to using the term, femicide as if it already existed in law, thereby, rising up against the resistance of the authorities to welcome the label that confirms them as complainants despite the fact that this, in fact, already plainly exists in public opinion and is accepted by the media.”).

<sup>46</sup> See *id.* The widespread use of the terms femicide or feminicide does not necessarily mean that there is not room for improvement in media coverage of feminicides. See generally Rocío Angelico et al., *El feminicidio y la violencia de género en la prensa argentina: un análisis de voces, relatos y actores [Femicide and Gender Violence in the Argentinian Press: An Analysis of Voices, Stories, and Actors]*, 78 *UNIVERSITAS HUMANÍSTICA* 281 (2014) (arguing that the media needs to make space for women’s

been incorporated into criminal law in almost all Latin American and Caribbean countries.<sup>47</sup>

### B. *Femicide as Crime*

In Latin America, not only did femicide take off as a way of describing fatal, gendered violence against women, it also became embedded in criminal codes. Femicide statutes vary country to country, but nearly every Latin American country now has a law either making femicide a crime or making it an aggravated form of homicide.<sup>48</sup> Mexico even has a feminicide provision allowing for prosecution of state officials for negligent or malicious hindering or delaying of investigations.<sup>49</sup>

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voices in their covering of femicide and violence against women); Mariana García et al., Commentary, *La trama del poder patriarcal: femicidios en la prensa gráfica de Gran La Plata* [*The Plot of Patriarchal Power: Femicides in the Graphic Press of Gran La Plata*], 7 *REVCOM* 101 (2018) (“[S]i bien existen transformaciones visibles en las coberturas mediáticas a través del tiempo, los lenguajes y las narrativas presentes en la prensa siguen quedando por detrás de los movimientos emergentes en el espacio público, y por lo tanto, siguen contribuyendo a la construcción de imaginarios que naturalizan la violencia, reproducen estereotipos discriminatorios y revictimizan a las mujeres.” / “If visible transformations do exist in the media coverage over time, the language and the narratives in the press continue to remain behind the emerging movements in the public sphere, and therefore, continue contributing to the construction of normative frameworks that normalize the violence, reproduce discriminatory stereotypes, and revictimize the women.”); Daniela A. Freire & Claudia Rodríguez-Hidalgo, *El femicidio en la prensa ecuatoriana: análisis de contenido de los diarios El Universo y El Comercio* [*Femicide in the Ecuadorian Press: Content Analysis of the Newspapers El Universo and El Comercio*], 24 *ESTUDIOS SOBRE EL MENSAJE PERIODÍSTICO* 13, 30 (2017) (noting that the press had brought attention to the issue of femicide while avoiding gender stereotypes, but that there were areas for improvement, including a need to play a more educational role in describing the broader context of the crimes rather than sensationalizing the gory details of the cases).

<sup>47</sup> See *Femicide and International Women’s Rights: An Epidemic of Violence in Latin America*, GLOB. AMS., <https://theglobalamericans.org/reports/femicide-international-womens-rights> [<https://perma.cc/G9BB-A4WA>] (providing a chart with a summary of the femicide legislation in each country); see also Munévar, *supra* note 44, at 157 (noting the incorporation of femicide as an aggravating factor in homicide or an autonomous crime within various Latin American statutes); U.N. Women, *Analysis of Femicide/Feminicide Legislation in Latin America and the Caribbean and a Proposal for a Model Law* (2018), <https://lac.unwomen.org/sites/default/files/Field%20Office%20Americas/Documentos/Publicaciones/2019/05/1Final%20Analysis%20of%20Femicide%20Legislation%20in%20Latin%20America%20and%20the%20Caribbean-compressed.pdf> [<https://perma.cc/GZ6N-XVLW>] (analyzing current law in Latin America and the Caribbean and creating a proposed model law on femicide/feminicide for those regions).

<sup>48</sup> See Davidson, *supra* note 6, at 389.

<sup>49</sup> For example, Article 325 of the Mexican Criminal Code not only punishes the perpetrator of feminicide, who is defined as a person “quien prive de la vida a una mujer por razones de género” / “who deprives a woman of her life for gendered reasons,” but also state officials. Código Penal Federal [CPF], art. 325, *Diario Oficial de la Federación* [DOF] 31-08-1928, últimas reformas DOF 14-06-2012 (Mex.) (“Al servidor público que retarde o entorpezca maliciosamente o por negligencia la procuración o administración de justicia se le impondrá pena de prisión de tres a ocho años y de quinientos a mil quinientos días multa, además será destituido e inhabilitado de tres a diez años para desempeñar otro empleo, cargo o comisión públicos.” / “For the public servant who

In the Latin American efforts to criminalize femicide and feminicide, feminist activists relied not only on the language of human rights, but also ICL. Marcela Lagarde's early efforts to codify feminicide in Mexico, for example, drew from the definitions of genocide and crimes against humanity.<sup>50</sup> Echoing the term's initial appearance at the International Tribunal on Crimes Against Women, femicide also was one of the subjects of another ICL shadow or alternative forum, the International People's Tribunal, in Mexico.<sup>51</sup> As is discussed below in Part IV, Rita Segato has explicitly called for a version of femicide, one she calls "femi-geno-cide," to be recognized as an international crime.<sup>52</sup>

Examining a recent femicide statute offers a glimpse at the potential contours of a femicide statute. Chile recently amended its criminal code to address femicide more robustly than it had previously. Until 2020, Chile, like Costa Rica, restricted femicide to intimate partner homicide.<sup>53</sup> In the face of significant criticism for the narrowness of its definition,<sup>54</sup> in 2020,

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maliciously or negligently delays or hinders the prosecution or administration of justice, there shall be a prison sentence of three to eight years and fines for 500 to 1,500 days, in addition to being dismissed and disbarred from performing the duties of any other employment, charge, or public commission for three to ten years."); *see also* Paulina García-Del Moral & Pamela Neumann, *The Making and Unmaking of Femicidio/Femicidio Laws in Mexico and Nicaragua*, 53 *LAW & SOC'Y REV.* 452, 465–66 (2019) (discussing Article 325 of Mexico's Federal Criminal Code).

<sup>50</sup> García-Del Moral & Neumann, *supra* note 49, at 467 (noting that two of Lagarde's early proposals with the Equity & Gender Commission attempted to "codify feminicidio using the language of the international crimes of genocide and crimes against humanity" but noting that the Senate ultimately adopted different formulations in 2012).

<sup>51</sup> Gabriela Cuadrado-Quesada & Gabrielle Simm, *Peoples' Tribunals: A Progressive Mechanism to Achieve Justice*, 23 *HUM. RTS. DEF.* 21, 22 (2014) ("The Mexico session of the Permanent Peoples' Tribunal started in 2010 and will conclude in November 2014. It aims to make visible the structural violence experienced in Mexico as a result of several free trade agreements and how these instruments have allowed the abuse and misuse of power by the Mexican government. At the seminar, one of the organisers, Ramón Vera Herrera, outlined how hearings focused on different themes, including: femicide and gender violence; migration, refugees and forced displacement; and environmental devastation and peoples' rights." (emphasis omitted)).

<sup>52</sup> *See infra* text accompanying notes 243–245.

<sup>53</sup> CÓDIGO PENAL [COD. PEN.] [CRIMINAL CODE] art. 390 (Chile) ("El que, conociendo las relaciones que los ligan, mate a su padre, madre o hijo, a cualquier otro de sus ascendientes o descendientes o a quien es o ha sido su cónyuge o su conviviente, será castigado, como parricida, con la pena de presidio mayor en su grado máximo a presidio perpetuo calificado." / "He who, knowing the relationships that binds them, kills his father, mother or child, any other ascendants or descendants, or *who is or has been his spouse or partner*, will be punished, as parricide, with a penalty of fifteen to twenty years imprisonment to life imprisonment.") (emphasis added); Law No. 20.480 art. 1, Diciembre 14, 2010, *DIARIO OFICIAL [D.O.]* (Chile) ("Si la víctima del delito descrito en el inciso precedente es o ha sido la cónyuge o la conviviente de su autor, el delito tendrá el nombre de feminicidio." / "If the victim of the crime described in the preceding subsection is or has been a spouse or partner of the perpetrator, the crime shall have the name of femicide.").

<sup>54</sup> *See, e.g.,* Ainhoa Montserrat Vásquez Mejías, *Femicidio en Chile, más que un problema de clasificación [Femicide in Chile, More Than a Classification Problem]*, 17 *URVIO, REVISTA LATINOAMERICANA DE ESTUDIOS DE SEGURIDAD* 36, 39 (2015) (arguing that the law, by covering only intimate partner femicide, seems designed not to protect

the government introduced legislation known as La Ley Gabriela or Gabriela's Law,<sup>55</sup> which retained intimate femicide but also introduced a broader category of gender-based femicide.<sup>56</sup> Both types of femicide carry a sentence of fifteen years ("presidio mayor en su grado máximo")<sup>57</sup> to life

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women but instead the "heteronormative institution" of "family"). The Dominican Republic has a similarly narrow definition of femicide, and Costa Rica's definition is even more limited and includes within femicide only killings committed by current intimate partners. See, e.g., Patsilí Toledo, *Criminalising Femicide in Latin American Countries: Legal Power Working for Women?*, in CONTESTING FEMICIDE: FEMINISM AND THE POWER OF LAW REVISITED 43–44 (Adrian Howe & Daniela Alaattinoğlu eds., 2019) (noting that these femicide statutes faced criticism from "feminist activists for their reductionist view of gender-based violence and killings of women").

<sup>55</sup> Law No. 21.212, Marzo 2, 2020, DIARIO OFICIAL [D.O.] (Chile). See *Ley Gabriela, Un paso relevante para enfrentar la violencia contra la mujer [Gabriela's Law: A Relevant Step to Confront Violence Against Women]*, MINISTERIO DE JUSTICIA Y DERECHOS HUMANOS (May 8, 2020), <https://www.minjusticia.gob.cl/ley-gabriela-un-paso-relevante-para-enfrentar-la-violencia-contra-la-mujer> [<https://perma.cc/JN9N-PZ73>] [hereinafter *Ley Gabriela*].

<sup>56</sup> Law No. 21.212 art. 1, Marzo 2, 2020, DIARIO OFICIAL [D.O.] (Chile) ("Artículo 390 bis. - El hombre que matare a una mujer que es o ha sido su cónyuge o conviviente, o con quien tiene o ha tenido un hijo en común, será sancionado con la pena de presidio mayor en su grado máximo a presidio perpetuo calificado. La misma pena se impondrá al hombre que matare a una mujer en razón de tener o haber tenido con ella una relación de pareja de carácter sentimental o sexual sin convivencia." / "The man who kills a woman who is or has been a spouse or partner, or who has or has had a child in common, will be imprisoned in its maximum grade to life imprisonment. The same punishment will be imposed on a man who kills a woman because of having or having had a relationship with her of sentimental or sexual nature without living together.") / see also *Ley Gabriela, supra* note 55; *Chile promulga la ley que considera feminicidio todo crimen por motivo de género [Chile Promulgated a Law that Considers as Femicide Any Crime Motivated by Gender]*, EFE (Mar. 2, 2020), <https://www.efe.com/efe/america/sociedad/chile-promulga-la-ley-que-considera-feminicidio-todo-crimen-por-motivo-de-genero/20000013-4186435> [<https://perma.cc/GU6U-DZSE>] ("La nueva legislación introduce dos conceptos en el Código Penal: el 'feminicidio por causa de género', para casos que se dan fuera de una relación afectiva y a manos de desconocidos solo por el hecho de ser mujer, y el 'feminicidio íntimo', para parejas que no convivían y mantenían relaciones intermitentes. Las penas irán de los 15 años a los 40 y se contemplan agravantes especiales, como por ejemplo que la víctima sea menor de edad, se encuentre embarazada o el crimen se comenta delante de sus hijos." / "The new legislation introduces two concepts into the penal code: 'femicide caused by gender', for cases that happen outside of intimate relationships and perpetrated by a stranger only because the victim is a woman, and 'intimate femicide', for couples who did not live together and maintain intermittent relations. The sentence will be from 15 years to 40 years and aggravating factors will be considered, for example that the victim is a minor, is pregnant, or that the crime was committed in front of their children.")

<sup>57</sup> "Presidio mayor en su grado máximo" is a sentence from fifteen years and a day to twenty years. See A. González, *Presidio Mayor [Maximum Sentence]*, ENCICLOPEDIA JURÍDICA ONLINE, <https://chile.leyderecho.org/presidio-mayor> [<https://perma.cc/8XM8-AVFM>] (Chile).

imprisonment (“perpetuo”).<sup>58</sup> Under the Chilean law, for both forms of femicide, the perpetrator must be a “man” and the victim a “woman.”<sup>59</sup>

Gabriela’s Law specifies a list of circumstances in which the killing of a woman will be deemed to be “motivated by gender.” The statute specifies that a killing will be considered “motivated by gender” in the following circumstances: where it “stems from refusing the perpetrator a sentimental or sexual relationship,” relates to the victim working in the sex industry, is committed after sexual violence, relates to sexual orientation or gender identity or expression, or is committed “in any type of situation in which there are circumstances of obvious subordination due to unequal power relations between the victim and perpetrator, or was motivated by an evident intent to discriminate.”<sup>60</sup> The final category seems to be a blend of (predominantly structural) feminist theory on femicide and a hate crime provision.

The statute also lists circumstances that aggravate femicide further and precludes a defense of heat of passion in cases of femicide. Gabriela’s Law recognizes certain aggravating circumstances for the crime of feminicide, including circumstances such as pregnancy, minority age, disability, elder violence, whether the crime was done in the presence of the victim’s parents or children, and/or whether it was done in the context of “the perpetrator’s habitual physical or psychological violence against the victim.”<sup>61</sup> Moreover, addressing a longstanding feminist concern,<sup>62</sup> the statute provides that the

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<sup>58</sup> CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 390 ter. (Chile) (“El hombre que matare a una mujer en razón de su género será sancionado con la pena de presidio mayor en su grado máximo a presidio perpetuo.” / “The man who kills a woman by reason of her gender will face a sentence ranging from fifteen years to life imprisonment.”).

<sup>59</sup> CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 390 bis, 390 ter. (Chile) (“El hombre que matare a una mujer” / “the man who kills a woman”).

<sup>60</sup> *Id.* (orig. “Se considerará que existe razón de género cuando la muerte se produzca en alguna de las siguientes circunstancias: 1. - Ser consecuencia de la negativa a establecer con el autor una relación de carácter sentimental o sexual. 2. - Ser consecuencia de que la víctima ejerza o haya ejercido la prostitución, u otra ocupación u oficio de carácter sexual. 3. - Haberse cometido el delito tras haber ejercido contra la víctima cualquier forma de violencia sexual, sin perjuicio de lo dispuesto en el artículo 372 bis. 4. - Haberse realizado con motivo de la orientación sexual, identidad de género o expresión de género de la víctima. 5. - Haberse cometido en cualquier tipo de situación en la que se den circunstancias de manifiesta subordinación por las relaciones desiguales de poder entre el agresor y la víctima, o motivada por una evidente intención de discriminación.”).

<sup>61</sup> CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 390 quáter. (Chile) (orig. “Son circunstancias agravantes de responsabilidad penal para el delito de femicidio, las siguientes: 1. Encontrarse la víctima embarazada. 2. Ser la víctima una niña o una adolescente menor de dieciocho años de edad, una mujer adulta mayor o una mujer en situación de discapacidad . . . 3. Ejecutarlo en presencia de ascendientes o descendientes de la víctima. 4. Ejecutarlo en el contexto de violencia física o psicológica habitual del hechor contra la víctima.”).

<sup>62</sup> *See generally* Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273 (2015) (describing the evolution of the feminist critique of provocation or its Model Penal Code equivalent and arguing that it was likely overblown and also overlooks disadvantages in curtailing the defenses, particularly for people from historically marginalized groups).

judge may not consider heat of passion as a mitigating circumstance in a femicide case.<sup>63</sup>

Although the statute is framed in terms of a gender binary, a man's killing of a woman, it includes trans women in the category of potential victims of femicide.<sup>64</sup> Targeting a woman based on her gender identity or expression supplies the requisite gender motivation, as does killing related to sexual orientation.<sup>65</sup>

This overview of the Chilean femicide statute not only offers a glimpse at a statute that went from a very narrow conception of femicide to a quite broad one. It also reveals some of the potential questions for defining a crime of femicide and possible concerns. Should the crime be defined in broad terms akin to its use in feminist theory and activism or more narrowly for the killing of women in certain pre-defined contexts? (The Chilean statute does both.) The specificity of femicide statutes varies significantly from country to country,<sup>66</sup> and statutes that more closely resemble the definition of femicide from feminist theory have faced criticism on legality grounds due to potential vagueness.<sup>67</sup> If defined in broader terms, such as the killing of a woman "based on her condition as such" or "because she is a woman," what facts supply the requisite gender motivation?

<sup>63</sup> Law No. 21.212, Marzo 4, 2020, DIARIO OFICIAL [D.O.] (Chile).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*; see also Congreso aprueba Ley Gabriela que amplía tipificación del femicidio [*Congress passed Gabriela's Law that Expanded the Definition of Femicide*], CORPORACIÓN HUMANAS, <https://www.humanas.cl/congreso-aprueba-ley-gabriela-que-amplia-tipificacion-del-femicidio/> [<https://perma.cc/KS6D-2TD8>] (explaining that "Gabriela's Law includes in its definition of femicide, its commission due to sexual orientation, gender identity, and gender expression, taking on the specific violence that lesbian women or trans women suffer" and noting the participation of lesbian feminist groups in the drafting of the law, including the organization "Lesbian Group Breaking the Silence," the executive director of which, Érika Montecinos, said: "[T]his, for us, is an incredibly important step because it renders visible this manifestation of violence, taking into account the diversity of women we represent, while incorporating a more powerful aggregating perspective to cases of lesbicide or transfemicide") (orig. "La Ley Gabriela incorpora en la tipificación del femicidio, haberlo cometido por orientación sexual, identidad de género y expresión de género, haciéndose cargo de las violencias específicas que sufren las mujeres lesbianas o trans. La Agrupación Lésbica Rompiendo el Silencio, junto a otras organizaciones lesbofeministas, participó de la tramitación de la ley e incidió directamente para incluir esta indicación. Para Érika Montecinos, directora ejecutiva de la organización, explica que "para nosotras es un Paso sumamente importante porque visibiliza una manifestación de la violencia tomando en cuenta la diversidad de mujeres que somos, e incorpora un agravante más potente ante los casos de lesbicidio o transfemicidio.").

<sup>66</sup> Davidson, *supra* note 6, at 410; see also Omar Huertas Diaz et al., *Ley, Educación, Construcción De Ciudadanía Y Prevención Del Femicidio* [*Law, Education, Citizenship, and Femicide Prevention*], FEMICIDIO Y EDUCACIÓN: APROXIMACIONES Y CONSTRUCCIÓN DEL DISCURSO DESDE LA PRACTICA SOCIAL (2017) (comparing femicide statutes across Latin America).

<sup>67</sup> Davidson, *supra* note 6, at 408–10; see also U.N Women, *supra* note 47, at 26 ("[T]he classification of femicide as a crime is frequently criticized by both legal and human rights doctrine for the perceived lack of precision in the description of the type of crime that weakens its typification.").



Then there is the issue of gender parameters. Is the crime restricted to men killing women (as in the Chilean law and Russell's conception of femicide), or does it include perpetrators of other genders, including women? Countries in Latin America are divided on whether the perpetrator must be a man.<sup>68</sup> How are men and women defined for the purposes of the statutes? What if the victim is a trans man? Are trans men excluded from the crime of femicide or included by reliance on biological sex? How do we reconcile femicide's self-conscious emphasis on the gender binary with more progressive notions of gender as a social construct and the rejection of the gender binary?

Unsurprisingly, some are critical of the criminalization of femicide. Locally and internationally, observers have voiced the concern that a far greater dedication of resources is needed in most places to make any meaningful change.<sup>69</sup> Some have suggested that femicide laws are nothing more than low-cost performative gestures at compliance with human rights norms.<sup>70</sup> Others have suggested that femicide laws may perpetuate gendered stereotypes of women as perpetual victims.<sup>71</sup> Finally, others have critiqued the femicide laws, along with the international human rights regime generally, more fundamentally as pernicious expansions of the colonial and/or neoliberal carceral state.<sup>72</sup>

Criticisms notwithstanding, femicide laws have emerged as a core legal response to the problem of femicide in Latin America. As the next Part

<sup>68</sup> See Huertas Diaz, *supra* note 66, at 23–65.

<sup>69</sup> See, e.g., *Why Latin America Treats "Femicides" Differently from Other Murders*, ECONOMIST (Mar. 5, 2020), <https://www.economist.com/the-americas/2020/03/05/why-latin-america-treats-femicides-differently-from-other-murders> [<https://perma.cc/AYG7-468W>] ("Investigators of femicide cases have no more training and resources than do others . . . and so are no more successful at winning convictions."); Sydney Bay, Comment, *Criminalization Is Not the Only Way: Guatemala's Law Against Femicide and Other Forms of Violence Against Women and the Rates of Femicide in Guatemala*, 30 WASH. INT'L. L. REV. 369, 386–87 (2021).

<sup>70</sup> See Davidson, *supra* note 6, at 410.

<sup>71</sup> See Angie Lorena Ruiz Herrera et al., *Feminicidio: La construcción de una definición [Femicide: The Construction of a Definition]*, in FEMINICIDIO Y EDUCACIÓN: APROXIMACIONES Y CONSTRUCCIÓN DEL DISCURSO DESDE LA PRÁCTICA SOCIAL [FEMICIDE AND EDUCATION: APPROXIMATIONS AND CONSTRUCTION OF THE DISCOURSE FROM SOCIAL PRACTICE] 126, 133 (Omar Huertas Díaz ed., 2017) ("[S]e configura también una idea de mujer casi siempre en condición de víctima, como si fuera el único rol que cada uno puede ejercer" / "It also enforces the idea that the woman almost always occupies the role of victim, as if that is the only role any woman could play.") ("[S]e pone de manifiesto que estas elaboraciones limitan el accionar de la mujer, al ser concebida como un sujeto en esencia vulnerable, que necesita la protección permanente de los Estados, debido en parte a la negación de sus capacidades." / "It makes clear that these conceptions constrain women, by virtue of being conceived as inherently vulnerable subjects, who need the permanent protection of the State, due in part to the denial of their capabilities.").

<sup>72</sup> See Davidson, *supra* note 6, at 443 (discussing Silvana Tapia Tapia, *A Decolonial Feminist Critique of Penalty*, CRITICAL LEGAL THINKING (Mar. 29, 2021), <https://criticallegalthinking.com/2021/03/29/a-decolonial-feminist-critique-of-penalty> [<https://perma.cc/C259-UY4M>]).

reveals, the human rights community has largely commended laws criminalizing femicide as steps in the right direction on the persistent problem of gendered killings of women (and a history of state inaction in the face of these killings).

C. *International Human Rights Community's Support for Criminalization of Femicide in Latin America, but Ambivalence About the Label*

Feminist groups, international human rights organizations, and regional human rights courts have framed VAW and femicide as a violation of women's human rights.<sup>73</sup> In many instances, the international human rights community has embraced the terms femicide and feminicide, often using the terms interchangeably, and even pushed for their criminalization in Latin America.<sup>74</sup> In other instances, international human rights bodies seem reluctant to embrace femicide in favor of more gender-neutral terms. This subpart offers a glimpse at the engagement of the human rights community with the concept and crime of femicide.

Let's start with the femicide hawks. Many international governmental and nongovernmental organizations have co-opted the criminalization of femicide as part of a strategy to combat VAW and the killing of women in Latin America. International organizations launched a series of initiatives to address VAW and femicide in Latin America.<sup>75</sup> In 2008, Committee of Experts (CEVI) of the Mechanism to Follow Up on Implementation of the Inter-American Convention on the Prevention, Punishment, and Eradication of

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<sup>73</sup> See HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS, WITH A NEW INTRODUCTION* xlii (2d ed. 2022) (“[T]he CEDAW committee has concluded that there is now sufficient evidence of *opinio juris* and state practice to suggest the ‘prohibition of gender-based violence against women has evolved into a principle of customary international law.’”). This recognition is an outgrowth of the broader recognition in the human rights community of “gender violence as per se gender discrimination.” Rhonda Copelon, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 AM. U. J. GENDER SOC. POL’Y & L. 865, 869 (2002) (“Recognition by the international human rights system is an important step in transforming private gender violence from a personal to a political issue.”).

<sup>74</sup> Comm. of Experts of the Follow-up Mechanism to the Belém do Pará Convention (MESECVI), Declaration on Femicide, OEA/Ser.L/II.7.10 MESECVI/CEVI/DEC.1/08, at 4 (Aug. 15, 2008), <https://www.oas.org/es/mesecvi/docs/declaracionfemicidio-en.pdf> [<https://perma.cc/37V4-EGGM>] (“In the international sphere . . . the two terms feminicide and femicide have been used interchangeably to name the same problem, although in the case of the Caribbean there is no controversy and the term *femicide* is used exclusively.”).

<sup>75</sup> See, e.g., U.N. Women, Latin American Model Protocol for the Investigation of Gender-Related Killings of Women (Femicide/Feminicide), at xii–xiv (2015), [https://eurogender.eige.europa.eu/system/files/events-files/latin\\_american\\_protocol\\_for\\_investigation\\_of\\_femicide.pdf](https://eurogender.eige.europa.eu/system/files/events-files/latin_american_protocol_for_investigation_of_femicide.pdf) [<https://perma.cc/7HQD-42T9>]; ACAD. COUNCIL ON U.N. SYS. (ACUNS), *FEMICIDE: A GLOBAL ISSUE THAT DEMANDS ACTION* 24–25 (Simona Domazetoska, Michael Platzer & Gejsi Plaku, eds., 2d vol. 2014) [hereinafter ACUNS Report].

Violence Against Women, “Convention of Beleém do Pará” (MESECVI), issued the Declaration on Femicide.<sup>76</sup> The CEVI declared:

1. That in Latin America and the Caribbean femicide is the most serious manifestation of discrimination and violence against women. High rates of violence against women, their limited or nonexistent access to justice, the prevalent impunity in cases of violence against them, and the persistence of discriminatory sociocultural patterns are among the causes that influence the rise in the number of deaths.
2. That we consider that femicide is the violent death of women based on gender, whether it occurs within the family, a domestic partnership, or any other interpersonal relationship; in the community, by any person, or when it is perpetrated or tolerated by the state or its agents, by action or omission.
3. That femicide victims are women at different stages, situations or circumstances of their lives.
4. That numerous cases of femicide occur as a result of unequal power relations within a couple, in which the woman has experienced serious or prolonged violence without having found alternatives or support to end the relationship.
5. That the situation of impunity for femicides is exacerbated by situations of emergency, armed conflict, natural disasters, and other hazardous situations.
6. That most femicides go unpunished as a result, among other things, of women’s limited access to justice and of gender bias during judicial proceedings and police and investigative work. Cases are either closed because of an alleged lack of evidence or punished as simple homicides with lesser penalties, in which the extenuating circumstance of “crime of passion” is frequently cited to diminish the perpetrator’s responsibility.<sup>77</sup>

The Declaration did not demand that states criminalize “femicide” as its own crime, but it “recommend[ed]” that states take a serious series of actions including eliminating the “extenuating circumstance” of “crime of passion” in femicide cases, strengthening laws “on women’s empowerment” “includ[ing] risks to life and personal safety as well as other manifestations of violence against women in their public security policies,” improving women’s access to justice and the criminal justice system, “eliminat[ing] impu-

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<sup>76</sup> Comm. of Experts of the Follow-up Mechanism to the Belém do Pará Convention (MESECVI), *supra* note 74, at 4 (noting that “the Inter-American Commission of Human Rights (IACHR) . . . has been using the term *feminicide* since 2007 in the case of Bolivia, on the basis of the Secretary General’s In-Depth Study on all Forms of Violence against Women, which also named the problem *feminicide*”).

<sup>77</sup> Comm. of Experts of the Follow-up Mechanism to the Belém do Pará Convention (MESECVI), *supra* note 74, at 6–7.

nity for perpetrators,” “adequately punish[ing] public officials who did not exercise due diligence in those proceedings,” and “develop[ing] and utiliz[ing] data banks, research, and statistics that enable them to assess the magnitude and problematic of femicide in their countries and to monitor State progress and setbacks.”<sup>78</sup>

Building on these efforts, in 2012, U.N. Women created a Handbook for Legislation on Violence Against Women.<sup>79</sup> In 2014, U.N. Women and the Office of the High Commissioner for Human Rights (OHCHR) jointly established the “Latin American Model Protocol for the investigation of gender-related killings of women.”<sup>80</sup> In 2018, U.N. Women and the Follow-up Mechanism to the Belém do Pará Convention subsequently prepared a report examining Latin American femicide laws and proposing a model femicide law.<sup>81</sup> Although the report emphasized the importance of precise language in order for femicide statutes to be consistent with the principle of legality, it defended the criminalization of femicide. It argued that, under the understanding that “gender-based violence is a form of discrimination produced by the unequal power relationships between men and women within the dominant patriarchal system,” femicide/feminicide “requires a differentiated and specialized response.”<sup>82</sup> In 2020, the Organisation for Economic Cooperation and Development (OECD) went so far as to extort any Latin American states that had not yet criminalized femicide to do so in order to “contain and address the issue of femicide.”<sup>83</sup>

The Inter-American Court of Human Rights likewise has engaged with the concept of femicide and condemned states’ failure to investigate, prosecute, and punish the gendered killing of women, but it has stopped short of embracing the term “femicide.” In the seminal *Cotton Field* case of 2009,

<sup>78</sup> *Id.* at 8–9 (also recommending that media “adopt codes of ethics to deal with cases of violence against women, especially femicides, promoting respect for the dignity and integrity of victims and avoiding the dissemination of morbid details and sexist or degrading stereotypes of women” and “play a role in the ethical education of the citizenry, promote gender equity and equality and contribute to the eradication of violence against women”).

<sup>79</sup> See U.N. WOMEN, HANDBOOK FOR LEGISLATION ON VIOLENCE AGAINST WOMEN 4 (2012), [https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/handbook-for-legislation-on-violence-against-women/UNW\\_Legislation-Handbook-pdf.pdf](https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/06/report/handbook-for-legislation-on-violence-against-women/UNW_Legislation-Handbook-pdf.pdf) [<https://perma.cc/AC6B-2X2Z>].

<sup>80</sup> See *Femicide and International Women’s Rights: An Epidemic of Violence in Latin America*, *supra* note 47; see also ACUNS Report, *supra* note 75, at 24 (noting that OHCHR has been involved in helping to develop femicide laws in El Salvador, Bolivia, and Mexico, has supported the elaboration of the Protocol for the Investigation of Femicide in El Salvador, and is monitoring decisions from the Guatemalan femicide tribunals).

<sup>81</sup> U.N. Women, *supra* note 47, at 7.

<sup>82</sup> *Id.* at 26.

<sup>83</sup> *Addressing Femicide in the Context of Rampant Violence Against Women in Latin America*, OECD (Mar. 2020), <https://www.oecd.org/gender/data/addressing-femicide-in-the-context-of-rampant-violence-against-women-in-latin-america.htm> [<https://perma.cc/WG9H-FC5G>] (advising governments to adopt policy recommendations, including updating their laws to classify the “intentional killing of a woman based on her gender as feminicide, femicide or aggravated homicide due to gender”).

the Inter-American Court of Human Rights found that Mexico had committed human rights violations relating to the disappearance and deaths of three women, two of them minors, “whose bodies were found in a cotton field in Ciudad Juárez on November 6, 2001.”<sup>84</sup> The Court assessed the case in the light of the broader context of a rash of murders of women and girls in the border factory (maquiladora) town, Ciudad Juárez, and the state response (or lack thereof) to the same.<sup>85</sup> The Court noted that, while “there [were] no reliable assumptions about the number of murders and disappearances of women in Ciudad Juárez,” “whatever the number, [the situation] is alarming.”<sup>86</sup>

The Court noted that, although Mexico disputed allegations that it had failed to investigate and prosecute adequately, other than in the initial stage of the investigations, and denied the existence of a clear pattern of gender motivation in the killings, Mexico had acknowledged the complex gender implications of a shifting economy at the border, where patriarchal attitudes had not kept up with women’s increased independence or roles as household providers through the rise of the maquiladoras, which preferred women workers.<sup>87</sup> The State also had acknowledged that “the culture of discrimination against women contributed to the fact that ‘the murders were not perceived at the outset as a significant problem requiring immediate and forceful action on the part of the relevant authorities.’”<sup>88</sup>

The Court ultimately held that Mexico had violated women’s rights under the Inter-American Human Rights Convention by failing to prevent the killings or to investigate, prosecute, and punish those responsible for them.<sup>89</sup> The Court found that Mexico had violated the “obligation not to discriminate,” as well as the victims’ rights to life, personal integrity, and liberty, among other rights.<sup>90</sup>

The *Cotton Field* case not only recognized state responsibility for failing to investigate, prosecute, and punish anyone for the murders of the victims but also engaged extensively with the concept of femicide. Although the Court ultimately did not adopt the terms femicide or feminicide, it used

<sup>84</sup> González (Cotton Field) v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 2 (Nov. 16, 2009) [hereinafter *Cotton Field*].

<sup>85</sup> *Id.* For more information on femicide at the border, see generally Gaspar de Alba & Guzman, *supra* note 39.

<sup>86</sup> *Cotton Field*, Am. Ct. H.R. (ser. C) No. 205, ¶ 121.

<sup>87</sup> *Id.* ¶¶ 129–30 (“Other factors mentioned by the State as generators of violence and marginalization, are the absence of basic public services in the underprivileged areas; and drug-trafficking, arms trafficking, crime, money-laundering and people trafficking, which take place in Ciudad Juárez because it is a border city; the consumption of drugs, the high rate of school desertion, and the presence of ‘numerous sexual predators’ and ‘military officials . . . who have participated in armed conflicts,’ in the neighboring city of El Paso.”).

<sup>88</sup> *Id.* ¶ 152.

<sup>89</sup> *Id.* ¶ 2.

<sup>90</sup> *Id.* ¶¶ 402–04.

them repeatedly. The terms “femicide” or “femicides” appear thirty-two times in the decision and “feminicidio” (or some variation of the term) another fourteen times.<sup>91</sup> The opinion uses the terms not only in quoting experts or citing reports from Mexico, but also in directly engaging with the merits of the concept.

In a section of the opinion entitled “Regarding the alleged femicide,” the Court noted the victims’ representatives’ embrace of the term femicide to condemn the murders as “the most evil expression of misogynous violence.”<sup>92</sup> The victims’ representatives contended that femicide is “an extreme form of violence against women; the murder of girls and women merely because of their gender in a society that subordinates them,” which involves “a combination of factors, including cultural, economic and political elements.”<sup>93</sup>

The Mexican state appeared to acknowledge the utility of the term femicide, at least as a descriptive matter, though it objected to it as a legal classification. The Court noted that although Mexico had argued that the term “[did] not exist in domestic law or in the binding instruments of the Inter-American human rights system,” Mexico had used the term descriptively before the Court and in other contexts.<sup>94</sup>

The Court ultimately split the difference. It said it would use the term “‘gender-based murders of women,’ also known as femicide.”<sup>95</sup> Thus, femicide made it in as an “a.k.a.,” as a descriptor. Although Russell and other proponents of the label “femicide” likely would decry the decision to use the more generic (and gender-inclusive) term “gender-based murder,”<sup>96</sup> the Court acknowledged the prevalence of the term femicide in Mexico and the victims’ embrace of it. The Court also made clear that its discussion of “gender-based murders” was referring to what the victims and many activists called femicide.

Recently, the Inter-American Court of Human Rights also addressed for the first time physical violence against a trans person in *Vicky Hernández v. Honduras*.<sup>97</sup> The case involved the killing of a trans woman during a state-imposed curfew in Honduras.<sup>98</sup> Again, the Court did not use femicide as a legal category, but cited various documents using the term “transfemicide.”<sup>99</sup> The Court found that Honduras had violated the victims’<sup>100</sup> rights to

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<sup>91</sup> See, e.g., *id.* ¶ 83 (femicide); *id.* ¶ 492 (“feminicidio”); *id.* ¶ 117 n.86 (“violencia feminicida”); *id.* (“feminocidios”).

<sup>92</sup> *Id.* ¶ 138.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* ¶ 139.

<sup>95</sup> *Id.* ¶ 143.

<sup>96</sup> See Russell, *supra* note 17 (explaining her preference for the term femicide over something like “gender-discriminatory murders” due to the lack of specificity as to “which gender is a victim of discriminatory murder”).

<sup>97</sup> *Hernández v. Honduras*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 422, ¶ 6 (Mar. 26, 2021).

<sup>98</sup> *Id.* ¶ 1.

<sup>99</sup> *Id.* at 5 n.9, 6 n.17, 7 n.25.

life, physical and moral integrity, judicial integrity and protection, as well as rights to recognition of juridical personality, personal liberty, privacy, freedom of expression, a name, equality, and non-discrimination.<sup>101</sup> Again, despite eschewing the term femicide or transfemicide, the decision highlighted the context of discrimination and persecution of trans people in Honduras.<sup>102</sup>

The controversial part of the decision related to the majority's finding that Honduras had violated the victims' rights under the Inter-American Convention for the Prevention, Punishment, and Eradication of Violence Against Women (Convention of Belém do Pará). The majority found that Honduras, in addition to violating the victims' rights under the American Convention on Human Rights, had also violated rights guaranteed in the Convention of Belém do Pará.<sup>103</sup>

Three judges wrote separate opinions expressing widely differing views on the applicability of the Convention of Belém do Pará to violence against trans women. Judge Odio Benito wrote separately to clarify that she agreed with the majority's findings of grave violations of the victims' rights under the American Convention and other human rights instruments, but not under the Convention of Belém do Pará, an instrument she described as designed to address the rights of women and girls, defined by sex at birth, in light of "historic discrimination" against them.<sup>104</sup> She decried the contemporary tendency to deny the existence of sex and any special history of discrimination against biological females.<sup>105</sup> While condemning both, Judge Odio Benito insisted on the difference between discrimination based on sex combined with gendered stereotypes and gender identity "because, in the absence of that distinction, there is a risk that violence against women becomes invisi-

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<sup>100</sup> The Court used the plural, "victims," because the Court considered Vicky Hernández's family members to be victims as well. *Id.* ¶ 1.

<sup>101</sup> *Id.* ¶¶ 101–02, 105, 111 ("With regard to the arguments relating to the rights to recognition of juridical personality, personal liberty, privacy, freedom of expression, a name, equality and non-discrimination and, more generally, the right to gender identity, the Court notes that these refer to violations relating to three different aspects: (a) as a result of the murder of Vicky Hernández; (b) in the context of the investigations into this murder, and (c) in the general legal framework of the State of Honduras that did not recognize Vicky Hernández's gender identity.").

<sup>102</sup> *Id.* ¶¶ 67–68 ("The Inter-American Court has recognized that the LGBTI community has historically been a victim of structural discrimination, stigmatization, diverse forms of violence, and the violation of fundamental rights. Similarly, the Court has established that a person's sexual orientation, gender identity and gender expression are categories protected by the Convention. Consequently, the State may not discriminate against a person based on their sexual orientation, their gender identity and/or their gender expression. Discrimination against LGBTI persons is revealed in numerous aspects of the public and private spheres. In the Court's opinion, one of the most extreme forms of discrimination against LGBTI persons is that which occurs in situations of violence.").

<sup>103</sup> *Id.* ¶¶ 128–30 (arguing that transphobic violence was equivalent to other forms of gender violence and that the Convention permitted consideration of "other factors," including gender identity).

<sup>104</sup> *Id.*, Partially Dissenting Opinion of Judge Elizabeth Odio Benito ¶¶ 1–3, 8–27.

<sup>105</sup> *Id.*, Partially Dissenting Opinion of Judge Elizabeth Odio Benito ¶¶ 8–21. She also observed that some of the obligations the Court imposed were mutually exclusive. *Id.* ¶ 2–30.

ble or is diluted by other violence and violations and is not adequately analyzed when designing policies as a structural phenomenon related to the system of domination and gender stereotyping of women.”<sup>106</sup> By extension (or “*sensu contrario*”), she argued, “the analysis of violence against trans persons from a perspective that only analyzes violence against women because they are women is plainly counterproductive and ineffective since it does not examine the origin of the specific violence suffered by the said group.”<sup>107</sup> Judge Vio Grossi likewise partially dissented, arguing that a textual, contextual, and teleological reading of the Convention of Belém do Pará made clear that it only covered biological women, not trans women.<sup>108</sup> By contrast, Judge Pazmiño Freire wrote separately to explain that he would have found that the Convention of Belém do Pará applied, not as some extension of it, but because Vicky Hernández was a woman since she identified as one.<sup>109</sup>

In sum, many in the international human rights community have embraced or even pushed for the criminalization of femicide in Latin American countries as an important step in bringing attention to deadly VAW and demanding accountability for it. Many international organizations have pushed for greater accountability through femicide statutes. The Inter-American Court of Human Rights has engaged with femicide, including by faulting states for failing to take measures to prevent and punish its commission, but has opted for gender-neutral terms in its own decisions rather than adopting the term “femicide.” Its recent decision condemning Honduras for violations in connection with the gendered killing of a trans woman (or transfemicide) reveals that judges have widely differing opinions on whether instruments addressing the rights of “women” extend to trans women and on whether gender-based violence against women should be conflated with gendered violence based on sexual orientation or diverse gender identity.

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<sup>106</sup> *Id.*, Partially Dissenting Opinion of Judge Elizabeth Odio Benito ¶¶ 40–41 (“[V]iolence against women is a result of the social hierarchy established according to the gender roles assigned on the basis of the biological sex, while the violence that was perpetrated against Vicky Hernández (and the proven facts in the instant case attest to this) was due to her non-conformity and act of resistance against the social and cultural dictates of heteropatriarchy.”).

<sup>107</sup> *Id.*, Partially Dissenting Opinion of Judge Elizabeth Odio Benito ¶¶ 40–41.

<sup>108</sup> *Id.*, Partially Dissenting Opinion of Judge Eduardo Vio Grossi ¶¶ 2, 14, 16, 29.

<sup>109</sup> *Id.*, Concurring Opinion of Judge L. Patricio Pazmiño Freire ¶ 1 (“Even though I am essentially in agreement with the decisions taken in the judgment, I would like to place on record that I dissent partially from the line of argument used to consider that the rights of trans women are protected by the Convention of Belém do Pará, as I will explain below and for a compelling reason: trans women are women. The relevant point as regards their identification, as the Court has already indicated in its consistent case law, is their self-perception as such.”).



### III. GENDER AND GENDERED KILLING IN INTERNATIONAL CRIMINAL LAW

Despite the human rights interest in femicide and its criminalization in Latin America, in ICL—the locus of criminalization of human rights violations—femicide is not recognized as an international crime. References to gender abound, but try as one might to find even a passing reference to the phenomenon of femicide at international criminal tribunals, it is not to be found. Tribunals have made great strides in recognizing that sexual violence can supply the *actus reus* of serious international crimes, but, until very recently, have focused far less on the gendering of killing. This Part canvasses the ways that ICL has categorized and addressed gendered violence to date, explains the ways that ICL and femicide are crossing paths, and offers a brief doctrinal analysis of femicide under ICL.

#### A. *Gender is Everywhere in ICL, but Not as a Basis for Genocide*

Although in recent years ICL has grown more attuned to issues of gender and gendered violence, femicide is not yet in the lexicon of international criminal tribunals. A search of the ICC’s database of its own decisions yields none using the term “femicide.”<sup>110</sup> Likewise, a search of the ICC’s Legal Tools Database for decisions from “other international criminal jurisdictions” yields no decisions using the term “femicide.”<sup>111</sup> Only when one expands the scope to the categories of “human rights law decisions and documents,” “other international law decisions and documents,” and “national criminal jurisdictions,” do documents discussing femicide appear. They include reports from human rights institutions such as the Committee Against Torture, U.N. Women, the Human Rights Committee, and the like.<sup>112</sup>

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<sup>110</sup> ICC LEGAL TOOLS DATABASE, <https://legal-tools.org> [<https://perma.cc/KGV4-SPB7>].

<sup>111</sup> *Id.*

<sup>112</sup> *See, e.g.*, Rep. of the Comm. Against Torture on the Work of Its Forty-Ninth and Fiftieth Session, U.N. Doc. A/68/44, at 39–40, 43, 113, 116 (2013) (commending Peru and Guatemala for legislation criminalizing femicide and noting a need to improve enforcement given continued prevalence of violence against women); U.N. Women, U.N. Women Americas and the Caribbean Results Achieved in 2014, at 20–22 (2015) (discussing U.N. Women and OHCHR efforts at reform in Latin America and Brazil’s and Ecuador’s new femicide laws); Human Rights Council Res. 29/14, U.N. Doc. A/HRC/RES/29/14, at 3 (July 2, 2015) (asking states “to take effective action to prevent domestic violence, including by [ ] publicly condemning, addressing and penalizing the perpetrators of offences involving physical, sexual and psychological violence and economic deprivation occurring in the family . . . [including] femicide, female infanticide, crimes committed against women and girls in the name of so-called ‘honour’, crimes committed in the name of passion, practices harmful to women and girls such as child, early and forced marriage, and female genital mutilation”); Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶ 72, U.N. Doc. A/HRC/26/36/Add.1, annex (Apr. 28, 2014) (commending progress in Mexico’s “legislative and institutional framework to address violence against women at the federal level,” but noting that “violence against women, specifically femicide, remains a serious concern in practice”).

The reports discuss femicide as a global problem, but much of the discussion relates to efforts to combat and criminalize femicide in Latin America, as well as ongoing issues of underenforcement and impunity notwithstanding femicide laws.<sup>113</sup>

This silence on femicide stands in stark contrast to the significant attention that ICL and international criminal courts have given to gender in other ways. In the past few decades, international tribunals have come a long way on the issue of gendered violence, in particular the recognition of various forms of sexual violence as international crimes. For a long time, ICL institutions largely ignored SGBV.<sup>114</sup> For example, SGBV crimes were not among those included in the Nuremberg Charter or the Tokyo Charter.<sup>115</sup> However, the ad hoc tribunals made strides in recognizing that SGBV was worthy of international attention. For example, the Security Council Resolution creating the International Criminal Tribunal for the former Yugoslavia (ICTY) expressly listed “massive, organized and systematic detention and rape of women” as one of the crimes giving rise to the need for a tribunal.<sup>116</sup> The statutes of the ICTY and International Criminal Tribunal for Rwanda (ICTR) also included rape as a crime against humanity.<sup>117</sup> The ICTR statute, but not the ICTY one, also lists rape as a war crime.<sup>118</sup> Both tribunals ulti-

<sup>113</sup> See sources cited *supra* note 112.

<sup>114</sup> See Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 317–46 (2003); see also Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 249 (1993) (writing in the early days of the ICTY and wondering, in light of international humanitarian law's framing of rape as an attack against honor, whether rape would be considered a grave breach of the Geneva Conventions such that the ICTY would adjudicate the issue, which it later was, and which the ICTY did).

<sup>115</sup> See Askin, *supra* note 114, at 302 (noting that the Nuremberg indictment did not allege any SGBV, but the prosecutors included evidence of it and that the Tokyo indictments in fact did allege sexual violence, despite its not having figured explicitly in the statute).

<sup>116</sup> See S.C. Res. 827, at 1 (May 25, 1993) (“The Security Council . . . [e]xpressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, *massive, organized and systematic detention and rape of women*, and the continuance of the practice of ‘ethnic cleansing’, including for the acquisition and the holding of territory . . . .”) (emphasis added).

<sup>117</sup> See Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 5(g) (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 3(g) (Nov. 8, 1994) [hereinafter ICTR Statute].

<sup>118</sup> Compare ICTR Statute, *supra* note 117, art. 4 (“The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: . . . (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, *rape*, enforced prostitution and any form of indecent assault . . . .”) (emphasis added) with ICTY Statute, *supra* note 117, art. 2 (“The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August

mately recognized in case law that rape could serve as the actus reus for war crimes, crimes against humanity, and genocide.<sup>119</sup>

The ICC has extended the recognition of SGBV crimes even further. The Rome Statute, the treaty that created the ICC, explicitly expands the category of sexual violence-based crimes against humanity: in addition to rape, it includes “sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”<sup>120</sup> It also recognizes the crime of “[e]nslavement.”<sup>121</sup>

The Rome Statute also, for the first time at an international tribunal, recognizes gender as a possible ground for a charge of persecution as a crime against humanity.<sup>122</sup> Previously, international diplomats tended “to view the persecution of women through the lens of race or ethnicity or religion, rather than on the basis of gender.”<sup>123</sup>

The ICC Office of the Prosecutor (OTP) has issued two major policy statements voicing a commitment to addressing gender crimes and setting out its reading of the Rome Statute, as well as its strategies for investigating and prosecuting gendered crimes. In its 2014 Policy Paper on Sexual and Gender-Based Crimes, the OTP “elevated this issue to one of its key strategic goals in its Strategic Plan 2012-2015.”<sup>124</sup> The Policy Paper announced that the OTP “has committed to integrating a gender perspective and analysis into all of its work,” including in the investigation and prosecution of SGBV crimes, staff training, and working with victims and communities.<sup>125</sup> It also considered SGBV crimes as “amongst the gravest under the Statute.”<sup>126</sup> The new ICC Prosecutor, Karim Khan, launched an initiative focusing on the crime against humanity of gender persecution and in December

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1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.”).

<sup>119</sup> See LOUISE CHAPPELL, *THE POLITICS OF GENDER JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: LEGACIES AND LEGITIMACY* 93 (2016).

<sup>120</sup> Rome Statute of the International Criminal Court, art. 7(1)(g), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>121</sup> *Id.* art. 7(1)(c).

<sup>122</sup> See generally AMNESTY INT’L, *STOP VIOLENCE AGAINST WOMEN: HOW TO USE INTERNATIONAL CRIMINAL LAW TO CAMPAIGN FOR GENDER-SENSITIVE LAW REFORM* (2005), <https://www.amnesty.org/es/wp-content/uploads/2021/08/ior400072005en.pdf> [<https://perma.cc/9GK3-4RQS>] (explaining how the Rome Statute can provide a basis for using gender motivation in a charge for crimes against humanity).

<sup>123</sup> *Id.* at 27 (citing A. Widney Brown & Laura Grenfell, *The International Crime of Gender-Based Persecution and the Taliban*, 4 MELB. J. INT’L L. 347, 357 (2003)).

<sup>124</sup> Off. of the Prosecutor, Int’l Crim. Ct., Policy Paper on Sexual and Gender-Based Crimes, ¶ 2 (June 2014) [hereinafter OTP Policy Paper].

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* ¶ 3.

2022 issued a Policy on the Crime of Gender Persecution (“Gender Persecution Policy”).<sup>127</sup>

These efforts arise in the context of feminist critiques of international criminal courts for not going far enough to address gender-based violence. In particular, many feminists have criticized the practice of “telescoping” (subsuming charges, particularly sexual violence charges, in other charges).<sup>128</sup> A critique from another angle is that there has been an excessive focus on sexual violence<sup>129</sup> at the exclusion of other forms of gendered violence<sup>130</sup> or with potentially overlooked collateral consequences, including ones that are bad for women.<sup>131</sup> Recently, commentators have also ques-

<sup>127</sup> Off. of the Prosecutor, Int’l Crim. Ct., Policy on the Crime of Gender Persecution, at 3 (Dec. 7, 2022) [hereinafter OTP Gender Persecution Policy], <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf> [<https://perma.cc/WE4J-LJYY>] (“‘Gender persecution’ is the crime against humanity of persecution on the grounds of gender, under article 7(1)(h) of the [Rome] Statute. Gender persecution is committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender.”).

<sup>128</sup> Valerie Oosterveld, *Atrocity Crimes Litigation Year-In-Review (2010): A Gender Perspective*, 9 NW. J. INT’L HUM. RTS. 325, 352–53 (2011); see also Copelon, *supra* note 114, at 259 (lamenting the ICTY statute’s “conflation of rape and persecution, together with the absence of gender as a basis of persecution,” saying “[t]his narrow view of crimes against humanity, which treats gender crimes as significant only when they are the vehicle of some ‘larger’ persecution, is quite prevalent and requires critical examination”). Interestingly, Copelon is okay with subsuming rape in some contexts—she argues rape should have been categorized as a form of torture. *Id.* at 258.

<sup>129</sup> CHAPPELL, *supra* note 119, at 9 (“Critics of [the international feminist legal project] have been particularly vexed about the focus on violations of women’s bodily integrity, viewing it as reductionist and dangerous . . . In their view, by making rape victims the ‘privileged subjects’ of the law, the international feminist legal project risks heightening the harm of such crimes. Aligning sexual violence crimes with other atrocities within the ‘pantheon of privileged rights violations’ suggests a level of devastation that victims themselves may not experience.”) (citations omitted); see also Patricia Viseur Sellers, *Gender Strategy Is Not A Luxury for International Courts*, 17 AM. U. J. GENDER SOC. POL’Y & L. 301, 304–05 (2009) (“There is an emerging, hopefully prevailing, norm that gender crimes under international criminal law and under humanitarian law should not be limited to prosecution of sexual violence.”); cf. CHARLESWORTH & CHINKIN, *supra* note 73, at xxxviii (criticizing the U.N. Security Council for reducing the notion of the “gender” part of “gender perspective” to women, “who are assumed to have ‘special needs’” as victims of sexual violence in armed conflict).

<sup>130</sup> CHAPPELL, *supra* note 119, at 9, 38–39 (“[T]he literature also draws attention to the historical failure of international legal institutions to pay attention to nonsexual violations, especially the ‘emotional harms, harms to the home and personal spaces, harms to children and those to whom women are intimately connected.’”) (citations omitted).

<sup>131</sup> See, e.g., Copelon, *supra* note 114, at 246 (“The elision of genocide and rape in the focus on ‘genocidal rape’ as a means of emphasizing the heinousness of the rape of Muslim women in Bosnia is dangerous. Rape and genocide are separate atrocities. . . . [T]o describe the horror of ‘genocidal’ rape as ‘unparalleled’ is factually dubious and risks rendering rape invisible once again. Labeling rape as ‘genocidal’ does not necessarily increase the likelihood that, when ethnic war ceases or is forced back into the bottle, the crimes against women, the voices of women, and their struggles to survive will be vindicated.”); Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT’L L. 1, 53–64 (2008) (describing disagreements among feminists on framing sexual violence in the Rome Statute); Karen Engle, *The Grip of Sexual Violence: Reading UN Security Council Resolutions on Human Security*, in RETHINKING PEACEKEEPING, GENDER EQUAL-

tioned the ICC Prosecutor for failing to charge gender persecution in various cases.<sup>132</sup>

Beyond the crimes, there are a panoply of gender-conscious rules in the Rome Statute.<sup>133</sup> The statute requires gender equality in applying the rules,<sup>134</sup> sensitivity to gender in investigation, prosecution, treatment of witness, and reparations,<sup>135</sup> gender representation among judges,<sup>136</sup> and contemplates the use of gender advisors.<sup>137</sup>

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ITY AND COLLECTIVE SECURITY 23–46 (Gina Heathcote & Dianne Otto eds., 2014) (describing the trend in Security Council resolutions on sexual violence and critiquing their framing of sexual violence as a humiliating, life-ruining harm); Karen Engle, *Feminism and Its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT'L L. 778, 780, 807–15 (2005) [hereinafter Engle, *Feminism and Its (Dis)contents*] (“[T]he international criminalization of rape . . . is neither as pathbreaking nor as progressive as the doctrinal recognition might suggest.”); Karen Engle, *Judging Sex in War*, 106 MICH. L. REV. 941, 942–43 (2008) (criticizing ICTY decisions on rape for “reproduc[ing] many assumptions about women’s (lack of) agency” and arguing that “[t]hrough its rules regarding evidence of consent and its equation of rape with torture, the ICTY essentially created a jurisprudence in which much of the sex between opposing sides in the war was made criminal”).

<sup>132</sup> See Rosemary Grey, Valerie Oosterveld & Rebecca Orsini, *The ICC’s Troubled Track Record on Sexual and Gender-Based Crimes Continues: The Yekatom & Ngai’s-sona Case (Part 2)*, OPINIO JURIS (Mar. 7, 2020), <http://opiniojuris.org/2020/07/03/the-icc-s-troubled-track-record-on-sexual-and-gender-based-crimes-continues-the-yekatom-ngaissona-case-part-2/> [<https://perma.cc/PY3U-T8KL>].

<sup>133</sup> See CHAPPELL, *supra* note 119, at 32 (“A standout feature of the Rome Statute is its novel gender justice mandate that includes *representation*, *recognition*, and *redistribution* elements.”).

<sup>134</sup> Rome Statute, *supra* note 120, art. 21(3) (“The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”).

<sup>135</sup> *Id.* art. 54(1) (“The Prosecutor shall: . . . (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children . . . .”); see also *id.* art. 68(1) (“The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”).

<sup>136</sup> *Id.* art. 36(8)(a) (“(a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges. (b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”).

<sup>137</sup> *Id.* art. 42(9) (“The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.”).

However, where gender does *not* make an appearance, at least at the ICC, is in the crime of genocide. Gender is not a protected or target group that qualifies for the crime of genocide at international tribunals. Unlike in some national legislation, where countries have included a broader range of groups, including gender,<sup>138</sup> international tribunals have employed a quite uniform definition of genocide, taken from the Genocide Convention.<sup>139</sup> At the ICC, genocide is defined as:

[A]ny 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.<sup>140</sup>

There was discussion about expanding the list of target groups during the Rome Statute's drafting, but states ultimately decided to stick with the groups covered by the Genocide Convention in the name of preserving consensus.<sup>141</sup>

The ICC's approach is consistent with that of other international tribunals. Although an early ICTR Trial Chamber decision interpreted that tribunal's genocide provision to include all stable groups, calling the list of protected groups illustrative and not exclusive, subsequent tribunal case law has backed away from this argument.<sup>142</sup> Moreover, even though there seems

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<sup>138</sup> Some national jurisdictions have broader definitions of genocide. Several countries cover political groups. See Oficina del Alto Comisionado de la ONU para los Derechos Humanos México (ONU-DH), *Feminicidio* [Feminicide], 50 (2009), <http://www.nomasviolenciacontra mujeres.cl/wp-content/uploads/2015/09/P.-Toledo-Libro-Feminicidio.compressed.pdf> [<https://perma.cc/P5FG-U9K9>]. Uruguay's genocide statute, for example, includes a far broader list of target groups, including "a group with its own identity based on reasons of gender, sexual orientation, cultural, social, age, disability or health." Law No. 18.026, Septiembre 25, 2006, *DIARIO OFICIAL* [D.O.] (Úru.) (orig. "un grupo con identidad propia fundada en razones de género, orientación sexual, culturales, sociales, edad, discapacidad o salud"); see also Segato, *supra* note 45, at 9.

<sup>139</sup> See Askin, *supra* note 114, n.131.

<sup>140</sup> Rome Statute, *supra* note 120, art. 6; ICTR Statute, *supra* note 117, art. 2; ICTY Statute, *supra* note 117, art. 4.

<sup>141</sup> Askin, *supra* note 114, n.131 ("In the ICC negotiations . . . there was fear that if delegates started tinkering with the definition [of genocide], some delegates might want it more expansive while others would want to make it more restrictive."); see also William A. Schabas, *Genocide*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 143* (Otto Triffterer ed., 2008).

<sup>142</sup> Schabas, *supra* note 141, at 149–50.

to be support for expansive definitions of the listed groups,<sup>143</sup> it is hard to squish gender into the terms “national, ethnical, racial or religious group.”<sup>144</sup>

At the ad hoc tribunals, much of the fight was about having acts targeting women, even focusing on their identities as members of a targeted ethnic group, recognized as genocide at all. Speaking of the world’s reaction to widespread rapes of Bosnian and Croat women by Serb “military men” in the Yugoslav war, Catharine MacKinnon argued in 1993:

When this is noticed, it is either as genocide or as rape, *or as femicide* but not genocide, but not as rape as a form of genocide directed specifically at women. It is seen either as part of a campaign of Serbia against non-Serbia or an onslaught by combatants against civilians, but not an attack by men against women. Or, in the feminist whitewash, it becomes just another instance of aggression by all men against all women all the time, rather than what it is, which is rape by some men against certain women.<sup>145</sup>

Note that MacKinnon was concerned about the dismissive potential of the label femicide. Her comment suggested that labeling the crime femicide in some way minimized it, perhaps by taking it out of the realm of a cognizable international crime. Just as she was concerned about the failure to recognize the gendered nature of this form of violence, she voiced concerns about solely focusing on gender at the exclusion of ethnic identity.

Ultimately, the courts recognized rape as a way of committing genocide. In the seminal ICTR case, *Prosecutor v. Akayesu*,<sup>146</sup> the ICTR established that rape could form the basis for genocide in a variety of ways. Rape, it explained, could constitute a way of “[i]mposing measures intended to prevent births within the group.”<sup>147</sup> Ultimately though, it found Akayesu guilty of genocide on the basis of “causing serious bodily or mental harm to members of the group” saying that “[t]hese rapes resulted in physical and

<sup>143</sup> In particular, some have embraced a move from an objective to a subjective standard, which takes account of collective identities’ socially constructed nature. *See id.*

<sup>144</sup> *See* HEFTI, *supra* note 13, at 7–8 (analyzing the definitions of “national, ethnical, racial or religious group” for genocide).

<sup>145</sup> Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN’S L. J. 59, 65 (1993) (emphasis added).

<sup>146</sup> *See generally* Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT’L L. 940 (2006) (explaining how rape is defined in international criminal law in *Prosecutor v. Akayesu*).

<sup>147</sup> The Trial Chamber reasoned that “[i]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group . . . measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.” *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 2, 507–08 (Sept. 2, 1998).

psychological destruction of Tutsi women, their families and their communities.<sup>148</sup> Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.<sup>149</sup>

As part of this argument that rape could comprise part of the *actus reus* of genocide, or as an addendum to it, the Trial Chamber also noted that the rapes were intended to be a prelude to the killing of the women. It found that:

[I]n most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed. A victim testified that Tutsi women caught could be taken away by peasants and men with the promise that they would be collected later to be executed. Following an act of gang rape, a witness heard Akayesu say “tomorrow they will be killed” and they were actually killed. In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.<sup>150</sup>

The ICTR found that these acts constituted “factual elements of the crime of genocide, namely the killings of Tutsi or the serious bodily and mental harm inflicted on the Tutsi,” which Akayesu performed with “the specific intent to destroy the Tutsi group, as such” and therefore found “Akayesu individually criminally responsible for genocide.”<sup>151</sup>

Thus, although case law has construed “causing serious bodily or mental harm to members of the group” and “[i]mposing measures intended to prevent births within the group” to include gendered violence such as rape, at least in some circumstances, it has not expanded the protected groups to include gender.<sup>152</sup> Progressive and expansive as the decision in *Akayesu* was on various fronts, the Trial Chamber still endorsed a strict adherence to the categories of groups recognized in the Genocide Convention. The judges emphasized the importance of “respect[ing] the intention of the drafters of the Genocide Convention . . . to ensure the protection of any stable and permanent group.”<sup>153</sup>

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<sup>148</sup> *Id.* ¶ 731.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* ¶ 733.

<sup>151</sup> *Id.* ¶ 734.

<sup>152</sup> *See id.* ¶ 731–34.

<sup>153</sup> *Id.* ¶¶ 516–19 (endorsing the view expressed by “the representative of Brazil during the travaux préparatoires of the Genocide Convention, [that] ‘genocide [is]



To summarize, for all the attention ICL gives gender, femicide and other gender-based killings are not a form of genocide in ICL. As things stand, gendered violence, even violence committed with the intent to destroy in whole or in part a gender, is not genocide unless the perpetrator also intends to destroy (in whole or in part) “a national, ethnical, racial or religious group.”<sup>154</sup>

### B. *Femicide and ICL on a Collision Course*

Despite femicide’s (and gender’s) exclusion from genocide, at least in some contexts, femicide may constitute an international crime. As the ICC examines violence in countries where the term is in common parlance (and a crime), it will be confronted with the question of how femicide fits into ICL, as well as the question of whether to dedicate its resources to investigating and prosecuting gendered killing and, if so, how to categorize the conduct. Latin American courts are already confronting this issue.<sup>155</sup> It bears keeping in mind that not only is Latin America the epicenter of the criminalization of femicide, it is also an epicenter of domestic atrocity prosecutions and transitional justice efforts that blend ICL and domestic law.<sup>156</sup> Femicide and transitional justice are on a collision course in Latin America, and therefore so too are femicide and ICL. Moreover, as discussed below, the ICC is already addressing at least one case involving gender-based killing.

Colombia, for example, until very recently, was under a preliminary investigation at the ICC.<sup>157</sup> Colombia’s reporting to OTP included information on cases involving SGBV, including cases of “femicide.”<sup>158</sup> Although the ICC Prosecutor has closed its preliminary investigation, the ICC contin-

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characterised by the factor of particular intent to destroy a group’” and that “[i]n the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide”).

<sup>154</sup> Rome Statute, *supra* note 120, art. 6.

<sup>155</sup> See discussion *infra* note 160.

<sup>156</sup> See Naomi Roht-Arriaza, *Transitional Justice in Latin America: Achievements and Limitations*, in THE OXFORD HANDBOOK OF TRANSITIONAL JUSTICE (Meierhenrich et al. eds., forthcoming 2019) (manuscript at 9–10) (accessed at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3281991](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281991) [<https://perma.cc/K2AW-GQRJ>]) (noting that “South-South efforts have sent Latin American experts around the globe to share experiences” and that “almost every country in the region has joined the” ICC).

<sup>157</sup> OFFICE OF THE PROSECUTOR, ICC, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES ¶ 125 (2018) (“The situation in Colombia has been under preliminary examination since June 2004. The OTP has received a total of 229 communications pursuant to article 15 of the Statute in relation to the situation in Colombia.”).

<sup>158</sup> *Id.* ¶ 148 (“On 24 August 2018, the AGO [Attorney General’s Office] submitted two reports to the SJP [Special Jurisdiction for Peace] on 1,080 SGBC [sexual and gender-based crime] cases allegedly committed by members of the armed forces and former members of the FARC-EP [Revolutionary Armed Forces of Colombia-People’s Army] involving approximately 1,246 victims, including civilians and members of their own ranks. The reports further provide details about SGBC cases committed with particular cruelty against women, minors, indigenous communities, members of LGBTI groups and social leaders. While the prevailing form of violence was rape, the AGO also reported on

ues to monitor developments in Colombian transitional justice institutions.<sup>159</sup> The Special Jurisdiction for Peace (JEP) in turn has announced that it will open a macro-case involving SGBV, and the decision announcing the case emphasizes that the case will focus on patterns of gender-based violence broadly, not only sexual violence.<sup>160</sup>

Femicide is similarly in the background of the Venezuelan referral to the ICC and has appeared in literature on the referral from non-governmental organizations (“NGOs”). The Women’s Initiative for Gender Justice, an NGO that focuses on gender issues at the ICC,<sup>161</sup> has flagged the issue of femicide in contextualizing the protests and the political crackdown on protesters and opposition in the wake of Venezuela’s economic crisis, which “has led to a surge in violence against women, rendering them increasingly vulnerable to femicides and sex trafficking.”<sup>162</sup>

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other sexual crimes, including forced nudity, *femicide*, sexual slavery and forced prostitution.”) (emphasis added).

<sup>159</sup> Press Release, ICC Prosecutor, Mr Karim A. A. Khan QC, Concludes the Preliminary Examination of the Situation in Colombia with a Cooperation Agreement with the Government Charting the Next Stage in Support of Domestic Efforts to Advance Transitional Justice (Oct. 28, 2021), <https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-khan-qc-concludes-preliminary-examination-situation-colombia> [<https://perma.cc/5JRA-AKBZ>]; see also Cooperation Agreement Between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia, art. 1, Oct. 28, 2021.

<sup>160</sup> Jurisdicción Especial para la Paz, Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Auto Srvr No. 103 de 2022, ¶¶ 45, 51 (July 11, 2022) (Colom.), [https://jurinfo.jep.gov.co/normograma/compilacion/docs/auto\\_srvr-103\\_11-julio-2022.htm](https://jurinfo.jep.gov.co/normograma/compilacion/docs/auto_srvr-103_11-julio-2022.htm) [<https://perma.cc/9HMY-L8AV>] (noting that another macro case had already received and analyzed reports of gender-based violence against LGBTQI persons, including homicides, massacres, enforced disappearances, displacement, sexual violence, torture and other cruel and inhumane acts, and stating that “the Chamber considers it appropriate to also shed light on other crimes that are committed as part of the same repertoire motivated by hate and prejudice on the basis of sexual orientation and gender identity, such as forced labor or displacement”) (orig. “la Sala considera procedente hacer visible también los otros crímenes cometidos como parte de un mismo repertorio motivado por el odio y el prejuicio por razones de sexo o de OISGD, como pueden ser los trabajos forzados o el desplazamiento”); see also *Colombia’s JEP to Open New Lines of Investigation*, MERCOPRESS (Feb. 21, 2022), <https://en.merco.press.com/2022/02/21/colombia-s-jep-to-open-new-lines-of-investigation> [<https://perma.cc/HNF2-ZWNQ>].

<sup>161</sup> *Women’s Initiative for Gender Justice*, WOMEN HUM. RTS. DEF. INT’L COAL., <https://www.defendingwomen-defendingrights.org/about/members/womens-initiatives-for-gender-justice/> [<https://perma.cc/5M6J-TT9N>] (“Women’s Initiatives for Gender Justice (WIGJ) is an international women’s human rights organization advocating for gender-inclusive justice and working towards an effective and independent International Criminal Court (ICC). They are based in The Hague, the Netherlands, the seat of the ICC, in order to advocate for inclusion of gender based crimes in the investigations and prosecutions of the ICC and to promote the rights of women victims/survivors of armed conflict throughout the justice process including through the Trust Fund for Victims. WIGJ advocates for the use of international treaties, specifically the Rome Statute of the ICC, to advance women’s rights and gender equality domestically.”).

<sup>162</sup> WOMEN’S INITIATIVES FOR GENDER JUST., GENDER REPORT CARD ON THE INTERNATIONAL CRIMINAL COURT 2018 35 (2018), [https://4genderjustice.org/ftp-files/publications/Gender-Report\\_design-full-WEB.pdf](https://4genderjustice.org/ftp-files/publications/Gender-Report_design-full-WEB.pdf) [<https://perma.cc/Q96V-MESU>] (noting that “the Prosecutor has not specifically commented on allegations of sexual violence in public, though given details of such violence in reports of the UN and Inter-American Com-

Moreover, femicide is garnering attention in domestic courts addressing atrocity crimes in Latin America, where, as noted above, it is a widely used term and a crime. In Guatemala, for example, the presence of a violent felony, including “femicide,” is a criterion that helps to justify transfer to a High Risk Court.<sup>163</sup> In Colombia, commentators have called on the JEP, a tribunal created as part of the Colombian Peace Accord to deal with civil war atrocities, to address femicide.<sup>164</sup> The JEP has also had to tease out when femicide is armed conflict-related and thus under the JEP’s purview and when it is not.<sup>165</sup>

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mission on Human Rights, including sexual violence in the examination appears necessary”).

<sup>163</sup> Christina M. Fetterhoff, *El Testimonio Ixil Pesa Mas: Reflections on the Guatemalan Genocide Trial One Year Later [The Ixil Testimony Carries More Weight]*, 21 HUM. RTS. BRIEF 22, 24 (2014) (“The High Risk Courts function as courts of first instance under the structure of the Supreme Court of Justice. As described by their name, these courts deal with criminal cases of high social impact. Their judges enjoy broader protections and receive special attention from the justice system to accelerate judicial processes when they are presiding over a case. According to Articles 2 and 3 of Supreme Judicial Court Agreement 6-2009 regarding competency for high risk cases, certain characteristics are required for a case to be labeled as high risk. For example, the case must involve both a violent felony, such as femicide or kidnapping, as well as a high probability of risk to the physical integrity of those involved in the prosecution of the case. For this reason, the Rios Montt and Rodriguez Sanchez case was brought before the High Risk Court of Judge Yassmin Barrios and the beginning of the trial moved very quickly.” (citations omitted)).

<sup>164</sup> See generally MARÍA FERNANDA GONZÁLEZ MARTÍNEZ & MARÍA JOSÉ VEGA DAZA, TIPIFICACIÓN DEL DELITO DE FEMINICIDIO EN LA JURISDICCIÓN ESPECIAL PARA LA PAZ EN EL MARCO DEL CONFLICTO ARMADO COLOMBIANO [TYPIFICATION OF THE CRIME OF FEMICIDE IN THE SPECIAL JURISDICTION FOR PEACE IN THE CONTEXT OF THE COLOMBIAN ARMED CONFLICT] (2018), [https://memoria.fahce.unlp.edu.ar/trab\\_eventos/ev.12650/ev.12650.pdf](https://memoria.fahce.unlp.edu.ar/trab_eventos/ev.12650/ev.12650.pdf) [<https://perma.cc/G8NB-B7FE>] (examining the shortfalls of femicide jurisprudence in Colombia and proposing methodologies under which the JEP may serve as a better judicial body for this type of crime within the context of armed conflict in Colombia).

<sup>165</sup> Several men convicted of gendered violence, including aggravated homicide, in the ordinary court system sought to have their cases transferred to the JEP presumably in the hopes that their lengthy sentences would be vacated pursuant to the JEP’s special (restorative) sanctions regime. See, e.g., Jurisdicción Especial para la Paz [Special Jurisdiction for Peace], Tribunal para la Paz, Sección de Apelación [Court for Peace, Appellate Division] septiembre 9, 2020, Auto TP-SA No. 599 de 2020, ¶ 8 (Colom.), [https://relatoria.jep.gov.co/documentos/providencias/7/1/Auto\\_TP-SA-599\\_09-septiembre-2020.pdf](https://relatoria.jep.gov.co/documentos/providencias/7/1/Auto_TP-SA-599_09-septiembre-2020.pdf) [<https://perma.cc/KQK7-TKH8>] (regarding the application to transfer to the JEP the case of a former member of the FARC-EP who had been convicted of the aggravated intentional homicide of his wife, which was rejected); Jurisdicción Especial para la Paz [Special Jurisdiction for Peace], Tribunal para la Paz, Sección de Apelación [Court for Peace, Appellate Division] agosto 4, 2021, Auto TP-SA 892 de 2021, ¶ 10 (Colom.), [https://relatoria.jep.gov.co/documentos/providencias/7/1/Auto\\_TP-SA-892\\_04-agosto-2021.pdf](https://relatoria.jep.gov.co/documentos/providencias/7/1/Auto_TP-SA-892_04-agosto-2021.pdf) [<https://perma.cc/DZR2-8Q6Q>] (regarding the application to transfer to the JEP the case of a member of the FARC-EP who had been convicted of the aggravated homicide of a minor, which was rejected); see also *JEP no puede aceptar casos de feminicidio [JEP Cannot Accept Femicide Cases]*, EL NUEVO SIGLO (Oct. 16, 2018), <https://www.elnuevosiglo.com.co/articulos/10-2018-jep-no-puede-aceptar-casos-de-feminicidio-procuraduria> [<https://perma.cc/72YS-YL3G>] (describing two cases in which the prosecutor for the JEP turned down transfer requests for cases involving femicide by men who claimed being associated with the FARC).

Finally, as discussed below, the ICC currently has before it a case involving the gendered killing of men and boys.<sup>166</sup> Thus, gendered killing is already emerging as a subject of ICL and ICC concern. The ICC should come to its analysis of gendered killing armed with knowledge about the phenomenon and criminalization of femicide.

### C. *Femicide's Existing ICL Analogues*

So how would ICL, given its lack of a femicide provision or recognition of a gender as a valid “group” for genocide, address the gendered dimensions of killing? ICL of the tribunals recognizes neither femicide nor genocide where “the group” at issue is a particular gender.<sup>167</sup> This Part provides a sketch of the way ICL, at least as currently articulated at the ICC, would or could frame gendered killing of women (i.e., femicide) or others. In particular, it argues that gendered killings (of women and others) could constitute war crimes or crimes against humanity and outlines a few possible charging options. As this Part reveals, not all femicides are likely to meet the stringent requirements for war crimes and crimes against humanity, but at least some likely will.

#### 1. *Gendered Killings as War Crimes*

Under ICL, femicide and other gendered killings may constitute a war crime. In short, what is needed to turn femicide into a war crime is a connection between the killing and an armed conflict.<sup>168</sup> Where that “nexus” is met, among the (many) possible war crime charges are “[w]illful killing” of a civilian” or “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,”<sup>169</sup> depending on the nature of the conflict and the status of the victim.

Prosecuting femicides in armed conflict may draw attention to the phenomenon of gendered killing generally, but the required connection to an armed conflict inherently excludes a great deal of gendered killings and femicides worldwide. A state policy discriminating against and encouraging the mistreatment and killing of trans women in peacetime, for example, will

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<sup>166</sup> See discussion *infra* notes 222–223.

<sup>167</sup> See *supra* notes 138–154.

<sup>168</sup> Cf. Oona A. Hathaway et al., *What is a War Crime?*, 44 YALE J. INT'L L. 53, 84 (2019) (“[I]t is widely recognized that for conduct to amount to a violation of IHL [international humanitarian law] to which criminal responsibility can attach, there must be a sufficient ‘nexus’ between the conduct at issue and the relevant armed conflict.”). Rejecting a standard definition of a war crime as a “violation of the law of war that has been ‘criminalized’” as problematic and circular, *id.* at 54, Oona Hathaway and her co-authors argue that a war crime, at its essence, is a “(1) a breach of IHL (2) that is serious,” *id.* at 55.

<sup>169</sup> Rome Statute, *supra* note 120, art. 8(2)(a)(i) (as a grave breach of the Geneva Conventions) and art. 8(2)(c)(i) (as a violation of Common Article 3 of the Geneva Conventions).

not qualify. Likewise, a criminal organization's policy of killing women to send a message to others in peacetime does not qualify. Segato has argued that femicide is in effect a part of a war where the "battlefield is women's bodies,"<sup>170</sup> but it is unlikely that these metaphors about women's bodies as territories, compelling and thought-provoking as they are, will satisfy a criminal court that the armed conflict requirement is met based on the gendered killing of women alone.

Even where the nexus to an armed conflict is met, war crimes charges, simply by virtue of their elements, may deemphasize the gendered nature of the violence. Nothing in the elements of killing, torture, and even rape, among many others, necessarily requires an inquiry into gendered motivations. To be fair, the prosecutor or the court may choose to emphasize gendered aspects of the crimes, even where the elements of the crimes do not require that they do so, but neither the crime labels themselves (in contrast to femicide) nor their elements inherently draw attention to the gendered aspects of the crimes. Unlike with crimes against humanity, there is no war crime of gender persecution.<sup>171</sup> Nevertheless, war crimes remain a possible international crime for gendered killings committed in the context of an armed conflict. The next Section examines the fit between femicide and crimes against humanity.

## 2. *Gendered Killings as Crimes Against Humanity*

This Part examines the doctrinal fit between femicide and crimes against humanity. It seems clear that not all femicides will satisfy the requirements of crimes against humanity, but some will. Where the femicide is committed as part of a widespread or systematic attack against a civilian population, with knowledge of the attack, pursuant to a state or organizational policy, it may fall within one of several categories of crimes against humanity. Several crimes against humanity, including murder, extermination, torture, and gender persecution, capture the conduct and, to varying degrees, the gendered dynamics at play in cases of femicide.

### (a) *Chapeau Elements of Crimes Against Humanity*

Pursuant to Article 7(1) of the Rome Statute, crimes against humanity are defined as "any of . . . [a list of] acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."<sup>172</sup> In turn, Article 7(2) defines an "[a]ttack

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<sup>170</sup> Rita Laura Segato, *Las Nuevas Formas de la Guerra y el Cuerpo de las Mujeres* [*The New Forms of War and Women's Bodies*], 29 REVISTA SOCIEDADE E ESTADO 341, 364 (2014).

<sup>171</sup> See Rome Statute, *supra* note 120, art. 8.

<sup>172</sup> *Id.* art. 7(1). All situations and cases before the ICC, regardless of their classification as war crimes, crimes against humanity or other crimes, likewise must be of sufficient "gravity." See Rome Statute, *supra* note 120, art. 17(1)(d) (allowing the Court to

directed against any civilian population” as “a course of conduct involving the multiple commission of acts referred to . . . [in the list of acts] against any civilian population, pursuant to or in furtherance of a State or organizational policy.”<sup>173</sup> Thus, in order to show all elements of crimes against humanity, the prosecution must prove that the acts were part of a widespread or systematic attack against civilians pursuant to a state or organizational policy. These required elements for all crimes against humanity are known as the “chapeau.”<sup>174</sup>

Meeting these chapeau elements will depend significantly on the factual circumstances, and some of these chapeau elements may be easier than others to meet. The attack requirement, for example, is at once broader and narrower than it seems. Again, the Rome Statute itself defines it as a “course of conduct involving the commission of multiple acts [defined in Article 7(1) as acts that can amount to crimes against humanity].” The Rome Statute’s companion document, the Element of Crimes, in turn states that “[t]he acts need not constitute a military attack.”<sup>175</sup> Case law from the international tribunals likewise defines “attack” to include mistreatment of a population.<sup>176</sup> The requirement “civilian”<sup>177</sup> similarly poses no difficulty with many

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find a case inadmissible where it “is not of sufficient gravity to justify further action by the Court”); art. 53(1)(c), 2(c), 4 (directing the Prosecutor to consider gravity “in deciding whether to initiate an investigation” or “reconsider[ing] a decision whether to initiate an investigation or prosecution based on new facts or information”). The content of the threshold is far from clear, but, according to Margaret de Guzman, “the case law and prosecutorial policies term the quantitative aspect ‘scale’ and list the qualitative factors as: the nature of the crimes, the manner in which they were committed, and their impact.” MARGARET DEGUZMAN, *SHOCKING THE CONSCIENCE OF HUMANITY: GRAVITY AND THE LEGITIMACY OF INTERNATIONAL CRIMINAL LAW* 17, 98–99, 101–02, 107 (2020) (arguing that “the legitimacy of global adjudication depends not only on the strength of the global community’s interest in adjudication, but also on whether that interest outweighs any countervailing interests” and that, in the context of the ICC’s adjudicative authority, gravity should be calibrated to those values). The gravity rhetoric surrounding femicide as a gross human rights violation seems to support a finding of gravity for at least some femicides, particularly where the chapeau elements of war crimes or crimes against humanity are met, but naturally this too will hinge on the particular facts of a case and the degree to which it is part of a broader criminal context.

<sup>173</sup> *Id.* art. 7(2)(a).

<sup>174</sup> GUÉNAËL METTRAUX, *INTERNATIONAL CRIMES: LAW AND PRACTICE: CRIMES AGAINST HUMANITY* 194–95 (2d vol. 2020).

<sup>175</sup> INT’L CRIM. CT., *ELEMENTS OF CRIMES*, art. 7(3), U.N. Sales No. E.03.V.2 (2013) [hereinafter *ICC ELEMENTS OF CRIMES*].

<sup>176</sup> *See, e.g.*, Prosecutor v. Perišić, Case No. IT-04-81-T, Judgment, ¶ 82 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 6, 2011) (“An ‘attack’ may be defined as a course of conduct involving the commission of acts of violence. In the context of crimes against humanity, an ‘attack’ is distinct from the concept of ‘armed conflict’ and not limited to the use of armed force. Rather, it may encompass any mistreatment of the civilian population. The attack may precede, outlast or continue during the armed conflict and need not be part of it.”); Prosecutor v. Prlić, Case No. IT-04-74-T, Judgment, ¶ 35 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013) (“The concept of an attack must be distinguished from that of an armed conflict. Although the attack may occur within the context of an armed conflict, it is equally true that the attack may precede an armed conflict, may continue once it has ended or proceed during the conflict, without necessarily being part of it. However, . . . the Tribunal will be competent to judge crimes committed by an

contemporary femicides, which are often directed against non-combatants. However, as discussed below, prosecutors may have a harder time establishing the “directed against” and “state policy” elements for many femicides, at least where the attack is based on the widespread or systematic practice of femicides or gendered killings themselves.<sup>178</sup> (As discussed below, the prosecutor need not frame the case this way.)

In many instances of gendered killing of women, it likely would not be difficult to argue that “attacks” against women are—or mistreatment of women is—widespread or even systematic, though only one of the two is needed. As an ICTY Trial Chamber explained in *Prosecutor v. Prlić*, the widespread or systematic attack requirement “is in the alternative, rather than cumulative.”<sup>179</sup> *Prlić* explained that “[t]he adjective ‘widespread’ refers to the attack being conducted on a large scale as well as to the high number of victims it caused.”<sup>180</sup> In contrast, “the adjective ‘systematic’ emphasizes the organised character of the acts of violence and the improbability of their random occurrence. Thus, it is in the ‘patterns’ of the crimes, in the sense of the deliberate, regular repetition of similar criminal conduct, that one discerns their systematic character.”<sup>181</sup> *Prlić* offers a non-exhaustive list

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accused only if they are committed as part of an attack occurring ‘in an armed conflict’. An ‘attack’ has been defined as ‘a course of conduct involving the commission of acts of violence’. In the case of a crime against humanity, the term ‘attack’ is *not restricted to the use of armed force but may also encompass circumstances where there is mistreatment of the civilian population.*”) (emphasis added); *Prosecutor v. Stanišić*, Case No. IT-03-69-T, Judgment, ¶ 962 (Int’l Crim. Trib. for the Former Yugoslavia May 30, 2013) (“The attack is not limited to the use of force, but encompasses *any mistreatment of the civilian population*”) (emphasis added); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, ¶ 205 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000) (“An attack *may also be non-violent in nature*, such as imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, which may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.”) (emphasis added); see also Rodney Dixon & Christopher K. Hall, *Crimes Against Humanity*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 175 (Otto Triffterer ed., 2008) (“[T]he meaning of ‘attack,’ as confirmed by the Elements of Crimes, does not necessarily equate with ‘military attack’ as defined by international humanitarian law. Rather, it refers more generally to a campaign or operation conducted against the civilian population . . . The attack need not even involve military forces or armed hostilities, or any violent force at all. It can involve any mistreatment of the civilian population.”).

<sup>177</sup> See, e.g., *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, ¶ 1102 (Mar. 7, 2014) (“The expression ‘civilian population’ denotes civilians as opposed to ‘members of armed forces and other legitimate combatants’. As such, the Chamber endorses the definition of ‘civilian’ provided by article 50(1) of Additional Protocol I and that of ‘civilian population’ provided by article 50(2) of Protocol I, namely ‘[t]he civilian population comprises all persons who are civilians.’”).

<sup>178</sup> Patsilí Toledo made this argument in her report on femicide. See ONU-DH, *supra* note 138, at 51–53.

<sup>179</sup> *Prlić*, IT-04-74-T at ¶ 41.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* See also *Katanga*, ICC-01/04-01/07 at ¶ 1098 (“It is generally recognised that the adjective ‘widespread’ adverts to the large-scale nature of the attack, whereas the adjective ‘systematic’ reflects the organised nature of the acts of violence.”).

of relevant factors for determining whether an attack is widespread, systematic, or both, including “the consequences of the attack on the civilian population targeted, the number of victims, the nature of the acts, the possible participation of political officials or authorities, or any identifiable pattern of crime in the sense defined above.”<sup>182</sup> The extensive work done by feminist and anti-VAW activists, organizations, and, in some instances, government agencies collecting statistics on the problem suggests that the “widespread” or “systematic” (mistreatment) part of the chapeau may be readily provable in many femicide contexts.<sup>183</sup>

Importantly, all that is required is that the gendered killing be a “part” of the attack (or the mistreatment of the population), not that it amount to the attack or mistreatment. In other words, it can be evidence of, but need not *be* the attack. As the ICC Prosecutor has argued in its Gender Persecution Policy, for example:

It is not required that the persecutory acts be widespread or systematic, provided that the act(s) formed part of a widespread or systematic attack against a civilian population. While evidence of repeated persecutory acts committed during an attack is not required, it may support the widespread or systematic nature of the ‘attack’ against the civilian population.<sup>184</sup>

Thus, though the widespread or systematic nature of femicides may show the widespread nature of the attack or mistreatment, they need not do so.

Then there is the requirement that the attack or mistreatment be “directed against any civilian population,” which may be easier to meet at the ICC than at other international tribunals. Case law from the ICTY indicated that the “directed against” language demands that the attack target a “population” rather than “selected individuals,” as the Trial Chamber explained in *Prosecutor v. Stanišić*:

<sup>182</sup> *Id.*

<sup>183</sup> See Dubravka Šimonović (Special Rapporteur on Violence Against Women, Its Causes, and Consequences), *Taking Stock of the Femicide Watch Initiative*, ¶ 33, U.N. Doc. A/76/132 (July 12, 2021) (noting “significant progress” on the creation of bodies that monitor violence against women and femicide); see, e.g., U.N. Off. on Drugs & Crime & U.N. Entity for Gender Equal. & Empowerment of Women, *Statistical Framework for Measuring the Gender-Related Killing of Women and Girls* (Also Referred to as “Femicide/Feminicide”), 3–4 (July 6, 2022), [https://data.unwomen.org/sites/default/files/documents/Publications/CEGS/Statistical\\_framework\\_femicide\\_2022.pdf](https://data.unwomen.org/sites/default/files/documents/Publications/CEGS/Statistical_framework_femicide_2022.pdf) [<https://perma.cc/HWR7-X22R>] (offering a comprehensive statistical framework for measuring the gender-related killing of women and girls); Nowak, *supra* note 3, at 1–3 (providing data on global patterns of femicide); *Femicide Data Standardization*, ILDA, <https://idatosabiertos.org/en/proyectos/estandardatosfemicidios/> [<https://perma.cc/Q556-YVZ8>] (detailing efforts to develop a consistent protocol and methodology for the research of femicide).

<sup>184</sup> OTP Gender Persecution Policy, *supra* note 127, ¶¶ 59–60; cf. *Katanga*, ICC-01/04-01/07, at ¶ 1115 (“[I]t is . . . not a question of demonstrating that each of the acts listed in article 7(1) of the Statute took place pursuant to or in furtherance of a State or organisational policy.”).



“Directed against” indicates that it is the civilian population which is the primary object of the attack. The attack does not have to be directed against the civilian population of the entire area relevant to the indictment. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Trial Chamber that the attack was in fact directed against a civilian “population”, rather than against a limited and randomly selected number of individuals.<sup>185</sup>

In *Prosecutor v. Ntaganda*, the ICC Appeals Chamber, however, stated that this “directed against any civilian population” requirement “does not require a separate finding that the civilian population was the primary object of the attack” and it “underst[ood] this to mean no more than that the attack targeted the civilian population.”<sup>186</sup>

Again, the ease of proving this element will vary significantly depending on the factual circumstances and the prosecutor’s theory of the case. If the attack or mistreatment contemplated is the femicides or other gendered killings themselves, as opposed to the gendered killings as part of some other attack or mistreatment, then the prosecutor would need to find evidence and craft arguments as to how these killings of women were levied against a “population,” and not just “randomly selected” individual women.

Complicating matters, the test the ICC Appeals Chamber endorsed in *Ntaganda* for determining whether the civilian population is the primary target, borrowed from the ICTY case *Prosecutor v. Kunarac*, clearly envisions a military attack. In *Kunarac*, the Court states:

In order to determine whether the attack may be said to have been so directed, [judges must] consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said

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<sup>185</sup> *Prosecutor v. Stanišić*, Case No. IT-03-69-T, Judgment, ¶ 964 (Int’l Crim. Trib. for the Former Yugoslavia May 30, 2013).

<sup>186</sup> *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Public Redacted Version of Judgment on the Appeals of Mr. Bosco Ntaganda and the Prosecutor Against the Decision of Trial Chamber VI of 8 July 2019 Entitled, ‘Judgment,’ ¶¶ 7, 424 (Mar. 30, 2021) (“While this requirement is sometimes described in terms of whether the civilian population is the ‘primary object’ of the attack, the Appeals Chamber understands this to mean no more than that the attack targeted the civilian population. Although the phrase suggests otherwise, it does not establish a legal requirement that the *main* aim or object of the relevant acts was to attack civilians. An attack directed against a civilian population may also serve other objectives or motives. The question of whether an attack was directed against a civilian population is essentially a factual issue that may be assessed by considering, *inter alia*, the criteria set out by the ICTY Appeals Chamber in the *Kunarac et al.* case.”).

to have complied or attempted to comply with the precautionary requirements of the laws of war.<sup>187</sup>

The question here is whether widespread mistreatment of women and even widespread killing of women for gendered reasons is “directed at” or “targeting” a civilian population in the manner contemplated here. The dearth of tribunal case law involving attacks of the mistreatment variety, particularly disassociated from an armed conflict, means that prosecutors and judges who argue that to target women is to target a “civilian population” would be charting new waters. Again, this problem only presents itself where the prosecutor is charging the femicide as the attack itself (the widespread or systematic killing of women), not as a part of another attack (the killing of women as part of a widespread or systematic attack against a particular ethnic population, for example).

At least at the ICC, another potential challenge in prosecuting femicide cases as a crime against humanity is the ICC’s requirement that the attack be “pursuant to or in furtherance of a State or organizational policy.”<sup>188</sup> The ICC Elements of Crimes requires that the organization or state “actively promote or encourage the attack against a civilian population.”<sup>189</sup>

A footnote to the ICC Elements of Crimes addresses omissions as policy and complicates arguments that state inaction of the femicide variety constitutes a “state or organizational policy.” After the sentence requiring that the organization or state “actively promote or encourage” the attack, the ICC Elements of Crimes adds in a footnote:

A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is *consciously aimed at encouraging such attack*. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.<sup>190</sup>

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<sup>187</sup> Prosecutor v. Kunarac, Case No. IT-96-23&IT-96-23/1-A, Judgment, ¶ 91 (Int’l Crim. Trib. for the Former Yugoslavia Jun. 12, 2002); see also *Katanga*, ICC-01/04-01/07, at ¶ 1104 (quoting the *Kunarac* test).

<sup>188</sup> Rome Statute, *supra* note 120, art. 7(2)(a). It is debated whether customary international law requires that a crime against humanity be committed pursuant to a state or organizational policy, but, for the ICC, the Rome Statute requires it. See, e.g., Schabas, *supra* note 141, at 145–46.

<sup>189</sup> ICC ELEMENTS OF CRIMES, *supra* note 175, art. 7(3).

<sup>190</sup> *Id.* at 3 n.6 (emphasis added). That said, ICC judges appear to be using a fairly broad conception of “policy.” See, e.g. *Katanga*, ICC-01/04-01/07, at ¶¶ 1108–13 (“To establish a ‘policy,’ it need be demonstrated only that the State or organisation meant to commit an attack against a civilian population” and that “it should be recalled that it is not so much the policy as it is the widespread or systematic nature of the attack—*viz.* a consideration of the scale and regular nature of the pattern followed—which first and foremost distinguishes a crime against humanity and constitute its ‘hallmark.’”). See also Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries, ¶¶ 26–27, U.N. Doc. A/74/10 (2019) [hereinafter Draft Articles],

This footnote is relevant in attempting to use crimes against humanity to prosecute state officials for failing to take action on the gendered killing of women, as in the femicide conception of femicide. A failure to take action, such as preventing, investigating, and prosecuting killings of women, is not enough to show a state policy that actively promotes or encourages an attack on women. Thus, unless there is evidence that state officials actively obstructed investigations or that failures to take action “were consciously aimed at encouraging” gendered killings, it may make strategic sense for the prosecutor to tether the gendered killings to an attack (or mistreatment) that goes beyond the (unprevented, uninvestigated, and unpunished) killing of women.

Finally, if the policy relied upon is not of the state but of an organization, that organization has to meet certain requirements. The Trial Chamber in the ICC’s *Katanga* case interpreted this to mean “that the organisation in question has sufficient means to promote or encourage a campaign involving the multiple commission of acts referred to in article 7(2) of the Statute.”<sup>191</sup>

As with the attack, the state or organizational policy requirement can be separated from the gendered killing. Thus, although the prosecutor must prove a widespread or systematic attack against a civilian population pursuant to or in furtherance of a State or organizational policy, it need not “prove a policy or plan to commit gendered murders.”<sup>192</sup>

(b) *Possible Crimes Against Humanity*

Under the Rome Statute, where the chapeau elements are met, the following acts can constitute crimes against humanity:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;

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gal.un.org/ilc/texts/instruments/english/commentaries/7\_7\_2019.pdf [https://perma.cc/MFM4-HSJX] (noting that ICC chambers have distinguished the policy requirement from systematicity (for the widespread or systematic attack), emphasized that “formal designs or pre-established plans” are not needed, and stated that the policy “can be implemented by action or inaction, and can be inferred from the circumstances”) (citing *Katanga*, ICC-01/04-01/07 at ¶¶ 1111–13 and *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/11, Decision on the Confirmation of Charges Against Laurent Gbagbo, ¶¶ 208, 216 (June 12, 2014)).

<sup>191</sup> *Katanga*, ICC-01/04-01/07, at ¶ 1117; see also Draft Articles, *supra* note 190, at ¶ 29 (“Jurisprudence from the International Criminal Court suggests that ‘organizational’ includes any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack.”).

<sup>192</sup> Cf. OTP Gender Persecution Policy, *supra* note 127, ¶ 61 (“There is no need to prove a policy or plan to commit gender-based crimes for a determination of gender persecution under the Statute. Instead, as for any other crimes against humanity under the Statute, the requirement is to prove a widespread or systematic attack against a civilian population pursuant to or in furtherance of a State or organisational policy.”); see also *Katanga*, ICC-01/04-01/07, at ¶ 1115 (interpreting the term “policy”).

- (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.<sup>193</sup>

Although femicide could fall within several of these categories, the most obvious fits are “murder,” “extermination,” or “persecution” on “gender” grounds. Although murder and extermination best emphasize the fatal nature of the violence at issue in femicides, the crime of persecution likely captures best the focus on gender motivation that animates the concepts and crimes of “femicide.”

### (1) *Murder*

The killing part of femicide is easily captured in the crimes against humanity category of “murder,” but, as proponents of the label “femicide” have long argued, the crime of murder ignores, at least on its face, the gendered nature of the killing. It is possible that prosecutors or the court could draw attention to gender when describing and contextualizing the murders, much as the Trial Chamber in *Akayesu* contextualized the rape of Tutsi women in Rwanda, by noting that they were almost always then killed, thus drawing the link between the sexual violence and the killing.<sup>194</sup> Moreover, this factual background may prove legally significant in helping to supply the chapeau elements if the targeted population is women or a particular gender. However, there is nothing in the definition of the crime of murder that obviously calls for an exploration of gendered motives.

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<sup>193</sup> Rome Statute, *supra* note 120, art. 7(1) (emphasis added).

<sup>194</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 733 (Sept. 2, 1998). In this case, it seemed that the observation was meant to reinforce the notion that the rape fit within the actus reus of genocide as “[c]ausing serious bodily or mental harm to members of the group” that was closely entwined with “killing,” both of which are listed as a possible actus reus of genocide. *Id.* ¶ 7.

## (2) *Extermination*

Extermination likewise may apply to gender-based killings of women in some contexts and goes further than murder in raising the issue of targeting group identity, though it, like murder, lacks any obvious focus on gender. The crux of extermination is “murder on a large scale, meaning that it involves large numbers of victims.”<sup>195</sup>

Although customary international law focuses on scale, commentators have noted that the ICC has introduced a somewhat genocide-like inquiry into the targeting of a group.<sup>196</sup> Nevertheless, as commentators Rodney Dixon and Christopher Hall explain, with extermination, “[t]he killings are directed at groups of individuals,” but, importantly, the “groups” are not restricted to those recognized by the Genocide Convention.<sup>197</sup> Dixon and Hall argue that the groups could include “a wide variety of other groups.”<sup>198</sup> Gender is one such possible group. The defendant need not personally have killed on a wide scale, as long as they are responsible for at least one killing that was part of large-scale killings.<sup>199</sup> One way of demonstrating that the crime was part of large-scale killings could be the gender motivation linking the killings to one another, or the policy of state impunity that fosters them.<sup>200</sup>

## (3) *Other Crimes Against Humanity*

A variety of other crimes against humanity may apply to gendered killings, depending on the factual contexts of the killings. If prosecutors focus on the acts surrounding the killings, the scope of possible charges expands, as does the possibility to situate the deadly violence in a continuum of other gendered violence, even without invocation of the label “gender persecution.”

Where accompanied with sexual violence, prosecutors could also charge perpetrators under the various sexual violence offenses in the Rome

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<sup>195</sup> Dixon & Hall, *supra* note 176, at 191.

<sup>196</sup> See METTRAUX, *supra* note 174, at 383–412.

<sup>197</sup> Dixon & Hall, *supra* note 176, at 191.

<sup>198</sup> *Id.*

<sup>199</sup> *See id.* (“[A]lthough extermination involves killings on a large scale, individuals may be held criminally responsible under article 7 for even one death, provided that it was part of large-scale killings.”).

<sup>200</sup> Human rights organizations frequently raise the alarm over large-scale gender-based killings in countries or regions. *See, e.g.*, Press Release, Inter-Am. Comm’n on Hum. Rts., IACHR Expresses Deep Concern over Alarming Prevalence of Gender-based Killings of Women in Brazil (Feb. 4, 2019), [https://www.oas.org/en/iachr/media\\_center/PReleases/2019/024.asp](https://www.oas.org/en/iachr/media_center/PReleases/2019/024.asp) [<https://perma.cc/QG96-2MFC>] (noting that 126 women had been killed in Brazil, just one month into 2019).

Statute.<sup>201</sup> Article 7(1)(g) reflects a recognition in ICL, particularly based on developments at the ad hoc tribunals, of rape and other forms of sexual violence as crimes against humanity. For femicides wherein the killing was accompanied by sexual violence,<sup>202</sup> this provision likewise offers another potential basis for prosecution. However, prosecuting the case as rape or sexual violence focuses attention on the sexual violence and conflates separate atrocities.<sup>203</sup> This subsuming of the gendered killing within a charge of sexual violence runs up against a powerful feminist critique that ICL has focused excessively on sexual violence to the exclusion of other forms of gendered violence.<sup>204</sup>

Many femicides could be prosecuted as torture<sup>205</sup> or other inhumane acts.<sup>206</sup> Some femicides also could be prosecuted as enforced disappearance.<sup>207</sup> In her fight for the recognition of the concept of feminicide, for example, Marcela Lagarde wanted the term to draw attention to not only the gendered killings of women and girls, but also their disappearances in the first place.<sup>208</sup> Even the charge of apartheid could apply in killings committed in certain social contexts.<sup>209</sup> The downside of these charges, as with gender

<sup>201</sup> See Rome Statute, *supra* note 120, art. 7(1)(g) (“Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”).

<sup>202</sup> In some countries, the fact that a killing was accompanied by sexual violence or sexual mutilation is a way of establishing a gender motivation for the crime or an aggravating circumstance of “femicide.” See Davidson, *supra* note 6, at 391, 392 n.64; see also U.N. Women, *supra* note 47, at 41.

<sup>203</sup> Cf. Copelon, *supra* note 114, at 246 (“The elision of genocide and rape in the focus on ‘genocidal rape’ as a means of emphasizing the heinousness of the rape of Muslim women in Bosnia is dangerous. Rape and genocide are separate atrocities.”).

<sup>204</sup> See discussion *supra* note 129.

<sup>205</sup> See Rome Statute, *supra* note 120, art. 7(2)(e) (“‘Torture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”); see also Adriana Carmona López et al., *Femicide in Latin America in the Movement for Women’s Human Rights*, in *TERRORIZING WOMEN: FEMINICIDE IN THE AMÉRICAS*, at 173–74 (Rosa-Linda Fregoso & Cynthia Bejarano eds., 2010) (arguing that feminicide should be recognized as the crime against humanity of torture).

<sup>206</sup> See *id.* art. 7(1)(k) (“Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”).

<sup>207</sup> See *id.* art. 7(1)(i); see also *id.* art. 7(2)(i) (“‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”).

<sup>208</sup> Lagarde, *supra* note 41, at xv-xvi; see also ATENCIO, *supra* note 41, at 3 (describing the evolution of femicide as a concept in Latin America).

<sup>209</sup> See A. Widney Brown & Laura Grenfell, *The International Crime of Gender-Based Persecution and the Taliban*, 4 MELB. J. INT’L L. 347, 374 (2003) (describing the debate over whether “gender apartheid” accurately described the Taliban’s treatment of women and asking, “Why is gender discrimination perceived as a lesser form of discrimination than race-based discrimination? Why is ‘gender apartheid’ not listed in the *Rome Statute* as a ‘crime against humanity’ in itself, alongside the crime of apartheid?”).

prosecution, is that, even though they may offer opportunities to explore the gendering of the violence through proving the contextual elements of the crimes and could lead to the condemnation of femicides as crimes against humanity, they deemphasize the killing (the “cide”). Femicide involves exclusively torture or inhumane acts of a fatal variety.

#### (4) *Gender Persecution*

Given its emphasis on discriminatory intent, the crime of gender persecution best captures the discriminatory essence of femicide and, by definition, provides an opportunity to situate the gendered killing in a broader spectrum of gendered violence. Unlike murder or extermination as crimes against humanity, however, the crime label of persecution does not inherently emphasize the deadly nature of the violence. Although Part IV makes the case for considering femicide and other gendered killings through the lens of gender persecution, this Part briefly assesses the doctrinal fit between femicide and gender persecution.

The Rome Statute spreads the definition of gender persecution throughout a few different clauses. Article 7(1)(h) provides that “[p]ersecution 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,” is a crime against humanity.<sup>210</sup> In turn, Article 7(2)(g) defines “persecution” as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>211</sup>

Article 7(3) then defines “gender,” the only ground for persecution it defines. Article 7(3) provides: “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.”<sup>212</sup> As discussed below in Part IV, the statute’s ambiguous definition of gender has provoked debate as to whether it includes crimes motivated by anti-LGBTQ+ bias.<sup>213</sup>

The ICC Elements of Crimes, a companion document to the Rome Statute, divides persecution into the following elements:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.

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<sup>210</sup> Rome Statute, *supra* note 120, art. 7(1)(h) (emphasis added). As with all other crimes against humanity listed, persecution is only a crime against humanity if it meets the chapeau elements discussed above.

<sup>211</sup> *Id.*, art. 7(2)(g).

<sup>212</sup> *Id.*, art. 7(3).

<sup>213</sup> See discussion *infra* notes 226–236.

2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>214</sup>

Turning initially to the actus reus requirement, the first part of the actus reus of persecution under the Rome Statute is the “severe deprivation of fundamental rights contrary to international law.”<sup>215</sup> The discriminatory killing at issue in femicide cases clearly fits the bill, since violence against women and gender violence (beyond violence against women) are widely regarded to violate people’s fundamental rights under international human rights law.<sup>216</sup> The requirement that the “conduct [be] committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court”<sup>217</sup> likewise is readily satisfied with femicide. The “in connection with” language was intended to restrict the ICC’s definition of persecution to only grave discriminatory acts, in light of the dropping of the requirement that crimes against humanity be connected to an armed conflict.<sup>218</sup> Moreover, murder, regardless of the gender of the victim, is listed as a separate crime against humanity “in [the crimes against humanity] paragraph.”<sup>219</sup>

Then, there is the targeting of a group or collectivity. The prosecutor must prove that “[t]he perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity

<sup>214</sup> ICC ELEMENTS OF CRIMES, *supra* note 175, art. 7(1)(h).

<sup>215</sup> Rome Statute, *supra* note 120, art. 7(2)(g). To achieve the requisite mens rea, the severe deprivation also must be “intentional.” *Id.*

<sup>216</sup> See discussion *supra* Part II.C. The European Court of Human Rights likewise has recognized VAW as a violation of women’s human rights and a form of discrimination. See *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. ¶¶ 186–91 (2009); *Volodina v. Russia*, App. No. 41261/17, Eur. Ct. H.R. ¶¶ 132–33 (2019), [https://perma.cc/JFM9-GPWF](https://hudoc.echr.coe.int/eng/?i=001-194321)].

<sup>217</sup> Rome Statute, *supra* note 120, art. 7(1)(h).

<sup>218</sup> See Sean D. Murphy (Special Rapporteur), *Fourth Rep. on Crimes Against Humanity*, ¶ 52, 99, U.N. Doc. A/CN.4/725 (Feb. 18, 2019).

<sup>219</sup> Rome Statute, *supra* note 120, art. 7(1)(a).



as such.”<sup>220</sup> Relying on the ICC Elements of Crimes, which lists the targeting of the group and the grounds for targeting the group separately, Australian law professor Rosemary Grey has argued that the targeting of the group is treated as distinct from the “grounds.”<sup>221</sup>

Although it is too early to see whether the Court accepts this reading of the statute separating the group from the grounds, the ICC’s ongoing gender persecution cases offer some examples. In the ICC’s *Al Rahman* case, the prosecution charged Al Rahman, a senior janjaweed leader in Western Darfur, Sudan, with gender persecution. The charging documents identify the group as “Fur males in [Mukjar and Delieg] perceived as belonging to, or being associated with, or supporting the rebel armed groups.”<sup>222</sup> The charged *ground* for persecution is perceptions based on the victims’ ethnicity and gender: “the victims’ Fur ethnicity, combined with the socially-constructed gender role presuming males to be fighters, underpinned the perpetrators’ perception of them as rebels or rebel sympathisers.”<sup>223</sup> According to the *Al Hassan* Pre-Trial Chamber, however, the “group should still be identifiable on the basis of at least one of the characteristics mentioned in article 7(1)(h) of the Statute.”<sup>224</sup> For femicide, in many cases, this may be a distinction

<sup>220</sup> ICC ELEMENTS OF CRIMES, *supra* note 175, at 7.

<sup>221</sup> Rosemary Grey, *Gender-based Persecution Against Men: The ICC’s Abd-al-Rahman Case*, OPINIO JURIS (May 30, 2021), <http://opiniojuris.org/2021/05/30/gender-based-persecution-against-men-the-iccs-abd-al-rahman-case/> [https://perma.cc/8WV6-QKZX] [hereinafter Grey, *Gender-based Persecution Against Men*] (“In line with the ICC Elements of Crimes, these persecution charges distinguish between the group that was targeted, and the *ground(s)* on which they were persecuted.”); Rosemary Grey et al., *Gender-Based Persecution as a Crime Against Humanity: The Road Ahead*, 17 J. INT’L CRIM. JUST. 957, 969–70 (2019) [hereinafter Grey et al., *Gender-Based Persecution as a Crime Against Humanity*] (noting inconsistent practice at the ICC). Grey’s interpretation permits broader liability. She offers an example drawn from the ICC Prosecutor’s preliminary examination in Afghanistan—the targeted group could be supporters for girls’ education in Afghanistan (and include men), and the grounds for targeting could be the gendered belief that only boys should be educated. *Id.* at 970. It is not clear that the ICC judges agree with this interpretation.

<sup>222</sup> Grey, *Gender-Based Persecution Against Men*, *supra* note 221 (quoting Prosecutor v. Abd-Al-Rahman, ICC-02/05-01/20, Public Redacted Version of “Second Corrected Version of ‘Document Containing the Charges’”, ¶¶ 93, 136 (Apr. 22, 2021)).

<sup>223</sup> Prosecutor v. Abd-Al-Rahman, ICC-02/05-01/20, Public Redacted Version of “Second Corrected Version of ‘Document Containing the Charges’”, ¶ 93 (Apr. 22, 2021) (“At the material times, ABD-AL-RAHMAN and the other perpetrators targeted Fur males in Mukjar perceived as belonging to, or being associated with, or supporting the rebel armed groups. They targeted them on political, ethnic and gender grounds. The victims’ Fur ethnicity, combined with the socially-constructed gender role presuming males to be fighters, underpinned the perpetrators’ perception of them as rebels or rebel sympathisers. ABD-AL-RAHMAN and the other perpetrators severely deprived, contrary to international law, these persons of fundamental rights, including the rights to life, and not to be subjected to torture or cruel, inhumane or degrading treatment.”).

<sup>224</sup> Prosecutor v. Al Hassan, ICC-01/12-01/18, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud [Correction to the Decision on the Confirmation of the Charges Against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud], ¶ 665 (Nov. 13, 2019) (“Le groupe ou la collectivité doit être identifiable au moyen de l’une des caractéristiques mentionnées à l’article 7-1-h du Statut. L’appartenance de la victime à un groupe doit être

without a major difference. In many instances, the targeted group—such as women involved in certain occupations or women of a certain ethnic group or trans women living in a certain area—will largely overlap with the grounds for the targeting, but this may not always be the case.

Next, there is persecutory intent and discriminatory grounds. The perpetrator must *intentionally* deprive the person of a fundamental right and do so *by reason of the identity of the group or collectivity*. According to the ICC Elements of Crimes, the Prosecutor must also prove that:

Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.

To prove gender persecution, the ICC Prosecutor, much like national prosecutors charging femicide under broader femicide statutes, would need to prove the perpetrator targeted the group on gender grounds. The ICC Prosecutor's new Gender Persecution Policy offers guidelines on proving the requisite gendered intent. The new policy flags that “[g]ender persecution may be evidenced through persecutory acts committed exclusively or disproportionately against a targeted group or collectivity, or against members of that group. In other cases, gender persecution may be evidenced by the targeting of members of a group or collectivity where no indication of such disproportionality exists” and that, often, there will be no direct order.<sup>225</sup>

The scope of the crime of gender persecution hinges on the Court's interpretation of the Rome Statute's definition of gender.<sup>226</sup> As noted above, unlike other grounds for persecution, the Rome Statute defined gender (and specifically for the purposes of the crime of gender persecution). Again, Article 7(3) states: “For the purpose of this Statute, it is understood that the

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définie par l'auteur sur la base d'un des motifs énoncés à l'article 7-1-h du Statut. Dans le présent contexte, il s'agit de motifs religieux et sexistes.” / “The group should still be identifiable on the basis of at least one of the characteristics mentioned in article 7(1)(h) of the Statute. The membership of the victim in a group must be defined by the *perpetrator* on the basis of one of the grounds set out in article 7(1)(h) of the Statute. In the present context, these are religious and gender-based grounds.”).

<sup>225</sup> OTP Gender Persecution Policy, *supra* note 127, ¶ 88.

<sup>226</sup> Meanwhile, outside of the Rome regime, the International Law Commission (ILC) has drafted a crimes against humanity convention. The ILC's draft Convention on Crimes Against Humanity repeated the Rome Statute's definition of gender. However, in the face of strong objections from states, U.N. entities, and NGOs, based on its failure to keep up with the development of human rights law and its potential to be read to exclude persecution based on gender identity and sexual orientation, the Special Rapporteur recommended that the arguably retrograde definition of gender be deleted from the draft convention. See Murphy (Special Rapporteur), *supra* note 218, ¶¶ 101–103. I say “arguably retrograde” because some, including the ICC Prosecutor, argue that the “in the context of society” language gets them to the progressive understanding of gender as a social construction. See discussion *infra* notes 235–242. The Rome Statute and its companion document, the ICC Elements of Crimes, define international crimes with respect to the ICC's jurisdiction, but do not limit the development of international law beyond the ICC. See, e.g., Rome Statute, *supra* note 120, art. 7(1)(h).

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.”<sup>227</sup>

Even the most conservative of interpretations of this provision, which would downplay or ignore the “in the context of society” language and focus on the male/female language and the phrase “‘gender’ does not indicate any meaning different from the above,”<sup>228</sup> likely would encompass “the killing of a (cisgender) woman because she is a woman” or a (cisgender) man because he is a man.

The bigger question is whether the provision protects others. Does it include persecution of a lesbian based on sexual orientation or a trans man based on nonconforming gender identity, which would be included in at least some femicide statutes, or persecution based on other forms of anti-LGBTQ+ discrimination, including against trans women or gay men?

There is a strong argument that it does. Some, like Professor Grey, have argued that the term “gender” in the Rome Statute very self-evidently means gender as a social construct.<sup>229</sup> Although I, like some other commentators, am less dismissive of concerns that the provision plausibly could be read narrowly,<sup>230</sup> I agree that the language of the statute, particularly read in the

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<sup>227</sup> Rome Statute, *supra* note 120, art. 7(3).

<sup>228</sup> Grey and her co-authors—in my view, correctly—argue that this phrase is superfluous and does nothing to change the definition set out in the first sentence. Grey et al., *Gender-Based Persecution as a Crime Against Humanity*, *supra* note 221, at 965–66.

<sup>229</sup> *See id.* at 966.

<sup>230</sup> Grey and her co-authors argue that those who think that the provision could be read to conflate gender and sex are just wrong or “misinterpreting” the statute. *See* Grey et al., *Gender-Based Persecution as a Crime Against Humanity*, *supra* note 221, at 961 (“[I]t is critical to address and head off any misinterpretation of the definition, as seems to have arisen in some comments on the draft articles on crimes against humanity. The fact that the Rome Statute’s definition is ‘skeletal’ is not a basis for interpreting it as equating gender with biological sex (male or female), ignoring the hard-fought recognition of gender as a social construct achieved by the majority of states and the Women’s Caucus for Gender Justice at the 1998 Rome Diplomatic Conference. To the contrary, because of the agreement reached at that conference, the Rome Statute’s definition not only enables but requires recognition of the socially constructed nature of gender.”). In my view, the fact that the hundreds of NGOs, dozens of special rapporteurs, and numerous U.N. agencies wrote to the ILC to oppose the inclusion of the Rome Statute’s definition of gender in the draft Convention on Crimes Against Humanity out of concern that the definition could be read to restrict gender to biological sex and to exclude anti-LGBTQI+ discrimination and arguing that the definition had failed to keep up with developments in international human rights law, suggests that this “social construct” interpretation of the Rome Statute’s definition of gender is somewhat less of a foregone conclusion than Grey and her co-authors suggest. *See* Lisa Davis & Danny Bradley, *Victory for Women and LGBTQI+ Rights Under International Criminal Law: Gender in the Draft Crimes Against Humanity Treaty*, in *GENDER AND INTERNATIONAL CRIMINAL LAW 187–206* (Rosenthal et al. eds., 2022) (praising the ILC for dropping the Rome Statute’s definition of gender in its draft Convention on Crimes Against Humanity and noting that the Rome Statute’s definition “raised concerns” due to uncertainty over who would be protected under it).

light of international human rights law,<sup>231</sup> supports the social construct conception of gender.<sup>232</sup> As Grey argues, the “in the context of society” language makes no sense other than as a way of assessing whether “males” and “females” are comporting themselves consistently with prevailing social norms.<sup>233</sup> Moreover, international human rights law, which guides interpretation of the Rome Statute, overwhelmingly has adopted the interpretation of gender as a social construct, supporting this interpretation.<sup>234</sup>

The Prosecutor’s recent Gender Persecution Policy makes very clear that the OTP will be advancing a progressive reading of the statute that views gender as a social construct and gender persecution to include perse-

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<sup>231</sup> The Rome Statute directs judges to consult international law in interpreting the statute and to interpret the statute consistently with international human rights law. Rome Statute, *supra* note 120, art. 21 (“The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict . . .”); *id.* art. 21(3) (“The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”).

<sup>232</sup> See Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 Nw. J. HUM. RTS. 1, 10 (2021) (arguing that the ICC should adopt the ILC’s conception of gender as a social construct, “since it is obligated by the Rome Statute to interpret legal terms in light of evolving international law”); *cf.* Caroline Davidson, *How to Read International Criminal Law*, 91 ST. JOHN’S L. REV. 37, 89–90 (2017) (reconciling the Rome Statute’s requirement of strict construction with the broader interpretation of gender as a social construct by stating that “[w]here states agreed to a compromise definition in the Rome Statute that was intentionally ambiguous, as in the case of gender, they were on notice that the court might land on an interpretation that differed from their own by consulting other sources of law and using standard tools of interpretation such as those set out in the Vienna Convention”).

<sup>233</sup> Grey et al., *Gender-Based Persecution as a Crime Against Humanity*, *supra* note 221, at 963.

<sup>234</sup> See *id.* at 966–68. I am somewhat less convinced of their argument relating to drafting history, since Grey and her co-authors, while citing repeatedly to Valerie Oosterveld, then a Canadian negotiator at Rome, as a source on the drafting history of the gender persecution provision, do not engage with Oosterveld’s argument that the definition of gender was an instance of “constructive ambiguity,” meaning the drafters left the provision intentionally ambiguous and left it to judges to interpret the term. See Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 58, 81–82 (2005) (“[B]y resorting to the use of ‘constructive ambiguity,’ the drafters did leave open opportunities for a positive and precedent-setting approach—an opportunity that should be seized upon by lawyers and the ICC itself.”); see also LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 160 (2002) (“The beauty, and the difficulty, of the compromise language employed is that while it was crafted to appease two irreconcilable points of view, both sides may assert that the definition as adopted reflects their understanding of the term[.]”). Thus, whereas Grey and her co-authors argue that the legislative history shows the progressive camp won, other commentators, in my view more compellingly, have argued that the legislative history shows that states punted the issue. To be fair, Grey and co-authors do not rely exclusively on Oosterveld and concede that commentators have reached different conclusions.

cution based on sexual orientation and gender identity.<sup>235</sup> In the Section of the Policy entitled “Use of Key Terms,” the Gender Persecution Policy explains the term “context of society,” saying:

Under article 7(3) of the Statute, “context of society” refers to the group of social constructs and criteria used to define gender. These include, for example, sexual orientation, gender identity and gender expression, e.g., “woman,” “man,” “girl” and “boy.” Just as social constructs and criteria are used to define the understanding of race, ethnicity or culture, so are social constructs and criteria used to define the understanding of gender.<sup>236</sup>

For the term “gender,” the Gender Persecution Policy explains:

Under article 7(3) of the Rome Statute (“Statute”), “gender” is understood as the two sexes, male and female, within the context of society. Gender refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviors, activities and attributes. As a social construct, gender varies within societies and from society to society and can change over time. This understanding of gender is in accordance with article 21 of the Statute.<sup>237</sup>

The Policy defines “gender persecution” as “the crime against humanity of persecution on the grounds of gender, under article 7(1)(h) of the Statute,” and it explains that gender persecution is “committed against persons because of sex characteristics and/or because of the social constructs and criteria used to define gender.”<sup>238</sup> The Policy then offers an example of “using gender persecution to enforce social constructs” from a report of the Islamic State in Iraq and the Levant, explaining that “the ideology of the Islamic State in Iraq and the Levant has been described as ‘grounded on a systematic discrimination against persons on the basis of gender and gender expression, which has included torturing and killing those deemed not to be in conformity with their understanding of gender roles.’”<sup>239</sup>

Although it is early days, as the cases have not yet reached a judgment, there are currently three cases before the ICC where the Pre-Trial Chamber has confirmed gender persecution charges.<sup>240</sup> Thus far, the judges seem to be

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<sup>235</sup> See OTP Gender Persecution Policy, *supra* note 127, at 3.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* ¶ 25 (citing Agnes Callamard (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings*, ¶ 47, U.N. Doc. A/HRC/35/23 (June 6, 2017)).

<sup>240</sup> Adrienne Ringin, *Gender Persecution Again a Focus for ICC in the Said Trial*, OPINIO JURIS (Sept. 29, 2022), <https://opiniojuris.org/2022/09/29/gender-persecution-again-a-focus-for-icc-in-the-said-trial/> [<https://perma.cc/QP2E-YT46>].

embracing the Prosecutor's interpretation of gender as a social construct.<sup>241</sup> Without using the term "social construct," the *Al Hassan* Pre-Trial Chamber talks about persecution being gendered when men and women are viewed or treated differently as a function of their gender.<sup>242</sup>

In sum, there are a variety of pathways for prosecuting femicides and other gender-based killings through existing international crimes, including crimes against humanity or war crimes. The next Part advocates framing femicide and other gendered killings as gender persecution.

#### IV. FEMICIDE AS GENDER PERSECUTION

As the OTP turns its attention to gender persecution, it should look seriously at the issue of femicide. This Part first explores whether to treat femicide as a new crime or under an existing international crime. It argues that, while there are strong arguments in favor of creating a new international crime of femicide, feminicide, or feminogenocide, there are significant countervailing arguments in favor of investigating and prosecuting femicide under existing international crimes. Those arguments include greater political feasibility, communicating gravity through existing international criminal categories, situating gender violence against women in a broader conception of gender violence (that avoids portraying women as perpetual victims), and greater gender inclusivity. Addressing femicide and other gendered killings, at least when it occurs outside of the context of war, may have the benefit of pushing the Court to think through and clarify the legal requirements for crimes against humanity divorced from armed conflict. Finally, this Part argues that femicide is an area where the ICC can exercise "positive complementarity" and help states to do better on the issue of gendered violence.

##### A. *The Case for Tackling Femicide through ICL*

As anti-femicide activists in Latin America have long argued, gendered killing is a serious human rights violation that warrants the attention of the international community, regardless of whether the killing is directed at a

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<sup>241</sup> See *supra* text accompanying note 235–39.

<sup>242</sup> See Prosecutor v. Al Hassan, ICC-01/12-01/18, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud [Correction to the Decision on the Confirmation of the Charges Against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud], ¶ 665 (Nov. 13, 2019) ("La Chambre retient en outre que la persécution peut-être sexiste << . . . lorsqu'un homme et une femme, membre d'un même groupe, sont visés de différentes manières ou par différentes formes de violence en fonction de leur genre (par exemple en tuant les hommes et violant les femmes) >>." / "The Chamber further finds that persecution may be gender-based ' . . . when a man and a woman, members of the same group, are targeted in different ways or by different forms of violence due to their gender (for example killing men and raping women)' .").

particular ethnicity, religion, or racial group or whether it occurs in the context of armed conflict. The inclusion of gender persecution among the forms of persecution recognized in the Rome Statute, as well as the recognition of violence against women as a human rights violation, suggest that femicide and other gendered killings belong on the radar of international justice actors.

Speaking of the gendered killing as an international crime, particularly at the ICC, will help anti-femicide activists on the ground by legitimizing their efforts and communicating the gravity of the crimes. As Rita Segato has argued forcefully, part of the objective of recognizing femicide (or her preferred term for the international crime, femi-geno-cide) is didactic—to gain recognition of these crimes against women as worthy of attention.<sup>243</sup> ICL has already provided such recognition, for example, in crimes involving sexual violence. The public (deemed “important” and law-worthy) and private (cast as “unimportant” and not law-worthy) divide is, of course, a long-standing feminist concern.<sup>244</sup> Segato also argues that addressing femicide in international criminal law will have practical benefits, including upping the bar for investigations and expert reports.<sup>245</sup>

Beyond conceptualizing and discussing gendered killings in ICL, addressing femicide through an ICC investigation when states are unwilling or unable to address it themselves<sup>246</sup> has the potential to strengthen the fight against femicide and other gendered violence. If the ICC initiates an investigation into the situation of femicide in a particular country, that country is on notice that it is under scrutiny. Notably, the scrutiny of the ICC is not the scrutiny of a human rights monitoring body that is conscribed to anodyne pronouncements about being “encouraged by x” and “disappointed by y.” Being watched by the ICC is being watched by an institution with the power to prosecute individuals, including state officials. As Sally Engle Merry has observed, “[a] central feature of human rights advocacy is generating international pressure on one’s own government.”<sup>247</sup>

Somewhat less menacingly, through the model of positive or “proactive” complementarity, the ICC could also assist in capacity-building.<sup>248</sup> Un-

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<sup>243</sup> See Segato, *supra* note 45, at 18.

<sup>244</sup> See Engle, *Feminism and Its (Dis)contents*, *supra* note 131, at 779.

<sup>245</sup> Segato, *supra* note 45, at 15 (arguing that treating femicide as an international crime will lead to specific laws compelling “detailed protocols for appropriate and efficient police and forensic expert reports for the investigation of the diversity of crimes against women”) (orig. “protocolos detallados para laudos periciales policiales y médico-legales adecuados y eficientes para la investigación de la diversidad de los crímenes contra las mujeres”).

<sup>246</sup> This state unwillingness or inability is required for the ICC to be able to take jurisdiction, under the principle of “complementarity.”

<sup>247</sup> SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 165 (2006).

<sup>248</sup> See generally William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L. J. 53, 55–56, 86 (2008) (advocating “proactive complementarity,”

like many human rights practitioners, ICC attorneys have experience in conducting criminal investigations and prosecutions, often domestically and on the international stage. The OTP even flagged the potential for the ICC to support domestic prosecutions for SGBV in its 2015 Policy Paper and reiterated it specifically with respect to gender persecution in its recent policy statement on the crime.<sup>249</sup>

A downside, of course, is the opposite side of the same coin. States may be wary of working with the ICC on issues related to femicide when their officials risk prosecution. Although the ICC's positive complementarity efforts could give states much needed boosts in their efforts to combat femicide and ICC scrutiny is likely to hold states' feet to the fire, these efforts also come with the risk of state officials refusing to cooperate with the ICC or human rights organizations for fear that they be investigated and prosecuted. This risk is relatively low for any given official, particularly given the ICC's high mens rea requirement.<sup>250</sup>

Moreover, cooperation with the ICC may well indicate a lack of a state policy, which would deprive the prosecution of one of the elements of a crime against humanity, at least for state officials of the current regime. Navigating this dynamic requires a nuanced understanding of realities on the ground. Thus, it is essential for the ICC Prosecutor and investigators to work closely with local civil society groups to gauge the merits of initiating investigations and prosecutions in any given location.<sup>251</sup>

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whereby the Prosecutor seeks to encourage states to engage in their own prosecution and which could include efforts at capacity-building); William W. Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 19 CRIM. L. F. 59, 62 (2008) ("Applied in practice, a policy of positive complementarity means that the OTP would actively encourage investigation and prosecution of international crimes within the Court's jurisdiction by States where there is reason to believe that such States may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offers a resource-effective means of ending impunity.") (emphasis in original).

<sup>249</sup> See OTP Policy Paper, *supra* note 124, ¶ 13 ("The ICC is complementary to national efforts. Given jurisdictional and admissibility considerations, and its policy to prosecute those most responsible, the Office will be able to prosecute a limited number of persons. In an effort to close the impunity gap, it is therefore crucial that States comply with their primary responsibility to investigate and prosecute serious international crimes effectively, including sexual and gender-based crimes. The Office will support genuine national efforts, where possible."); OTP Gender Persecution Policy, *supra* note 127, ¶¶ 31–33.

<sup>250</sup> In general, the Rome Statute requires intent and knowledge. See Rome Statute, *supra* note 120, art. 30 ("Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."). Under the Rome Statute, the elements are committed with the requisite "intent" if the "person means to engage in the conduct" at issue, or if the "person means to cause [the] consequence [at issue] or is aware that it will occur in the ordinary course of events." *Id.* art. 30(2). The Rome Statute defines "knowledge" as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events." *Id.* art. 30(3).

<sup>251</sup> Perhaps for this reason, the Open Society Initiative in its report on crimes against humanity in Mexico, for example, concluded that crimes against humanity have been committed in Mexico but did not endorse the ICC initiating an investigation or prosecu-



As always with the ICC, there is also a risk that states could threaten to withdraw from the Rome regime if they do not like the approach that the Prosecutor or Court is taking towards femicide. Just as Turkey withdrew from the Council of Europe Convention on preventing and combating violence against women and domestic violence, known as the “Istanbul Convention,”<sup>252</sup> due to a belief that it was being used to undermine “family values” and “normalise[ ] homosexuality,”<sup>253</sup> states may withdraw or threaten to withdraw from the Rome Statute and the ICC if they disagree with the direction the Court takes on gender violence.<sup>254</sup> Although many issues related to gender elicit strong disagreement between states, this risk of withdrawal or threatened withdrawal is by no means unique to prosecutions involving gender violence.

Although the ICC is not a replacement for the efforts of international and regional human rights organizations already working to combat femicide in countries where the problem is particularly acute, its work is a valuable complement to those efforts. As noted above, ICL has more teeth than international human rights law, and the prospect of criminal prosecutions, particularly of state officials, may be a more powerful motivator for states to take action domestically than is an admonition of some human rights body. The ICC is also well-resourced in contrast to many domestic criminal justice systems and even human rights organizations<sup>255</sup> and thus is in a position to

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tion. See ERIC A. WITTE, OPEN SOCIETY JUSTICE INITIATIVE, UNDENIABLE ATROCITIES: CONFRONTING CRIMES AGAINST HUMANITY IN MEXICO 10 (2016) (“Some Mexican individuals and organizations—including some of the partners in this report—have already filed communications with the ICC Office of the Prosecutor (OTP), urging it to pursue an investigation in the country. ICC intervention in Mexico is not, however, this report’s purpose; instead, it is to ensure that these atrocity crimes are prosecuted to the full extent of the law in Mexican courts, regardless of the perpetrators.”).

<sup>252</sup> Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, May 11, 2011, C.E.T.S. No. 210.

<sup>253</sup> *Turkey’s Withdrawal from the Istanbul Convention Rallies the Fight for Women’s Rights Across the World*, AMNESTY INT’L (July 1, 2021), <https://www.amnesty.org/en/latest/news/2021/07/turkeys-withdrawal-from-the-istanbul-convention-rallies-the-fight-for-womens-rights-across-the-world-2/> [<https://perma.cc/7LSB-EBUA>].

<sup>254</sup> See Frank Kuwonu, *ICC: Beyond the Threats of Withdrawal*, U.N. (2017), <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal> [<https://perma.cc/K9UJ-KHPP>]; Associated Press in Addis Ababa, *African Leaders Plan Mass Withdrawal from International Criminal Court*, GUARDIAN (Jan. 13, 2017), <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court> [<https://perma.cc/K8QW-ZXPY>].

<sup>255</sup> Both the Inter-American Human Rights Commission and the Inter-American Court of Human Rights operate on a shoestring budget. See *Coalition Letter to OAS on Budget of Inter American System of Human Rights*, CTR. FOR CONST. RTS. (June 20, 2017), <https://ccrjustice.org/coalition-letter-oas-budget-inter-american-system-human-rights> [<https://perma.cc/M5Q9-FJXZ>] (“Last year, the Inter-American Commission on Human Rights (IACHR) suffered the worst financial crisis in its history and despite the willingness of different OAS member states to ensure it has stable and independent funding, a budget increase was not approved at the OAS General Assembly special session on 31 October 2016, leading to the adoption of an emergency clause to ensure the financing of its work.”). In 2019, IACHR’s total budget was \$6,460,402.11. *What Is the I/A Court HR?*, INTER-AM. CT. OF HUM. RTS., [https://www.corteidh.or.cr/que\\_es\\_la\\_corte.cfm?lang](https://www.corteidh.or.cr/que_es_la_corte.cfm?lang)

offer more support. Finally, unlike human rights organizations and even human rights courts, the ICC is a criminal court. It is staffed by investigators and lawyers with experience not only in ICL, but also in domestic criminal justice systems from all over the world. The ICC may therefore be able to help (or push) domestic jurisdictions to act in ways not possible through other mechanisms. As a criminal court, it is also uniquely positioned to model the relevance of international human rights norms to criminal law and to help convey the importance and legitimacy to international human rights norms.<sup>256</sup>

Even accepting that the phenomenon of femicide (gendered killing of women) and feminicide (gendered killing of women in a context of state impunity) are worthy of the ICC's attention, there remains the question of whether this attention is best given through a new international crime of femicide, feminicide, or femi-geno-cide, as Segato argues, or through an existing international crime. This question ties into a longstanding feminist debate between the merits of drawing attention to crimes against women as sufficient on their own terms to warrant international attention versus anchoring crimes against women to already established international crimes, where a degree of legitimacy already exists.<sup>257</sup> This Part canvasses the arguments for a stand-alone crime and argues that addressing femicide and other

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=EN [<https://perma.cc/WJL3-9D9H>]. In contrast, the ICC's total 2019 budget was 148 million euros or 163 million U.S. dollars. ICC Res. ICC-ASP/17/Res.4, Resolution of the Assembly of States Parties on the Proposed Programme Budget for 2019, the Working Capital Fund for 2019, the Scale of Assessment for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2019 and the Contingency Fund (Dec. 12, 2018), [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP17/RES-4-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP17/RES-4-ENG.pdf) [<https://perma.cc/B384-SEQC>].

<sup>256</sup> The ICC in *Al Hassan*, for example, cited CEDAW for the proposition that violence against women is defined as violence “against a woman because she is a woman” or that affects women in a disproportionate manner. See *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud [Correction to the Decision on the Confirmation of the Charges Against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud], ¶ 667 (Nov. 13, 2019) (“La Chambre note également la définition des violences faites envers les femmes du Comité pour l’élimination de la discrimination l’égard des femmes. Celui-ci définit les violences faites envers les femmes par les violences dirigées contre une femme parce qu’elle est une femme ou qui affectent les femmes de façon disproportionnée.” / “The Chamber also notes the definition of violence against women of the Committee for the Elimination of the Discrimination Against Women. The Committee defines violence against women as violence directed against a woman because she is a woman or violence which disproportionately affects women.”).

<sup>257</sup> See, e.g., Copelon, *supra* note 114, at 248, 257–66 (“[T]he concept of ‘crimes against humanity’ must be interpreted to encompass mass rape apart from persecution and be broadened to encompass persecution based on gender.”). For a more critical view, see Halley, *supra* note 131, at 66–67 (assessing the participation of feminists in drafting the Rome Statute, and contending that they “resolved that rape is sexual violence and should be criminalized under two rubrics: rape and the almost redundant ‘sexual violence’” because “they wanted rape . . . to appear in the IHL hierarchy at the highest level of generality possible” and “had begun to see that this goal could not be satisfied by treating rape as a special harm subsidiary to the false universals of masculinist humanitarianism”).

gendered killings through existing international crimes, in particular gender persecution, is the best path forward.

### B. *Calls for New Crime of Femicide*

Rita Segato argues that having a new stand-alone international crime of femi-geno-cide, akin to genocide, will bolster domestic anti-femicide efforts and help to cement the notion that femicide is not just a private matter unworthy of state attention.<sup>258</sup> Since international human rights organizations have recognized femicide and feminicide as gross human rights violations and international courts, like the ICC, have as part of their mission prosecuting and punishing perpetrators of criminally gross human rights violations, it seems quite plausible that femicide or feminicide be the subject of ICL.

Segato, however, acknowledges some challenges in making femi-geno-cide a new stand-alone international crime. First, she notes that there is the issue of how to define it in a way that is “systematic” and “generic,” which here may be better translated as generalizable.<sup>259</sup> She argues that for feminicide to be recognized as an international crime, it is necessary to find a way to understand and communicate that even if it is a sexual attack, the intent is one of extermination of the group and that, whatever the individual motives of the perpetrator, the crime is an impersonal one—aimed at the genus.<sup>260</sup>

Even assuming that State Parties are willing to amend the Rome Statute to create a new genocide-like crime—a rather big assumption—Segato herself notes that the chief problem is the difficulty of showing the intent to

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<sup>258</sup> Segato, *supra* note 45, at 17.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* (“La primera dimensión responde al imperativo de sistematicidad y carácter genérico que la tipificación de crímenes en el Derecho Penal Internacional exige para poder acoger el concepto de ‘feminicidio’ como ‘conjunto de violencias dirigidas específicamente a la eliminación de las mujeres por su condición de mujeres’. Esto sólo será posible, como he argumentado anteriormente . . . , si somos capaces de: 1. Acceder cognitivamente al hecho de que, si bien el medio de la agresión es sexual, su finalidad no es de orden sexual sino de exterminio o eliminación dirigida a una categoría o *genus* de personas; y 2. Fundamentar su “impersonalidad”, es decir, si conseguimos caracterizar su dimensión subjetiva en términos de una intención genérica y no personalizable, tanto con relación a los móviles del agresor, como a la relación entre éste y su víctima. Fundamentar su “impersonalidad” implica desarrollar una estrategia retórica que convenga a jueces, fiscales y público de que los feminicidios son crímenes contra un *genus*.” / “The first dimension responds to the imperative of systematicity and the generic nature that the definition of crimes under International Criminal Law requires in order to accept the concept of ‘feminicide’ as ‘a set of violent acts aimed specifically at the eliminating women because of their status as women.’ This will only be possible, as I have argued above. . . , if we are capable of: 1. Cognitively accepting the fact that, even if the form of the aggression is sexual, its purpose is not of a sexual order but rather the extermination or elimination of category of people; and 2. Justify its “impersonality.” that is, if we manage to characterize its subjective dimension in terms of a generic and non-personalizable intention, both in relation to the aggressor’s motives as well as the aggressor’s relationship with his victim. Justifying its “impersonality” implies developing a rhetorical strategy that convinces judges, prosecutors, and the public that feminicides are crimes against a category of people.”)

destroy the group or, as she calls it, the genus.<sup>261</sup> The Appeals Chamber's reasoning in the ICTY case, *Prosecutor v. Krstić*, wherein they found that the intent to kill a part of a part (the Bosnian Muslim population of Srebrenica) sufficed for genocidal intent, may provide an analytical path forward.<sup>262</sup> However, even in places where femicide is rampant, it may be difficult to show that a defendant intended to destroy a substantial part of all women.<sup>263</sup>

The second issue is reaching consensus on precisely what version or subset of femicides are appropriate for international criminalization. Should the new crime definition attempt to capture all femicides, including intimate femicides; feminicides (against state officials); or just a subset of femicides? Segato argues that there is a public and generalizable aspect to all femicides, including intimate femicides, but that on the international front, due to the public's failure to comprehend the distinction between femicide and feminicide even in places where the term is in common use, it may make sense to focus on criminalizing certain femicides occurring in "public and war-like scenes."<sup>264</sup> She argues:

It is precisely the understanding of gender violence typical of these other public and war-like scenes that compels the transformation of the socially shared imagination and orients us toward an understanding of gender as a dimension that is neither private nor deprived of human existence, but rather one that is public, political, and broadly impacts the history of communities.<sup>265</sup>

She notes that it would be hard to convince people that these more quotidian femicides have the "impact and magnitude of a genocide,"<sup>266</sup> but gaining

<sup>261</sup> See HEFTI, *supra* note 13, at 80 (citing Ana Messuti, *La Dimension Jurídica Internacional del Femicidio* [*The International Legal Dimension of Femicide*], in FEMINICIDIO, EL ASESINATO DE MUJERES POR SER MUJERES [FEMICIDE, THE MURDER OF WOMEN FOR BEING WOMEN] 48–49, 56 (Graciela Atencio ed., 2015) for the proposition that women and girls are too big a group to be a protected group).

<sup>262</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Judgment, ¶¶ 19–23 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004), <https://www.icty.org/x/cases/krstic/acjug/en/> [<https://perma.cc/XN3V-KC9H>]; see also *id.* ¶¶ 43–44 (Shahabudeen, J., dissenting) (“[N]o question arose as to the correct yardstick to be used to determine whether those killed constituted a ‘part’ of any group.”).

<sup>263</sup> This assumes that a court would approach femi-geno-cide in a similar manner to genocide. As the *Krstić* Appeals Chamber noted, “It is well established that where a conviction for genocide relies on the intent to destroy a protected group ‘in part,’ the part must be a substantial part of that group.” *Krstić*, Case No: IT-98-33-A, ¶ 8.

<sup>264</sup> Segato, *supra* note 45, at 18.

<sup>265</sup> *Id.* at 18–19 (orig. “es precisamente la percepción de las violencias de género propias de esas otras escenas, públicas y bélicas, que presionan para transformar la imaginación socialmente compartida y la orientan hacia una comprensión del género como una dimensión no particular, no privada de la existencia humana, sino pública, política y de impacto general en la historia de las colectividades.”).

<sup>266</sup> *Id.* at 19 (“Por otro lado, hasta que la prehistoria patriarcal de la humanidad comience a ceder ante la epifanía de una nueva era, a menos que despleguemos una capacidad retórica hasta ahora desconocida, será difícil convencer, por este camino de la privatización del concepto de feminicidio, de que estos crímenes tienen el impacto y la magnitud de un genocidio. Pues nuestro imaginario se encuentra formateado por la inicua

recognition that even some femicides are tantamount to genocide would be of enormous didactic value.<sup>267</sup>

Segato's concept of femi-geno-cide relies on an argument that there are new war-like contexts, such as organized crime, that are worthy of international attention and an assumption that an international crime need not have any kind of a personal motive. Neither view, I believe, is strictly necessary. On the one hand, in theory, neither crimes against humanity nor genocide require a connection to a war or armed conflict.<sup>268</sup> On the other, a person may be guilty of an international crime as long as they have the requisite intent for the crime, regardless of whether they also have some personal motive.<sup>269</sup> Thus, Segato may be limiting international crimes more than necessary.

In contrast, Costa Rican scholar Ana Carcedo argues that *feminicides* (in contrast to femicides)<sup>270</sup> ought to be international crimes, because they

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noción de que lo público y lo privado se constituyen jerárquicamente, y solamente lo primero es de interés general, lo segundo constituyéndose como una parcialidad, una particularidad, un verdadero resto" / "On the other hand, until the patriarchal prehistory of humanity begins to give way to the epiphany of a new era, and unless we display an otherwise unknown rhetorical capacity, it will be difficult to convincingly assert, through this path of privatizing the concept of femicide, that these crimes have the impact and magnitude of genocide. Indeed, our conception is shaped by the malevolent notion that the public and the private are hierarchically constituted, and only the former is of general interest, the latter constituting itself as a partiality, a particularity, a true afterthought.").

<sup>267</sup> *Id.* ("Si, por la avenida opuesta, mostramos que hay crímenes de género que se encuentran plenamente en la escena pública y bélica, esta constatación hará su impacto en la mirada colectiva y presionará para instalar las relaciones de género en una plataforma de importancia general y de valor universalizable. Esta consideración es de orden estratégico, casi didáctica, y resulta en una contra-retórica que compensa y revierte el esfuerzo privatizador del sentido común patriarcal." / "If, on the other hand, we show that there are gender crimes that are committed, in their entirety, in the public and war-like spheres, this will have an impact on the collective gaze and will result in gender relations being considered on a platform of general importance and universalizable value. This consideration is of a strategic, almost didactic order, and results in a counter-rhetoric that compensates and reverses the privatizing effort of patriarchal common sense.").

<sup>268</sup> See discussion *supra* Parts III(A), III(C)(2)(a).

<sup>269</sup> See OTP Gender Persecution Policy, *supra* note 127, ¶¶ 46–55 (distinguishing between motive and intent).

<sup>270</sup> ASOCIACIÓN CENTRO FEMINISTA DE INFORMACIÓN Y ACCIÓN (CEFEMINA), NO OLVIDAMOS NI ACEPTAMOS: FEMICIDIO EN CENTRO AMÉRICA 2000–2006 [WE NEITHER FORGET NOR ACCEPT: FEMICIDE IN CENTRAL AMERICA 2000–2006] 480, 483 (2010), <http://mujeresdeguatemala.org/wp-content/uploads/2014/06/Feminicidio-en-Centro-América.pdf> [https://perma.cc/8KHU-V9YD] (distinguishing feminicides as "a particular form, not referring to just any homicide, rather one that is particularly culpable, given its relationship to the violation of human rights" and noting that "the settings of femicide are: The socioeconomic, political, and cultural contexts in which unequal relationships between men and women are produced and promoted, and generate dynamics of control, violence against women, and femicide that adopt or include their own characteristics") (orig. "una forma particular, ya que no se trata de un homicidio cualquiera, sino uno que es particularmente reprochable, por estar relacionado con la violación de derechos humanos" and "[l]os escenarios del femicidio son: Los contextos socioeconómicos, políticos y culturales en los que se producen o propician relaciones de poder entre hombres y mujeres particularmente desiguales y que generan dinámicas de control, violencia contra las mujeres y femicidio que adoptan o incluyen características propias.").

are crimes of the state.<sup>271</sup> She argues that since the “[s]tate itself is the author of the crime, not just certain officials, this crime cannot be defined or judged within the same State,” and that “[t]he judicial system, which is accused of being inoperable, cannot guarantee a process in which it is both judge and a party.”<sup>272</sup> It is therefore necessary, Carcedo argues, to take these matters to international courts.<sup>273</sup>

In many ways, a new international crime of femicide makes a lot of sense. Of particular note, the ICC’s complementarity analysis, which makes a case inadmissible before the Court unless a domestic jurisdiction is “unwilling or unable genuinely to prosecute the case itself”<sup>274</sup> dovetails with femicide’s focus on state inaction. Among the criteria for determining unwillingness is an assessment of whether:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is in-

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<sup>271</sup> *Id.* at 483 (“En este mismo nivel jurídico, el *feminicidio*, como señala Marcela Lagarde, es un crimen de Estado: Se trata de una fractura del Estado de derecho que favorece la impunidad. El feminicidio es un crimen de Estado. En este caso el sujeto activo del delito es el Estado, y los bienes jurídicos tutelados el derecho a la justicia, y otros relacionados con la garantía de contar con un Estado de derecho” / “At this same legal level, femicide, as Marcela Lagarde points out, constitutes a State crime: It is a breach of the rule of law that favors impunity. Femicide is a State crime. In this case, the active subject of the crime is the State, and the protected legal rights are the right to justice, as well as other rights related to the guarantee of the rule of law.”) (citing Marcela Lagarde, *Introducción [Introduction]*, in *FEMICIDIO UNA PERSPECTIVA GLOBAL [FEMICIDE: A GLOBAL PERSPECTIVE]* (Diana Russell & Roberta Harnes ed., 2006)).

<sup>272</sup> *Id.* at 483 (orig. “Siendo el Estado mismo el autor del delito, no unos funcionarios determinados, este crimen no puede ser tipificado ni juzgado dentro del mismo Estado. El Sistema Judicial, al que se le acusa de inoperante, no puede garantizar un proceso en el que es juez y parte.”).

<sup>273</sup> *Id.* at 484 (arguing that it is necessary to turn to international courts and that “doing so opens the possibility of acting in two areas, the domestic criminalizing femicide as an act of concrete people who use this extreme form of violence against women, and on the international level, criminalizing femicide as a crime that States commit when they do not comply with their obligation to provide security and justice to women in the face of the violence they experience as women”) (orig. “Se abre así la posibilidad de actuar en dos ámbitos, el nacional penalizando el feminicidio como el acto de personas concretas que utilizan esta forma extrema de violencia contra las mujeres, y a nivel internacional, penalizando el feminicidio como el delito que cometen los Estados que incumplen su obligación de garantizar seguridad y justicia a las mujeres frente a la violencia que como mujeres viven.”).

<sup>274</sup> Rome Statute, *supra* note 120, art. 17 (“Issues of admissibility”).

consistent with an intent to bring the person concerned to justice.<sup>275</sup>

These criteria strike at the heart of Lagarde's conception of femicide—the failure of the state to meaningfully investigate, prosecute, or punish perpetrators of gendered killings of women.

However, one challenge in the proposed international crime of femicide relates to a significant limitation of the ICC—a requirement of individual criminal responsibility. Carcedo frames the proposed crime as one of the state, and not of specific state officials, which would not meet the ICC's standard. At least for the moment,<sup>276</sup> international criminal courts cannot prosecute states or organizations, only individuals.<sup>277</sup> A state can bring a case against another state before the International Court of Justice, as Bosnia did against Serbia for genocide,<sup>278</sup> or an individual can accuse a state of human rights violations. However, prosecutors cannot prosecute a state before an international criminal court. This limitation may be overcome if femicide is framed as an offense committed by a state official in failing to investigate, prosecute, or punish gendered killings of women.<sup>279</sup>

<sup>275</sup> *Id.*, art. 17(2).

<sup>276</sup> The ICC's limited focus on individuals is a subject of intense debate, particularly with respect to corporate responsibility. See Jonathan Kolieb, *Through the Looking-Glass: Nuremberg's Confusing Legacy on Corporate Accountability Under International Law*, 32 AM. U. INT'L L. REV. 569, 600 (2017); Carsten Stahn, *Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law*, 50 CASE W. RES. J. INT'L L. 91, 124 (2018) (“The idea of corporate criminal responsibility should not be romanticized. The benefits of criminal responsibility over civil liability or human rights accountability are not always fully clear. It is certainly too early to claim that corporate criminal responsibility is a general principle of law. The ILC has been visibly more cautious in its draft articles on crimes against humanity. It recognizes the responsibility of legal persons, but leaves states the option to choose between criminal, civil or administrative responsibility.”).

<sup>277</sup> Patsilí Toledo flags this limitation in her report on femicide for the Mexican Office on the High Commissioner for Human Rights of the United Nations. ONU-DH, *supra* note 138, at 48 (“[E]s necesario recordar que los crímenes internacionales o crímenes de Derecho Penal Internacional, buscan hacer efectiva la responsabilidad penal individual de quienes han cometido tales crímenes, no la responsabilidad del Estado.”) / “It is necessary to remember that international crimes or International Criminal Law crimes seek to put into effect the individual criminal responsibility of those who have committed such crimes, not the responsibility of the State.”).

<sup>278</sup> Bosnia and Herzegovina alleged that Serbia and Montenegro had violated the Genocide Convention by committing genocide. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, Judgment, 2007 I.C.J. Rep. 43, ¶ 64 (Feb. 26), <https://www.icj-cij.org/sites/default/files/case-related/91/091-20070226-JUD-01-00-EN.pdf> [<https://perma.cc/BW4W-YWHN>].

<sup>279</sup> The burden of proof is higher at the ICC than in regional human rights courts, since it is an individual rather than a state on trial and is a criminal trial as opposed to a civil one. Moreover, the ICC demands a higher mens rea than may a domestic court. Mexico's federal femicide charge against state officials is satisfied by negligence. The ICC demands purpose or knowledge. Compare Código Penal Federal [CPF], art. 325, Diario Oficial de la Federación [DOF] DOF 14-06-2012 (Mex.) with Rome Statute, *supra* note 120, art. 30.

Although this Article ultimately proposes a different course, there are advantages to creating a stand-alone international crime for femicide or feminicide. First, it could draw attention to the particular gendered dynamics prevalent in many countries: deadly, gendered violence against women combined with widespread impunity.<sup>280</sup> In doing so, it would avoid “telescoping” gendered crimes against women into other crimes deemed worthy of international attention.<sup>281</sup> (Then again, a telescope is sometimes a useful tool for seeing things one would not otherwise see.) Second, it means a clean slate. Drawing on lessons learned in Latin America, but in no way bound to any particular formulation, State Parties could craft a new definition of some international version of femicide. A new definition would avoid having to put the square peg of femicide in a round hole of genocide (intent to destroy in whole or in part a particular group) or the crime against humanity of gender persecution (widespread or systematic attack, state policy, and persecutory intent) or war crimes (nexus to armed conflict). A stand-alone femicide crime would allow for the criminalization of a serious human rights violation on its own terms. However, as the next Section argues, the advantages of capitalizing on existing international crime definitions outweigh those associated with creating a new crime of femicide or feminicide.

Nevertheless, Segato and Carcedo make compelling arguments that condemning femicide or feminicide not only as human rights violations but also as international crimes may help fight femicide on the ground. The next Section contends that having the ICC address femicide through an existing crime, such as gender persecution, will reap many of the same benefits without some of the obstacles.

*C. A Proposal for the ICC to Use Existing ICL Categories, Particularly Gender Persecution, to Address Femicide*

This Section contends that femicide and other gendered killings are best tackled, at least at the ICC, through existing international crimes and that the crime of gender persecution achieves much of what a stand-alone international crime of feminicide or feminogenocide would accomplish and more. Although other crime categories may likewise fit and be appropriate, such as the crime against humanity of murder or extermination, contemplating the crime against humanity of gender persecution offers a significant opportunity to discuss and condemn the broader discriminatory dynamics surrounding the killing. Where applicable and appropriate, the Prosecutor and Court should consider noting that femicide or feminicide or transfemicide are the

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<sup>280</sup> See discussion *supra* Part II. In many places, this dynamic is particularly acute with respect to trans women. See Jane Chambers, *Chile Transgender: ‘Growing Up Here Is Torture’*, BBC (May 31, 2018), <https://www.bbc.com/news/world-latin-america-44237691> [<https://perma.cc/LH5N-PZW3>].

<sup>281</sup> See discussion *supra* note 129.



terms used or preferred by victims' groups or often used in the affected region. Consultation with victims' groups and experts from the region is also essential to ensuring that investigations and prosecutions will help more than they hurt.

These arguments in favor of using existing international crimes are a mix of pragmatism and idealism. Some relate to the challenges in using femicide as a new crime category, at least in international law. Most importantly, there is the simple political reality that State Parties are unlikely to make femicide or feminicide an international crime at this time. Other arguments rely, more optimistically, on the good that can come from the ICC's addressing femicide as gender persecution.

Beginning with the pragmatic arguments, addressing femicide through existing crimes avoids some of the challenges of addressing femicide through a new crime. First, it does not require amending the Rome Statute. Amending the Rome Statute is a laborious and fraught process that many States Parties may hesitate to pursue. Second, it circumvents the need to persuade states to allow for the prosecution of their own officials, which a new crime of feminicide would require. There may be pushback against recognizing an international crime of feminicide even from states who criminalize femicide domestically. It is one thing for domestic legislators to agree to statutes criminalizing the gender motivated killing of a woman. It is another for them to add a provision to the Rome Statute allowing for the prosecution of their nationals and, possibly, state officials before the ICC. As Louise Chappell has observed, in the drafting of the Rome Statute, "at the point in negotiations where State sovereignty met concerns for gender justice, sovereignty came up trumps."<sup>282</sup> The same may prove true in trying to amend the statute to include femicide.

Further, investigating and prosecuting femicide through existing crimes, like gender persecution, means that one does not need to define a subset of femicides that look enough like genocide to count as an international crime,<sup>283</sup> and, in the process, signal a dismissal of the importance of other femicides. In cases of gendered killings of women, the Court can still legitimize efforts to combat femicide domestically by noting the prevalence of the term (again, femicide as an "a.k.a.") and efforts to combat femicide in the region, where this is the case.

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<sup>282</sup> See CHAPPELL, *supra* note 119, at 40–41 ("The nestedness of the Court in the broader international relations environment, through its complementarity provisions and its relations with the UN in particular, has been critical to the gender justice provisions of the Rome Statute. For the most part, the ICC's spatial nestedness has created a barrier to the expansion of these objectives. This has been most obvious in states' rejection of specific gender justice provisions in the complementarity rules. . . . [A]t the point in negotiations where State sovereignty met concerns for gender justice, sovereignty came up trumps. Negotiations led to a gap in the formal rules that has limited the reach of the ICC into states' responses to sexual and gender-based violations.").

<sup>283</sup> See *supra* Part IV.B (discussing Segato's proposal for an international crime of feminicide).

Relatedly, using existing crime categories avoids stultifying debates over more controversial, adjacent topics. For example, many femicide scholars and activists consider deaths resulting from states' refusal to provide abortion to be femicide.<sup>284</sup> States were so preoccupied with the specter of abortion that they insisted on a sentence in the Rome Statute's forced pregnancy provision to clarify that it did not encroach on states' laws regarding abortion.<sup>285</sup> Attempts to define a new international crime of femicide, at least at the ICC, would likely get mired in similar debates.

Exploring femicide and other gendered killings through ICL, in turn, may help to address some tensions inherent in ICL. In many instances, femicide offers a powerful example of a serious human rights violation occurring outside of the context of traditional armed conflict. Where the Court focuses on gendered killings within armed conflict, as Segato notes, it may help shift the public's understanding of gendered violence as private. Where the Court focuses on gendered killings outside of armed conflict—such as where state actors kill certain women or girls to set an example to others to adhere to discriminatory gender rules—it may help to shift not only the public's conception of violence against women and girls, but even its own conception of violence against women and girls. The vastly under-theorized and under-litigated area of ICL is the bounds of crimes against humanity outside of armed conflict. Just as domestic and regional courts may benefit from the ICC's perspective on gender violence, so too may the ICC benefit from domestic and regional perspectives on femicide.<sup>286</sup>

To be sure, not all cases that might be considered femicide in a domestic jurisdiction (such as an isolated intimate femicide unaccompanied by state malfeasance) will satisfy the elements of the crimes against humanity of gender persecution, murder, or extermination. As Part III illustrated, in some femicide contexts, the ICC would have to flesh out the meaning of an attack against a civilian population outside of armed conflict and, in particular, the types and scale of mistreatment that substitute for a military attack. As Patsilí Toledo has observed and as was discussed above in Part III, the state or organizational policy requirement likewise may prove challenging in

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<sup>284</sup> CEFEMINA, *supra* note 270, at 480 (“En Nicaragua, las muertes de mujeres por no poder acceder al aborto terapéutico se denuncian en la actualidad como femicidios.” / “In Nicaragua, the deaths of women caused by lack of access to a medical abortion are currently reported as femicides.”).

<sup>285</sup> Rome Statute, *supra* note 120, art. 7(2)(f) (“‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”).

<sup>286</sup> *Cf.* DARRYL ROBINSON, JUSTICE IN EXTREME CASES 120 (2020) (arguing that just as international criminal law could benefit from thinking about criminal law theory, criminal law theory could benefit from international criminal law since “the study of ‘special’ cases can lead us to reconsider our theories built on the ‘normal’ cases, by requiring us to notice subtleties and underpinnings” which can help to “build a more ‘general’ theory”).

many cases.<sup>287</sup> However, as she notes, systematic femicides occurring in the context of organized crime may satisfy these elements.<sup>288</sup> So too might femicides occurring in the context of armed conflict, where perpetrators could be members of the state or organizations opposing it.<sup>289</sup> Prosecutors will also have to determine whom to prosecute—direct perpetrators of femicide or state officials guilty of allowing it to thrive unchecked—and how to prove the mens rea of purpose or knowledge.<sup>290</sup>

Nevertheless, it is not necessary that all femicides satisfy the elements of gender persecution or other crimes against humanity. ICL and in particular the ICL of international tribunals is a selective endeavor,<sup>291</sup> and the selection of cases says a lot about what the international community believes matters. By turning its attention to the issue of femicide in a “situation,” the ICC Prosecutor’s first point of engagement,<sup>292</sup> or in a “case” against particular defendants, the exploration of gendered killings as existing crimes can help to communicate the gravity of femicide. Prosecution of cases involving femicides as gender persecution could and should still highlight the gendered dynamics and communicate the importance of this particular human rights violation.

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<sup>287</sup> ONU-DH, *supra* note 138, at 48.

<sup>288</sup> *Id.* at 54 (“Fuera de estos casos, y si bien subsiste la posibilidad teórica de aplicar el modelo de crímenes de lesa humanidad a la sanción de algunos casos de feminicidio—como aquellos calificados como *feminicidio sexual sistémico* que se dan en la frontera norte mexicana—ello supondría mantener la hipótesis de que existe una organización criminal tras todos los crímenes que alienta la comisión de éstos, como en efecto lo sostienen algunas investigadoras.”) / “Apart from these cases, and although there remains the theoretical possibility of applying the crimes against humanity model to the prosecution of some cases of femicide—such as those classified as systemic sexual *feminicide* that occur on the northern Mexican border—this would entail maintaining the hypothesis that there is a criminal organization behind all the crimes encouraging their commission, as indeed some researchers assert.”)

<sup>289</sup> If committed in connection with an armed conflict, the gendered killings may also be punished as war crimes.

<sup>290</sup> Again, the Rome Statute defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.” Rome Statute, *supra* note 120, art. 7(2)(g).

<sup>291</sup> See Stahn, *supra* note 276, at 124 (“Selectivity has been one of the original sins of international criminal law.”); Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. OF INT’L L. 265, 267 (2012).

<sup>292</sup> The Rome Statute distinguishes between investigations into situations, where no defendant has been named, and the later stage of prosecuting individual cases. Compare Rome Statute, *supra* note 120, art. 13 (“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14; (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”) with Rome Statute, *supra* note 120, art. 17–18 (on admissibility of cases).

It may be helpful to consider factual circumstances that could satisfy the requirements of the crime against humanity of gender persecution. The ICC Prosecutor's Gender Persecution Policy offers a couple of examples of gender persecution that involved gendered killing, such as a "'social cleansing,' i.e., the . . . killing of people considered 'undesirable,' such as women sex workers and LGBTQI+ persons,"<sup>293</sup> or a government bombing of schools for girls.<sup>294</sup> A few other examples are:

- A state or rebel group's killing of women in armed conflict who refuse to marry.<sup>295</sup>
- A state or organized crime group's killing of women or LGBTQI+ human rights defenders based on the disapproval of the vision of gender that they were propounding.<sup>296</sup>
- The killing of women for failing to adhere to a gendered dress code or other gendered norms relating to work, education, or social relations.<sup>297</sup>
- An organized crime group's killing of women to send a message to family members or other women.<sup>298</sup>

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<sup>293</sup> OTP Gender Persecution Policy, *supra* note 127, ¶ 91 (using this example, along with corrective rape, in its Gender Persecution Policy); *see, e.g.*, Agnes Callamard (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on a Gender-Sensitive Approach to Arbitrary Killings*, ¶ 47, U.N. Doc. A/HRC/35/23 (June 6, 2017); Deepa Parent & Ghoncheh Habibiadzad, 'They Used Our Hijabs to Gag Us': Iran Protesters Tell of Rapes, Beatings and Torture by Police, *GUARDIAN* (Feb. 6, 2023), <https://www.theguardian.com/global-development/2023/feb/06/iran-protesters-police-rapes-beatings-and-torture> [<https://perma.cc/AQQ7-ASUG>].

<sup>294</sup> OTP Gender Persecution Policy, *supra* note 127, ¶ 80.

<sup>295</sup> The Extraordinary Chambers in the Courts of Cambodia (ECCC) discussed this phenomenon. *See, e.g.*, Prosecutor v. Nuon, Case File No. 002/19-09-2007-ECCC-OCIJ, Closing Order, ¶ 850 (Sept. 15, 2010), <https://www.eccc.gov.kh/sites/default/files/documents/court/doc/D427Eng.pdf> [<https://perma.cc/S53H-7RUK>].

<sup>296</sup> *Cf.* Inter-American Commission on Human Rights, *Rep. on the Situation of Human Rights Defenders and Social Leaders in Colombia*, ¶¶ 68–81, OEA/Ser.L/V/II. Doc.262/19 (Dec. 6, 2019), <https://www.oas.org/en/iachr/reports/pdfs/colombiadefend ers.pdf> [<https://perma.cc/R4GP-MY62>].

<sup>297</sup> *Cf.* Prosecutor v. Al Hassan, ICC-01/12-01/18, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud [Correction to the Decision on the Confirmation of the Charges Against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud], ¶ 698 (Nov. 13, 2019) (discussing gender persecution relating to the beating and detention of women perceived to have violated the strict dress code in Timbuktu after Ansar Dine and al-Qaeda in the Islamic Maghreb (AQIM) took control of Timbuktu).

<sup>298</sup> *See, e.g.*, RED FEMINISTA ANTIMILITARISTA, PAREN LA GUERRA CONTRA LAS MUJERES [STOP THE WAR AGAINST WOMEN] 17–18 (2020), [https://redfeministaan-timilitarista.org/images/documentos/Revista\\_Paren\\_La\\_Guerra\\_Contra\\_Las\\_Mujeres\\_RFA\\_2019.pdf](https://redfeministaan-timilitarista.org/images/documentos/Revista_Paren_La_Guerra_Contra_Las_Mujeres_RFA_2019.pdf) [<https://perma.cc/44XU-3QPM>].

- State officials' systematic failure to investigate the killing of women or of LGBTIQ+ persons where it is "consciously aimed at encouraging such attack."<sup>299</sup>
- State officials' covering up the killing of women.<sup>300</sup>

Each of these examples is not without complications, and the complications likely increase as one works down the list. Some require that the Court embrace the social construction interpretation of "gender" favored by the OTP, the ILC, and commentators on gender persecution. As discussed above, for all, they would need to meet the chapeau requirements for crimes against humanity. Finally, they would have to prove that the perpetrator had the heightened persecutory intent.<sup>301</sup>

Since the crime of gender persecution encompasses forms of gender persecution beyond men killing women, use of the category to prosecute femicide may encourage states to be more conscious of gender dynamics and gendered violence that deviate from the male on female violence paradigm. The ICC Prosecutor's Gender Persecution Policy alone arguably already supports this goal by articulating an approach to investigation and prosecution of gender persecution in a document that can be readily translated into a variety of languages and disseminated to states and human rights organizations around the world. Attention to gender persecution may help to draw attention to other overlooked forms of discrimination. As the Gender Persecution Policy explains, focusing on gender persecution "can also help to unearth misogynist, homophobic, and transphobic discrimination, when it intertwines with racial, ethnic and other forms of discrimination that undergird crimes. Accountability for gender persecution crimes can help contrib-

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<sup>299</sup> Cf. *Hernández v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 422, ¶ 6 (Mar. 26, 2021) (noting that the victims' representatives had argued that the killing was an "extrajudicial execution" and "occurred 'as part of a pattern of human rights violations against trans women in Honduras, and of social cleansing tolerated by the State'").

<sup>300</sup> See, e.g., Sarah Morland, *Mexican Mayor Doubles Down on Accusation of Alleged Femicide Cover-Up*, U.S. NEWS (Jan. 17, 2023), <https://www.usnews.com/news/world/articles/2023-01-17/mexican-mayor-doubles-down-on-accusation-of-alleged-femicide-cover-up> [<https://perma.cc/54F5-R8D8>]. However, Mexico launched an investigation into the cover-up allegations. See *Mexican State Launches Probe After Prosecutors Accused of Covering Up Femicide*, REUTERS (Nov. 7, 2022), <https://www.reuters.com/world/americas/mexico-city-mayor-accuses-state-prosecutor-covering-up-femicide-2022-11-07/> [<https://perma.cc/MZF9-5M96>] ("A Mexican anti-corruption authority said on Monday it had launched an investigation into the state attorney's office of Morelos, after a top official accused prosecutors there of covering up the killing of a young woman found on a highway last week.").

<sup>301</sup> OTP Gender Persecution Policy, *supra* note 127, ¶ 46 (stating that to satisfy the "mental elements for (gender) persecution," the perpetrator must have "meant to cause a severe deprivation of fundamental rights or knew that it would occur in the ordinary course of events; had the specific intent to discriminate (targeting based on the statutory ground of gender); and [known] that the conduct was part of a widespread or systematic attack or intended that it be part of the attack").

ute to sustainable peace and disrupt the normalisation of institutionalised gender discrimination and violence.”<sup>302</sup>

The Gender Persecution Policy also makes clear that the Prosecutor intends to approach gender in a progressive manner through the lens of intersectionality, with attention to the other aspects of a person or group’s identity that can contribute to the discriminatory dynamics.<sup>303</sup> Although it is not a given that the Court will accept the Prosecutor’s interpretation of these terms or share its enthusiasm for an intersectional lens, the ICC Prosecutor’s Gender Persecution Policy and practices may help establish best practices, particularly for states that have shown even less attention to gendered violence outside of femicide or outside of cases of femicide against cisgender women.

The ICC can also help think through the vexing issue of proof of intent. This issue of proving discriminatory intent is quite similar to the intent to be proved in many femicide statutes (the killing of a woman because she is a woman).<sup>304</sup> The Gender Persecution Policy explains:

Discriminatory intent may be evidenced in the disproportionate use of a persecutory conduct against one group based on gender. Or, it may be evidenced through the use of the same persecutory conduct committed against multiple groups but targeted separately based on gender. This requires a holistic understanding of the persecutory intent.<sup>305</sup>

ICC case law that details the requisite intent for gender persecution may help to guide domestic jurisdictions that are grappling with very similar issues in femicide statutes or even, as in the United States, hate crime statutes.

Finally, and perhaps most importantly, addressing femicide through the crime against humanity of gender persecution avoids one of the biggest problems with the label femicide: its emphasis on the gender binary.<sup>306</sup> The label “femicide” is not ideal to capture many forms of lethal gendered (and persecutory) killing. Eleonora Ghioldi, an Argentine activist who spearheaded ATRAVESADXS, a visual project that called attention to gender-based crimes in Argentina, has explained that “[t]hinking that the problem of gender violence only concerns women is simply a fundamental

<sup>302</sup> *Id.* at 5.

<sup>303</sup> *Id.*

<sup>304</sup> *See, e.g.,* Davidson, *supra* note 6, at 396.

<sup>305</sup> OTP Gender Persecution Policy, *supra* note 127, ¶ 50.

<sup>306</sup> *Cf.* Darren Rosenblum, *Unsex CEDAW, or What’s Wrong with Women’s Rights*, 20 COLUM. J. GENDER & L. 98, 106 (2011) (criticizing CEDAW for its insistence on the gender binary, and arguing that “to move sex equality into international law’s mainstream, CEDAW must incorporate this anti-essentialist and anti-identitarian critique”). CEDAW has subsequently moved away from this emphasis on gender as binary and biological. *See* CHARLESWORTH & CHINKIN, *supra* note 73, at xxxvi (noting that the CEDAW committee has since defined gender as a social construct and “expanded its understanding of gender to express concern about discrimination, harassment, violence and hate speech against lesbian, bisexual and transgender women and intersex persons”).

mistake on the way to a profound change in our society . . . . There is no reparations possible without justice.”<sup>307</sup>

Moving beyond the gender binary in tackling gendered killings in ICL may in turn be good for women. It avoids playing into the trope of women as perpetual victims requiring special protection, a criticism levied against femicide statutes.<sup>308</sup> As Diane Otto has argued, “dispensing with dualism and asymmetry would strengthen advocacy for women’s rights by situating women’s inequalities within an understanding of gender as a technology of power that may also disadvantage men and other gender identities, and thus work against protective responses to women.”<sup>309</sup>

That two of the first three gender persecution cases before the ICC involve the persecution of men and boys, including gendered killing, is likely no coincidence. In choosing to bring gender persecution charges for conduct directed at men and boys, the Court draws attention to the notion that gender persecution is not uniquely directed at women and, even without mentioning them, may help to situate the concepts of violence against women and femicide in a broader discussion of gendered violence.<sup>310</sup> These cases likewise permit the Court to lay the groundwork, through case law interpreting the Rome Statute’s term “gender” in terms of social expectations, for tackling charges based on violence targeting sexual and gender minority individuals in future cases, violence that has long been overlooked.<sup>311</sup>

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<sup>307</sup> Estefania Mitre, *Families of Murdered Women and Trans Argentinians Ensure their Voices are Not Silenced*, NPR (June 30, 2022), <https://www.npr.org/sections/pictureshow/2022/06/30/1102449439/argentina-families-demand-justice-for-femicide-victims> [<https://perma.cc/FW65-9CCG>].

<sup>308</sup> See discussion *supra* note 71.

<sup>309</sup> Dianne Otto, *International Human Rights Law: Towards Rethinking Sex/Gender Dualism and Asymmetry*, in *THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY* 210–11 (Margaret Davies & Vanessa E. Munro eds., 2013) (“[T]he dominant codes of m/f dualism and m>f asymmetry have sustained biological accounts of sex/gender and protective responses to women’s human rights abuses, thwarting the recognition of women as fully human . . . . Far from leading to the marginalization of women’s issues, or the loss of the category of women, the General Comments show that treating sex/gender as diverse and shifting creates new opportunities to enrich and strengthen efforts to ensure that women are represented as fully human in human rights law. Engaging sex/gender as an inclusive category has the additional advantage of enabling feminists to ‘carry a brief’ for everyone who experiences sex/gender harm, including those who do not identify as, or are not perceived to be, women.”); see also Dianne Otto, *Disconcerting Masculinities: Reinventing the Gendered Subject(s) of International Human Rights Law*, in *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* 125–29 (Doris Buss & Ambreen Manji eds., 2005).

<sup>310</sup> Cf. Grey, *Gender-based Persecution Against Men*, *supra* note 221 (“In the Abd-al-Rahman case, Bensouda [the former ICC Prosecutor] and her team have interrogated the way that socially constructed ideas about gender—specifically, the idea that men and boys represent potential fighters—can contribute to extraordinarily violent crimes.”).

<sup>311</sup> See Meredith Loken & Jamie J. Hagen, *Queering Gender-Based Violence Scholarship: An Integrated Research Agenda*, 24 *INT. STUD. REV.* 1, 3, 6 (2022) (describing how, despite the lack of scholarly engagement on the issue, there is abundant evidence of violence against sexual and gender minorities in conflict situations, and arguing that scholarship on gender-based violence “should extend to consider sexuality—through compulsory heteronormativity—and gender identity as integral components of gender

Investigating and prosecuting femicide and other gendered killings as crimes against humanity and, specifically, as gender persecution, in turn may help clarify some murky aspects of ICL. The ICC has a very limited and so far unsuccessful history of pursuing crimes against humanity charges outside of the context of war.<sup>312</sup> By pursuing situations or cases of systemic femicide or feminicide, particularly instances where the Prosecutor is framing the mistreatment of women as the “attack,” the ICC has the opportunity to explain better the constituent elements of crimes against humanity, such as an attack against a civilian population, outside of the military context. The femicide as attack framing, concededly, is likely to be the hardest case for the Prosecutor, so this clarity may be long in coming.

Some caveats are warranted. The ICC Prosecutor needs to be very attuned to context on the ground in the regions where they explore gender persecution investigations and prosecutions. As discussed above, the OTP must do a careful analysis of how they can help best—through informal assistance<sup>313</sup> or threat of investigation and prosecution. Relatedly, they should listen to victims’ groups and activists on the ground to ensure that this is not an instance of the international community displacing worthy domestic initiatives aimed at addressing gender violence.<sup>314</sup> The OTP has voiced

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and as a basis on which lesbian, gay, bisexual, transgender, and otherwise queer individuals may be targeted”); Lisa Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGB-TIQ Persons*, 24 WM. & MARY J. WOMEN & L. 513, 518 (2018) (describing the need for ICL to engage with “the longstanding targeting of civilians based on gender, sexual orientation, and gender identity in the context of war and conflict” and contending that “ISIS’s gender-based crimes should be viewed through the legal framing of the societal construct of gender”).

<sup>312</sup> I am basing this on the fact that almost all of the cases to date have included war crime charges, which require that the Prosecutor prove a nexus to an armed conflict. *See generally Cases*, INT’L CRIM. CT., <https://www.icc-cpi.int/Pages/cases.aspx#Default=%7B%22k%22%3A%22%22%7D#2ae8b286-eb20-4b32-8076-17d2a9d9a00e=%7B%22k%22%3A%22%22%7D> [https://perma.cc/627Q-JA34] (showing search results for ICC cases). The exceptions would be the crimes against humanity charges against officials for post-election violence in Côte d’Ivoire and Kenya. Neither case went forward. *See Prosecutor v. Gbagbo*, ICC-02/11-01/12-90, Decision on the Prosecutor’s Request to Vacate the Effect of the Warrant of Arrest Issued Against Ms. Simone Gbagbo, ¶ 3 (July 19, 2021); *Prosecutor v. Kenyatta*, ICC-01/09-02/11, Decision on the Withdrawal of Charges, ¶ 10 (Mar. 13, 2015).

<sup>313</sup> *See* OTP Gender Persecution Policy, *supra* note 127, ¶ 70.

<sup>314</sup> The ICC should be particularly concerned about displacing or undermining approaches geared at addressing underlying problems, such as access to education and poverty. *Cf.* Karen Engle, *International Human Rights and Feminisms: When Discourses Keep Meeting*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 65–66 (Doris Buss & Ambreena Manji eds., 2005) (“That first world feminists focus on culture, rather than poverty, as the locus of women’s oppression, for example, misses the role played by economics in the construction of women’s identities and concerns in both the first and third world. More significantly, because of a history of colonialism and economic and political exploitation, when first world feminists make their primary aim to save brown women from the cultural oppression imposed by brown men, they are deeply implicated in the plight of the third world.”); *see also* Asad G. Kiyani, *Third World Approaches To International Criminal Law*, 109 AM. J. INT’L L. UNBOUND 255, 255–59 (2016) (critiquing ICL for its uneven and selective enforcement, its narrow focus on only certain crimes



the intention to consult extensively with victims' groups and experts to attempt to ensure a greater understanding of context.<sup>315</sup>

Another caveat—this may be messy. Setting aside the state response to decisions deemed too progressive or too invasive of state sovereignty, there may be disagreement at the Court over many issues related to gender persecution generally and its application to femicide and gendered killings specifically. As the divided Inter-American Court's decision in *Vicky Hernandez v. Honduras* indicates, judges may have widely varying views on the concepts of sex and gender and may not agree on the meaning of gender in the Rome Statute when it comes to extending gender persecution to crimes against LGBTQI+ persons. Just because the Prosecutor says it is so, does not necessarily make it so.

Nevertheless, the Prosecutor appears to be proceeding very carefully and strategically with respect to gender persecution. It has started with a case involving persecution of women and girls and two others involving boys and men. These early cases seem to sit safely in the male/female frame of the first part of the Rome Statute's gender definition. However, the arguments for persecutory intent rely on gender as a social construct—targeting boys based on the masculine perception that boys and men were likely to be soldiers—or failure to adhere to prevailing gender norms on acceptable dress.<sup>316</sup> If the Court accepts this logic, which thus far they appear to do, it paves the way to arguments related to persecution based on sexual orientation and other non-conforming gender identities.

In sum, activist and advocates should not overlook ICL and ICL-enforcing institutions like the ICC as tools for combatting femicide. The ICC can bring attention to the problem of gendered killings, spur government action, and support domestic civil society and even authorities attempting to combat femicide. The ICC and other fora adjudicating international crimes in turn should not overlook the phenomenon of femicide and other gendered killings. Even without the creation of a new international crime, ICL is equipped to address gendered killings in at least some contexts. The crime of

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divorced from “structural effects and antecedents of international crime, such as the unwillingness and inability to recognize violence beyond particular forms of bodily harm, notably the structural or slow violence that conditions the day-to-day realities of violence and criminality in the postcolonial state, all the while intersecting with transnational economic forces,” and the failure of ICL practitioners and academics to question the costs or unintended effects of ICL enforcement).

<sup>315</sup> OTP Gender Persecution Policy, *supra* note 127, ¶¶ 103–05.

<sup>316</sup> The Al Hassan case before the ICC, for example, relies in part on the particularly stringent control of women's behavior and dress and differential punishment, including beatings, detention, and rape, meted out to women in Timbuktu who failed to conform to strict religious requirements on how women should dress or act. Prosecutor v. Al Hassan, ICC-01/12-01/18, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud [Correction to the Decision on the Confirmation of the Charges Against Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud], ¶ 667 (Nov. 13, 2019).

gender persecution, in particular, addresses much of what anti-femicide activists have sought to capture in the criminalization of femicide.

## V. CONCLUSION

Femicide is already recognized as a gross violation of women's human rights and, in many countries, is a crime. In at least some circumstances, it also amounts to an international crime and is a worthy subject for the ICC's attention. This Article has argued that the best way for the ICC to address femicide is through existing international crimes, particularly the crime of gender persecution. Recognizing femicide as gender persecution will help to communicate the gravity of the crime and draw attention to the problem, as well as put pressure on states to do more to combat it domestically. Although the crime of gender persecution does not on its face name the particular gendered dynamics involved in femicides—deadly, discriminatory violence against women—it does draw attention to the gendered dynamics, provide an opportunity for the Court to describe them, and situate femicide in a category of crimes that offends all of humanity. Addressing femicide as gender persecution may also encourage states to think more broadly about gendered violence beyond violence against cisgender women at the hands of cisgender men. In turn, tackling femicide as the crime against humanity of gender persecution may give the ICC an opportunity to clarify the contours of crimes against humanity outside of the context of war and the Rome Statute's novel crime of gender persecution.