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Criminalisation of femicide/feminicide in Latin American countries

La criminalisation du féminicide dans les pays d'Amérique latine

*Patsilí Toledo**

Riassunto

L'uso dei termini femicidio/femminicidio, elaborati principalmente da studiosi negli ambiti della sociologia e dell'antropologia, così come da militanti femministe, è divenuto frequente nei paesi dell'America Latina in materia di diritto e politica pubblica. L'articolo intende analizzare le attuali sfide da affrontare relativamente all'interpretazione e all'applicazione di questi nuovi delitti in diversi paesi, tenendo in considerazione il dibattito acceso in ambito penale. In tal senso, l'articolo analizza brevemente le origini e lo sviluppo dei termini femicidio/femminicidio unitamente alle caratteristiche essenziali e alle problematiche poste da queste nuove fattispecie criminose.

Résumé

L'utilisation du mot féminicide (en anglais : femicide et feminicide), développé principalement par des scientifiques dans les domaines de la sociologie et de l'anthropologie ainsi que par les militantes féministes, est devenue fréquente dans les pays d'Amérique latine en matière de loi et de politique publique.

Cet article vise à analyser les défis actuels relatifs à l'interprétation et à l'application de ce nouveau délit dans plusieurs pays, compte tenu de la série de questions posées à son égard dans le domaine pénal.

Dans ce but, l'article analyse brièvement les origines et le développement de ce mot féminicide ainsi que les caractéristiques essentielles et les problèmes posés par ce nouveau délit.

Abstract

The use of expressions femicide and feminicide, mainly developed by academics in the sociological and anthropological fields as well as by feminist activists, have become frequent in the areas of law and public policy in Latin American countries. This article seeks to analyse the challenges currently faced regarding the interpretation and application of these new criminal offences in various countries, considering the strong questioning they have often received from the criminal law field. For this purpose, the article analyses briefly the origin and development of the expressions of femicide/feminicide, as well as the main characteristics and problems of the new crimes and their incipient legal interpretation and application.

Key words: femicide; feminicide; Latin American countries; new crimes.

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1. Overview.

The use of expressions femicide and feminicide, mainly developed by academics in the sociological and anthropological fields as well as by feminist activists¹, have become frequent in the areas of law and public policy in Latin American countries. The visibility of these crimes, laws and policies has also reached international attention beyond this continent in the last years, which allows speaking of femicide/feminicide as a global phenomenon².

What is specific to Latin America is that, since 2007, more than a dozen countries in this region have introduced legal reforms to specifically criminalise certain female homicides³ as femicide or feminicide. These crimes have received special legal recognition for being an extreme expression of violence against women, i.e. they are committed against women and are gender-based/motivated⁴.

There are many factors that have led to these legislative processes. The factual increase of these crimes –and homicide rates in general- in some

countries of the region –as in Mexico and Central America⁵ - and the specific brutality of the killings of women in some places⁶, together with the lack of appropriate response by the States were factors that contributed to their public visibility and the social demand for State response. This demand was formulated thanks to the strength and high level of coordination of Latin American feminist activists since the 1980s⁷, one of the central political factors contributing to the extraordinary visibility these crimes have had in the last decades in the whole continent. In this context, many governmental and legislative authorities have found in these new criminal laws a feasible way of addressing this highly visible phenomenon, so often all political parties –in the whole political spectrum- have given support to these new laws⁸.

The Latin American feminist movement has promoted and advocated for these legal processes⁹, aiming to make the phenomenon of female homicides politically and socially visible, as well as to underline their association with the structural discrimination affecting women. Although the legislative, social and institutional scenarios in the

¹ For example, in the United States, Diana Russell, Jane Caputi and Jill Radford, and in Latin America, Marcela Lagarde, Julia Monárrez and Rita Segato, among others.

² In Europe, it has been used by feminist activists mainly in Italy and Spain, and in France and the United Kingdom more recently. The CEDAW Committee has been using the expression femicide/feminicide in the last years, and it has included this expression in its Draft update of General Recommendation No. 19 on gender based Violence against women, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_19_Add-1_8070_E.pdf The UN General Assembly focused specifically on gender-based killings of women with the adoption of the resolution *Taking action against Gender-Related Killing of Women and Girls* on 18 December 2013.

³ Costa Rica (2007), Guatemala (2008), Colombia (2008), Chile (2010), El Salvador (2010), Nicaragua (2011), Peru (2011), Argentina (2012), Mexico (2012), Panama (2013), Bolivia (2013), Ecuador (2014), Venezuela (2014) and Brazil (2015).

⁴ "Gender" has been defined as "the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for men and women" (Article 3 c) of the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence or Istanbul Agreement* (2011).

⁵ Carcedo A. (Coord.), *No olvidamos ni aceptamos: Femicidio en Centroamérica 2000-2006*, CEFEMINA Feminist Centre for Information and Action, San José, Costa Rica, 2010; Toledo P., "The drug-war femicides / Femicidios de la guerra contra las drogas", *The Project Syndicate*, 9 August 2011, available at: <http://www.project-syndicate.org/commentary/the-drug-war-femicides>

⁶ Monárrez J., *Trama de una injusticia. Femicidio sexual sistémico en Ciudad Juárez*, El Colegio de la Frontera Norte School, Miguel Ángel Porrúa Mexico City, 2009; Morales H., "Femicide and Sexual Violence in Guatemala", in Bejarano C., Fregoso R-L. (Eds), *Terrorizing Women. Femicide in the Americas*, Duke University Press, Durham and London, 2010, pp. 127–137.

⁷ Toledo P., "Movimiento de mujeres, derechos humanos y tipificación del femicidio / feminicidio en Latinoamérica", in Femenías M.L. (compiladora), *Violencias cruzadas. Miradas y perspectivas*, Col. Los Ríos Subterráneos, IV, Prohistoria Ediciones, Rosario, 2015.

⁸ Toledo P., *Femicidio / feminicidio*, Ediciones Didot, Buenos Aires, 2014.

Latin American continent regarding femicide/feminicide are very diverse, this article seeks to analyse the challenges currently faced regarding the interpretation and application of these new criminal offences in various countries, considering the strong questioning they have often received from the criminal law field.

For this purpose, the article analyses briefly the origin and development of the expressions of femicide/feminicide, as well as the main characteristics and problems of the new crimes and their incipient legal interpretation and application.

2. From femicide to feminicide.

The conceptualisation of femicide by Russell and Caputi in the United States – as murders of women by men motivated by hatred, contempt, pleasure or a sense of ownership of women¹⁰ - has been the basis for the theoretical reflection and political action of Latin American feminist academics and activists¹¹. Despite this common root, the theoretical, academic and political definitions of femicide and feminicide present different trends.

In the first place, the coexistence in Latin America of the expressions "femicide" (femicidio) and "feminicide" (feminicidio) is also the result of debates based on both linguistic¹² and political

considerations. The use of the expression feminicide –and not femicide- by Mexican anthropologist and politician Marcela Lagarde¹³ and by feminist and human rights activists, intended to highlight that these were not only gender-based killings of women, but also crimes committed due to the inaction of the State to prevent and punish them, and so, impunity and State responsibility were elements of feminicide. It was feminicide, in this sense, what was highlighted by the hundreds of decisions and recommendations from national and international human rights bodies, whereby the judgment of the Inter-American Court of Human Rights (IACHR) in the emblematic "Cotton Field" case had particular legal significance, as it condemned the Mexican State for not guaranteeing the right of the victims to life, integrity and freedom, as well as for the impunity and discrimination that affected the victims and their families¹⁴. Even the author Ana Carcedo¹⁵ highlighted the compatibility of both expressions, by saying that femicide should indicate any gender-based killing of a woman, and feminicide, the cases where femicides also involved State responsibility. Nowadays, however, and largely due to the laws that have introduced these new crimes in several Latin American countries, the element of State responsibility has disappeared from the expression *feminicide*, and so, *femicide* and *feminicide* have become synonyms to refer to gender-based female

⁹ Although in some cases they have opposed inadequate or too restrictive laws, as in the case of some Mexican states (Toledo P., *op. cit.*, 2014).

¹⁰ Russell D., Caputi J., "'Femicide': Speaking the unspeakable", *Ms. Magazine*, September-October 1990, p. 34.

¹¹ Although Diana Russell had first used the word femicide in 1976, its use in Latin America was a consequence of Russell and Caputi's article in 1990. The use of the expression feminicide has been generalised in Mexico and in most of the region since the mid-1990s, mainly since the reporting of many cases of disappearances and bloody murders of women in the State of Chihuahua, especially in Ciudad Juárez, characterised by extreme sexual or physical violence as well their associated impunity.

¹² For example, Julia Monárrez (Monárrez J., *Trama de una injusticia. Femicidio sexual sistémico en Ciudad Juárez*, El Colegio de la Frontera Norte School, Miguel Ángel Porrúa

Mexico City, 2009) has argued that the correct translation of *femicide* into Spanish, should be *feminicide*, as it uses the whole Latin root 'femina'.

¹³ Lagarde M., "El feminicidio, delito contra la humanidad", in: CEFEM, *Feminicidio, justicia y derecho*, Chamber of Deputies of the Hon. Congress of the Union - 59th Legislature Mexico, 2005, pp. 151–164.

¹⁴ Inter-American Court of Human Rights, *González Banda et al ("Cotton Field") vs. Mexico*, 16 November 2009.

¹⁵ Carcedo A. (Coord.), *No olvidamos ni aceptamos: Femicidio en Centroamérica 2000-2006*, CEFEMINA

homicides. They both are crimes committed by individuals, with no reference to negligence or responsibility of public actors in it¹⁶.

But besides this current common conceptualisation, framed by or a consequence of criminal law, it is possible to find diverse concepts of femicide/feminicide beyond law, mostly in research and activism, considering the types of crimes and perpetrators included. Generally, their broad or narrow character depend on the theoretical perspectives that underpin the notion of femicide/feminicide, the type of study or analysis carried out and their objectives¹⁷. While theoretical and political documents tend to use broad definitions of femicide/feminicide, empirical research work, field studies and criminal law tend to use more restricted definitions.

The broad concepts of femicide/feminicide include intentional killings of women as well as deaths

caused by discrimination-related factors, such as clandestine abortions in the countries where voluntary abortion of women is a crime, or deaths because of illnesses that disproportionately affect women and are not properly treated or prevented¹⁸, among others¹⁹. Therefore, broad definitions of femicide/feminicide, in general²⁰, include all the deaths of women as a result of the structural discrimination affecting them, irrespective of the sphere of life in which they occur²¹. The broadness of these conceptualisations, of interest in the anthropological, sociological and political fields, however, situate them very far from the definitions applicable in criminal law, as they include behaviours that do not even, strictly speaking, constitute crimes.

So, narrower conceptualisations of femicide/feminicide are the most common, restricted to homicides, without considering the unintentional deaths of women resulting from other factors. Within this category there are also broader

Feminist Centre for Information and Action, San José, Costa Rica, 2010.

¹⁶ The only exception is a provision in the Mexican Federal Criminal Code, that punishes negligence in investigation by public officers and prosecutors; but because of its federal character, has a very restricted scope.

¹⁷ For example: Crawford M., Gartner R., *Women killing: Intimate femicide in Ontario, 1974-1990*, Women We Honour Action Committee, Toronto-Ontario, 1992; Campbell J., Runyan C., "Femicide: Guest Editors Introduction", *Homicide Studies*, Vol. 2, n. 4, 1998, pp. 347-352; Carcedo A., Sagot M., *Femicidio en Costa Rica. 1990-1999*, Pan American Health Organisation - Women, Health and Development Programme, San José, Costa Rica, 2000; Russell D., Harnes R. (Eds.), *Feminicide: una perspectiva global*, Mexico, National Autonomous University of Mexico, 2006; Lagarde M., "El feminicidio, delito contra la humanidad", in: CEFERM, *Feminicidio, justicia y derecho*, Chamber of Deputies of the Hon. Congress of the Union - 59th Legislature Mexico, 2005, pp. 151-164; Russell D., Radford J. (Eds.), *Feminicidio. La política del asesinato de las mujeres*, National Autonomous University of Mexico, Mexico, 2006; Carcedo A. (Coord.), *No olvidamos ni aceptamos: Femicidio en Centroamérica 2000-2006*, CEFEMINA Feminist Centre for Information and Action, San José, Costa Rica, 2010; Cano J.E., Yacobino M.L., "Historias de 'amor', machismo y muerte", in La Plata, FAHCE-UNLP, 25-27 de septiembre 2013, available at: <http://jornadascinig.fahce.unlp.edu.ar/iii-2013/actas-2013/Cano.pdf>; Santana P., Astudillo L., *Violencia extrema hacia las mujeres en Chile (2010-2012)*, Andros Impresores, Santiago, 2014.

¹⁸ For example, Russell (Russell D., "AIDS as Mass Femicide: Focus on South Africa", in *Off Our Backs*, Vol. 31, No. 1 January 2001, pp. 6-9) in relation to HIV/AIDS in South Africa.

¹⁹ For Russell and Caputi (1990) "Femicide is the ultimate end of a continuum of terror that includes rape, torture, sexual slavery (particularly in prostitution), incestuous and extrafamilial child sexual abuse, physical and emotional battery, sexual harassment, genital mutilations (clitoridectomies, infibulations); unnecessary gynaecological operations (gratuitous hysterectomies), forced heterosexuality, forced sterilisation, forced motherhood (criminalising contraception and abortion), psychosurgery, [...] denial of protein to women in some cultures, cosmetic surgery and other mutilations in the name of beautification. *Whenever these forms of terrorism result in death, they become femicides*" (Russell D., Caputi J., "'Femicide': Speaking the unspeakable", *Ms. Magazine*, September-October 1990, p. 35. Own highlighting).

²⁰ Other definitions are even broader, such as those presented by academics who consider that the word "homicide" excludes women, so the word "feminicide" should always be used when referring to a woman being killed.

²¹ Lagarde M., "Antropología, feminismo y política: Violencia feminicida y derechos humanos de las mujeres", in: Bullen, Margaret and Diez, Carmen (Coords.), *Retos teóricos y nuevas prácticas*, Ankulegi Antropología Elkarte, Spain, 2008, pp. 209-239.

and narrower definitions. For example, some authors consider as femicide only the killing of women committed by their intimate partners or intimate partner femicide²², while others also include the crimes committed by strangers, for instance, in the context of a sexual assault, or even homicides committed against third parties as a form of violence against women. These include collateral murders/killings, for instance, when other female relatives or children are killed by the attacker while trying to kill a woman²³, or when people that are related or close to a woman are killed by a man “to punish and psychologically destroy the woman he considers his ownership”²⁴.

In this sense, the broadest formulation in Latin America considers as femicides/femicides all gender-based killings of women, i.e. which constitute an extreme manifestation of violence towards women, whether committed or not by people known to the victims and occurring in the public or private life. This concept of femicide/femicide has been developed and used in various contexts and regions of Mexico and most of Latin America, but it has also had an incipient use in Europe, particularly in Spain²⁵, Italy²⁶.

²² Crawford M., Gartner R., *Women killing: Intimate femicide in Ontario, 1974-1990*, Women We Honour Action Committee, Toronto-Ontario, 1992; Stout K., “Femicidio íntimo: un panorama demográfico nacional”, in Russell D., Harnes R. (Eds.), *Femicidio: una perspectiva global*, Mexico, National Autonomous University of Mexico, 2006, pp. 119-133.

²³ Carcedo A., Sagot M., *Femicidio en Costa Rica. 1990-1999*, Pan American Health Organisation - Women, Health and Development Programme, San José, Costa Rica, 2000, p. 11.

²⁴ La Casa del Encuentro (n.d.). Femicidios, available at: <http://www.lacasadelencontro.org/femicidios.html>

²⁵ Reina Sofia Centre Institute (ICRS), *III Informe Internacional. Violencia contra la mujer en las relaciones de pareja. Estadísticas y Legislación*, Document Series 16, 2010a, available at: <http://www.fundacionluisvives.org/upload/88/18/informe.pdf>; Reina Sofia Centre Institute (ICRS), *Informe: Mujeres asesinadas por su pareja. España (2000-2009)*. Instituto Universitario para el Estudio de la Violencia (University

3. Femicide/femicide as a new crime: common justifications, diverse laws.

The specific treatment of certain female killings by criminal law has a long history in several continental European criminal codes. For example, in Italy up to 1981, the homicide of a woman by her husband, father or brother for honour reasons constituted a

Institute for the Study of Violence) / ICRS, 2010b, available at <http://www.psicologo-valencia.es/resources/Informe+femicidio+en+espa%C3%B1a+2000-2010.pdf>

In Spain, the reports on mortal victims of gender-based violence by the Spanish General Council of the Judiciary use the expression “femicide” but restricted only to “the violent death of women exercised by their present or former spouse or by men with whom they maintain or have maintained analogous affective relations” (Consejo General del Poder Judicial General (CGPJ) Council of the Judiciary, Spain, *Informe sobre víctimas mortales de la violencia de género y de la violencia doméstica en el ámbito de la pareja o ex pareja en 2011*, 2011, p. 7, available at: <http://www.poderjudicial.es/stfls/CGPJ/OBSERVATORIO%20DE%20VIOLENCIA%20DOM%20C3%89STICA/INFORMES/FICHERO/20120705%20Informe%20sobre%20v%C3%ADctimas%20mortales%20de%20la%20VG%20v%20VD%20C3%A1mbito%20pareja%202011.pdf>. The meaning of “femicide” is broader in feminist organisations (Laporta E., “España: Una restringida acepción de la “violencia de género” y los feminicidios”, in: Heinrich Böll Stiftung – European Union, *Femicidio: Un fenómeno Global. De Madrid a Santiago*, Brussels, 2013, pp. 38-40).

²⁶ Karadole C., *Femminicidi in Italia nel corso del 2006: indagine sulla stampa*. Casa delle donne per non subire violenza di Bologna / Università degli Studi Roma Tre, 2007, available at:

<https://femicidiocasadonne.files.wordpress.com/2013/04/femminicidi-in-italia-nel-2006-karadole.pdf>; Giari S., *Femminicidio. Ricerca sulla stampa italiana nell'anno 2007*.

Centre for women against violence in Bologna (Italy), 2008, available at:

https://femicidiocasadonne.files.wordpress.com/2013/05/ricerca_femmini_nel2009.pdf; Adolfini L. Et. Al., *Il costo di essere donna: Indagini sul femicidio in Italia. I dati del 2010*.

Centre for women against violence in Bologna (Italy), 2010, available at:

https://femicidiocasadonne.files.wordpress.com/2013/05/femminicidio_2010.pdf; Spinelli B., *Femminicidio. Dalla denuncia sociale al riconoscimento giuridico internazionale*,

FrancoAngeli, Milano, 2008; Crociati P. Et. Al., *Indagine sui femminicidi in Italia realizzata sui dati della stampa nazionale e locale. Anno 2013*. Centre for women against violence in Bologna (Italy), 2014, available at:

https://femicidiocasadonne.files.wordpress.com/2013/04/ricerca-femmini-dati_2013.pdf

In the United Kingdom: Ingala-Smith K., Fisher H., “United Kingdom. The need for a broader approach to femicide”, in Jiménez P., Toledo P., de Socarras-Nova L. (Eds.), *Femicide: A Global Phenomenon. From Santiago to Brussels*, Heinrich-Böll-Stiftung – European Union, Brussels, 2015.

privileged crime, penalised with sentences of three to seven years in prison, while any other homicide was penalised with minimum sentences of 20 years. A similar type or category of crime existed in Spain until 1961, with a penalty of banishment and not prison for the homicide of an adulterous women committed by her husband²⁷. Other similar provisions continue today or have been in force up to very recently in the Caribbean and Latin American countries, as part of the European colonial legacy²⁸. Obviously, other civil and penal criminal provisions can be added to the aforementioned, indicating legal systems that historically have been intended, among other purposes, to ensure the subordination of women and elevation of male authority²⁹.

While most of these legal provisions have been repealed in contemporary legal systems, their cultural consequences continue to be rooted in our societies and at a global level. Female killings

nowadays are still mostly committed by their partners or family members and their numbers are not lowering over time, while homicides in general worldwide have in fact decreased in recent decades³⁰. In this context, the laws that punish femicide/feminicide in Latin American countries have aimed to expressly delegitimise the justifications that historically have supported male violence against women.

Although these laws vary significantly across the continent, and no single legal definition is identical to other, one common trait is that criminalisation of femicide/feminicide and other gender-specific (non-neutral) criminal offences has been mainly justified, from a legal perspective, through international human rights law³¹. The Belem do Para Convention³² of the Organisation of American States, adopted in 1994 and widely ratified in Latin America, was the first international convention on violence against women and has had a central role in the human rights framework for these new laws. The Convention defines violence against women in its Article 1 as “any act or behaviour of gender-based violence that results in death, or physical, sexual or psychological harm or suffering to women, whether occurring in public or private life” (own highlighting).

²⁷ Acale M., *La discriminación hacia la mujer por razón de género en el Código Penal*, Editorial Reus, Madrid, 2006.

Uxoricide, or the killing of one's wife, remained in force in the Spanish legal system until the approval of Law 79/1961 of 23 December, yet it was not abolished because it was believed to be archaic and unjust, but because it was considered that the same effects could be achieved with the application of the general mitigating circumstances of the Code (Sáinz J., “La condición jurídica de la mujer en el Código Penal español”, in *Spanish Yearbook of Social and Legal Studies*, No. 4, 1975, pp. 205-236).

²⁸ In Haiti up to 2005, there was a rule that absolved the husband who killed his wife in certain cases (United Nations Division for the Advancement of Women / United Nations Economic Commission for Africa, *Good practices in legislation on “harmful practices” against women*, Report of the expert group meeting. Addis Ababa, Ethiopia, 26 to 29 May 2009, pag. 25, available at: http://www.un.org/womenwatch/daw/egm/vaw_legislation_2009/Report%20EGM%20harmful%20practices.pdf, and in Mexico, even nowadays, the criminal codes of some States contemplate homicide for honour reasons (Incháustegui T., López M. (Coords.), *Feminicidio en México. Aproximación, tendencias y cambios, 1985–2009*, Mexico: UN Women, National Institute for Women (Mexico), Special Commission on Femicides - 59th Legislature, Chamber of Deputies, 2011, pag. 25).

²⁹ MacKinnon C., *Hacia una teoría feminista del Estado*, Madrid, Cátedra, 1995; Facio A., *Cuando el género suena*

cambios trae. Una metodología para el análisis de género del fenómeno legal, ILANUD, San José, Costa Rica, 1992.

³⁰ United Nations Office on Drugs and Crime (UNODC), *Global Study on Homicide 2013. Trends, contexts, data*, 2014, electronic document available at: https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf

³¹ It constitutes a central reference point for the Latin American feminist movement for historic and political reasons (Toledo P., *Femicidio / feminicidio*, Ediciones Didot, Buenos Aires, 2014, pp. 64-73). Furthermore, in the area of international human rights law, the criminalisation of diverse crimes was a requirement after the dictatorships and conflicts of the decades from 1960 to 1980 in the region, including the criminalisation of torture, forced disappearances, etc.

³² The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, adopted in Belem do Para, Brazil, in 1994.

According to the Convention, States must adopt criminal legislative measures, among others, that are “needed to prevent, punish and eradicate violence against women” (Article 7, letter c). Also, general human rights treaties include the obligation to adopt the appropriate measures, including legislative, to guarantee all rights without discrimination³³. In this regard, the measures adopted to specifically punish certain forms of violence against women are fully justifiable, as has been recognised by the Costa Rican Constitutional Chamber since 2004³⁴ and the Spanish Constitutional Court since 2008³⁵.

The provisions set down in Article 5 of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and in Article 7 e) of the Belem do Para Convention, which explain the State's duty to “modify legal or customary practices that support the persistence or tolerance of violence against women” also support the legitimacy of these laws.

However, the laws that criminalise femicide/feminicide –whether in a broader or a narrower way- have often faced strong questioning by some sectors of criminal doctrine. These sectors have insisted on the sufficiency of already existing crimes, such as murder or aggravated murder, which incorporate a range of sanctions that allow the most serious cases to be punished more severely. It has

³³ The general obligation to guarantee human rights without discrimination is sufficient to justify these specific laws, without the need to draw on special provisions or to qualify these measures as “special measures”. They can be considered as affirmative actions but, while this may be appropriate from a theoretical perspective, it is not necessary from the legal perspective of human rights' obligations, nor does it contribute to a better understanding of these laws.

³⁴ Judgment 3441-2004 of the Costa Rican Constitutional Chamber of the Supreme Court of Justice, of 31 March 2004.

³⁵ Among others, Judgments of the Spanish Constitutional Court (STC) No. 59/2008, of 14 May 2008 and STC No. 45/2009, of 19 February 2009, on unconstitutional issues of Articles 153.1 and 171.4 of the Criminal Code (in its current wording, resulting from *Organic Law 1/2004*, of 28

also been argued that these crimes would discriminate against men, by giving greater value to the lives of women, or would constitute a form of ‘offender-based criminal law’ (*Täterstrafrecht*) which would provoke evident constitutionality conflicts³⁶. These criticisms, however, are not exclusive to these initiatives, as they have also affected other laws that punish violence against women separately, such as the legislation on gender-based violence in Spain since 2004³⁷. In Spain, the Constitutional Court has justified this separated –and aggravated- treatment, considering that violence against women committed by current or former intimate partners required so precisely because this violence is one of the most pervasive and clear manifestations of discrimination and subordination of women. In a similar way to hate crimes³⁸, these crimes are aggravated with the intention of expressing the highest social rejection

December, on Comprehensive Protection Measures against Gender-Based Violence).

³⁶ During the legislative process of the law that criminalised femicide in Costa Rica (between 1999 and 2007), this aspect was persistently addressed by those that questioned the constitutionality of this regulation.

³⁷ For example, the criticism of Gimbernat (Gimbernat E., “Prólogo”, in *Código Penal*, 10th edition, Tecnos, Madrid, 2004) of Spanish Organic Law 1/2004, on *Comprehensive Protection Measures against gender-based violence*, precisely qualifies it as an example of ‘offender-based criminal law’. In similar terms, the Opinion of the Spanish General Council of the Judiciary adopted regarding the “Preliminary Draft of the Organic Law for comprehensive measures against violence exercised towards women”, on 24 June 2004 (CGPJ, 2004). Against this criticism, among others: Lorenzo P., “La Violencia de Género en la Ley Integral. Valoración político-criminal”, in *Revista Electrónica de Ciencia Penal y Criminología*, núm. 07-08, 2005, pp. 1–23, available at: <http://criminnet.ugr.es/recpc/07/recpc07-08.pdf>; Maqueda M.L., “¿Es la estrategia penal una solución a la violencia contra las mujeres? Algunas respuestas desde un discurso feminista crítico”, *InDret*, n. 4, October 2007; Larrauri E., “Igualdad y violencia de género. Comentario a la STC 59/2008”, *InDret: Revista para el Análisis del Derecho*, n. 1, 2009, available at: <http://www.indret.com/pdf/597.pdf>; Nicolás G., Bodelón E. (Comps.), *Género y Dominación. Críticas feministas del derecho y el poder*, Desafío(s) 7, Ed. Anthropos, Barcelona, 2009.

³⁸ Among those which, historically, crimes against women have been excluded (Toledo P., *Femicidio / feminicidio*, Ediciones Didot, Buenos Aires, 2014, pp. 177 et ss.).

that deserve behaviours based on contempt towards certain collectives³⁹.

In addition, some of the various phenomena identified as femicide/feminicide by activism and the sociological research are aggravated by its own nature, as they constitute multiple offences in criminal law. This is the case of sexual femicide/feminicide (when there is also a sexual assault of the victim) or cases that also include kidnapping, mutilation, illegal inhumation, etc. of the victim.

In Latin American legislation, however, femicides/feminicides do not necessarily constitute aggravated crimes, when compared with a similar crime committed against a man. Some countries have criminalised femicide imposing penalties that are equal to those stipulated for other aggravated murders -such as 'parricide'- and, more specifically, those imposed on a woman who commits a similar crime against a man. In this regard, despite being separated and differentiated crimes, the equal penalty neutralises their effects by assimilating them to common crimes, thereby evading legal controversy as regards differentiated punishment.

About the content of these new crimes, there is great diversity in the continent both in the scope of the crimes included and in the elements used to describe them, mostly related to specific manifestations of gender-based violence⁴⁰. While

³⁹ This is also controversial when it is argued, for example, that there is no justification for punishing an individual for sexism that is also present in the society, or an act of racism, when the societies are also racist, etc. In general terms, the issue is like punishing economic crimes, although we live in societies that promote greed. These cases point to the responsibility of the State to actively promote the eradication of these social values (sexism, racism, etc.), and the use of criminal law is another State action to promote a more equal and fair society.

⁴⁰ There are specific elements in several countries. For example, in Guatemala, among others, when a woman's death is a consequence of group rituals or in the presence of the victim's children; in Bolivia, that the crime is committed

most of countries penalise femicide/feminicide committed by both individuals known and unknown to the victims, some limit it to those that occur in the private sphere or are committed by the intimate partner, as in the case of Chile and Costa Rica.

The laws that include crimes committed both in public and private sphere, i.e. the broader types of crime, however, often transpose sociological or anthropological concepts to criminal law without the precision required by the principle of legality. The reference to killing a woman "because she is a woman", or "for being a woman", "in the context of unequal power relations between men and women" and "misogyny", among others, are examples that illustrate this⁴¹. In other cases, the criminal definition of femicide/feminicide may include elements that are very difficult to prove, and consequently will have virtually no application, leading to the application of simpler neutral crimes sanctioned with the same penalty⁴². These regulatory differences also correspond to the social and political contexts that have determined these legislative processes. Thus, the opportunity and promptness to approve several of these laws, the intervention or not of the women's movement in their drafting and the difficulty of applying some of the laws by the criminal system are all issues that are linked to various political options and scenarios in the diverse countries, and in particular, among the various Mexican federative entities.

Consequently, the more restrictive criminal definitions that only address the crimes committed

because the victim is pregnant; in various Mexican federative entities, that the victim's body has been exposed in a public place, etc.

⁴¹ As it happen in some cases in Mexican and Guatemalan law.

⁴² That is what happens in the Mexican states of Guerrero, Guanajuato and Tamaulipas, among others.

in the private sphere, i.e. by intimate partners, are much less disputed and are, as will be seen, those that tend to be more applied in practice.

A worth mentioning option has been followed in Argentina⁴³, where femicide was criminalised but without using this word in the legal text, including it into diverse forms of aggravated homicide,⁴⁴ in article 80 of the Criminal Code:

Article 80: Life imprisonment or confinement may be served and the provisions of Article 52 may be applied to an individual that kills:

1. His ascendant or descendant relative, spouse or former spouse, or a person with whom he has or has had an intimate relationship, even if they were not living together at the time of the crime. (...)

4. For pleasure, greed and hatred based on race, religion, gender, or sexual orientation, gender identity or its expression. (...)

11. A woman when the act is perpetrated by a man because of gender-based violence.

12. With the intent to cause suffering to a woman with whom he has or has had a relationship in the terms of subsection 1.

Clearly, in a strict sense, femicide is punished in No. 11: when a man kills a woman owing to gender-based violence. However, various forms of femicide, as have been developed in feminist theory, may be subsumed in these diverse paragraphs. For instance, intimate partner femicides are sanctioned

in accordance with No. 1, a provision that, analysed separately, is equal to those already mentioned in Costa Rica and Chile. Furthermore, the law prevents the application of "extraordinary mitigation circumstances" -which permit a substantial reduction in the penalty- when the perpetrator "had previously carried out acts of violence against the female victim", which reinforces the qualification of femicide in these cases.

Female homicides committed due to "gender hate" -in the case of women, misogyny-, or hate of "the sexual orientation, gender identity or its expression" e.g. homicides of lesbian women or bisexuals, *queer*, etc., are aggravated in No. 4, and they are also femicides. Finally, the aggravation contemplated in No. 12 of homicides that are committed to cause suffering to a person with whom they maintain or have maintained a partner relationship corresponds, when the person to whom they wish to cause suffering is a woman, to what the activism in Argentina has called *related femicide*⁴⁵. In these cases, it will be necessary to prove the additional subjective element of intent to cause psychological harm.

The Argentinian model puts on view the diversity of phenomena considered under the umbrella term *femicide/feminicide*. And the legislative outlines in the various countries that have criminalised them also lead to diverse problems in their judicial interpretation.

⁴³ It is interesting to point out that in Argentina, the expression "femicide" had been used in some judgments even before this legal reform was approved, particularly in intimate partner homicide cases where there had been previous violence exercised by the perpetrator against the victim. For example, Judgment of 23 August 2012, of Oral Criminal Court No. 9 of Buenos Aires.

⁴⁴ Law No. 26.791, enacted on 11 December 2012, published on 14 December of the same year.

⁴⁵ In Spanish, "femicidio vinculado". In other countries, like Chile, feminist studies call this type of crime "femicidal punishment" (Santana P., Astudillo L., *Violencia extrema hacia las mujeres en Chile (2010-2012)*, Andros Impresores, Santiago, 2014).

4. After the laws: interpretation of the new crimes.

Once enacted, these laws have found resistance from academics and jurists, including lawyers, judges and prosecutors. This resistance is not very different from what historically has affected the various legislations that aimed to give express criminal recognition to diverse forms of violence against women, especially violence exercised by intimate partners.

This resistance mostly affects the laws that sanction femicide/feminicide more severely than other neutral crimes (homicide or parricide, for example), or define it more broadly, considering that they violate the principles of equality or legality. This resistance, together with the lack of understanding of the elements of these crimes, may lead legal practitioners to remain using the already known neutral crimes, such as homicide or murder, instead of the new crimes of femicide/feminicide, especially when the penalties are the same. When there are other elements or aggravations that are easier to prove with an identical sanction, there is no incentive to investigate the elements that could possibly constitute a femicide, as it would involve the unnecessary use of investigative resources. For example, in the State of Guerrero in Mexico, in addition to criminalising feminicide as a crime, the law introduced a general aggravation of all homicides committed by a man against a woman, punished with the same penalty as feminicide. In this way, most of the crimes will be considered homicides of women, and not feminicides.

When there are criminal definitions that are particularly vague, as in some countries, the chances of applying the new crime are reduced⁴⁶. Resistance

⁴⁶ In Colombia, for instance, the aggravation of the homicide of a woman "because she is a woman" was introduced into

to these laws may also result in the need to prove the concurrence of elements that are not expressly required by law, such as proof of the subordinate relationship between the man and woman in the specific case, as has occurred in some cases regarding Spanish Organic Law 1/2004 (Prieto, 2010).

In Argentina, Raúl Zaffaroni, Minister of the Supreme Court of Justice and criminal law professor, has stated that the law that criminalised femicide would not be effective because nobody "kills a woman because she is a woman". According to him, the law would only be effective "in relation to transvestites and transsexuals", because "hate homicide occurs against minorities"⁴⁷.

While there are no general case-law studies on femicide in the various countries that have criminalised this offence, the first evaluations available present very varied results. In Chile, for example, as femicide is a type of crime only applicable to intimate partner femicides and which only means a change in name with respect to parricide, without altering the penalties or including additional elements, its application has not had any major obstacles. It is arguable, however, that it has led to advances in understanding violence against women, considering that very serious crimes, such as sexual femicides, are not qualified as femicide according to the Chilean law (unless it is committed by an intimate partner).

the Criminal Code in 2008 (Law No. 1257 of 2008), but the first judgment applying this type of crime was obtained by the Supreme Court in 2015 (Colombian Supreme Court of Justice, Criminal Chamber, Judgment SP-2190 (41457). Writing for the Court, Justice Patricia Salazar, 12 April 2015).

⁴⁷ Halfon F., Álvarez L., Exclusive interview to Zaffaroni, Minister of the Supreme Court of Justice: "La libertad condicional no está controlada en el país", *Tiempo Argentino*, 2012, 2 December, <http://tiempo.infonews.com/nota/19464/zaffaroni-la-libertad-condicional-no-esta-controlada-en-el-pais>

On the contrary, the provisions that contemplate various forms of femicide in Argentina, seek to cover the numerous circumstances in which these crimes are presented. This diversity, however, also creates a certain amount of confusion in the doctrinal and judicial interpretation, which does not necessarily favour the understanding of the complex phenomenon of violence against women and femicide.

The biggest difficulty is the interpretation of the expression “gender-based violence”, an expression that lacks legal definition in Argentina⁴⁸, although it is often considered to be a synonym of “violence against women”. While this interpretation may be controversial, gender-based violence is theoretically a broader perception, as it also includes gender-based violence against other subjects, and not only women⁴⁹. Gender-based violence “punishes all those people that deviate from what is considered to be normal in terms of the social roles assigned to men and women, and it sanctions the sexual options and behaviours that differ from the norm”⁵⁰. From this perspective, violence against women is a form of gender-based violence.

Argentinian legislation, however, is not the only one that has used “gender-based violence” and “violence against women” synonymously. The same has happened in current Spanish Organic Law 1/2004, which still restricts “gender-based violence”

⁴⁸ Argentinian Law No. 26.485, on *Comprehensive Protection to Prevent, Punish and Eradicate Violence against Women*, adopted in March 2009, defines “violence against women” according to Belem do Para Convention, but not “gender-based violence”.

⁴⁹ Normally exercised against those that have different gender identities or orientation to the dominant majority, as occurs with lesbian, gay, intersex, transgender and transsexual people, or against any person that do not adapt their behaviour to the dominant heteronormative model.

⁵⁰ Juliano D., *Les altres dones. La construcció de l'exclusió social. Els discursos que ens uneixen i ens separen*, Institut Català de les Dones (Catalan Women's Institute), Barcelona, 2006.

to only violence against women within the scope of partner relationships. The widespread dissemination of the Spanish regulation at international level has also contributed to confusion between the two expressions, as well as their scope.

The express reference in some legislations to the gender of the perpetrator (a male perpetrator) –like in Argentina– is significant, as some other legislations have not done the same, which means that femicides / feminicides might be committed by either men or women. This has happened in some Mexican federative entities, where cases of killings between lesbian couples are qualified as feminicides, whereby the women have been given exceptionally high penalties (Toledo, 2013)⁵¹. This matter has been the subject of theoretical debate at a comparative level⁵², having agreed that violence against women presents specific characteristics, so it cannot be equated with other forms of violence in the domestic sphere or other forms of violence in partner relationships⁵³.

⁵¹ The severity of the criminal system towards lesbians has already been documented in some studies (Streib, 1995; Robson, 1992, 2004). The application of aggravated sanctions for gender-based violence to women that assault other women may constitute a form of discrimination against lesbians due to their sexual orientation (Nicolás G., Bodelón E. (Comps.), *Género y Dominación. Críticas feministas del derecho y el poder*, Desafío(s) 7, Ed. Anthropos, Barcelona, 2009, p. 255) and, in any case, it is a use that does not fit in with the objectives of the criminalisation of femicide.

⁵² Larrauri E., “Igualdad y violencia de género. Comentario a la STC 59/2008”, *InDret: Revista para el Análisis del Derecho*, n. 1, 2009, p. 6, available at: <http://www.indret.com/pdf/597.pdf> ; Lorenzo P., “La Violencia de Género en la Ley Integral. Valoración político-criminal”, in *Revista Electrónica de Ciencia Penal y Criminología*, núm. 07-08, 2005, p. 17, available at: <http://criminet.ugr.es/recpc/07/recpc07-08.pdf>

⁵³ In Spain, where Organic Law 1/2004 increased the sanctions of various crimes committed against women in the context of intimate partner relationships, it has been debated as to whether the aggravation would be applied to crimes committed by women, i.e. relationships between lesbians. In terms of case-law, however, unlike what has occurred to date in Mexico, it has been sustained that these aggravated sanctions are not applicable in lesbian couples, notwithstanding that these acts, just like violence in gay couples, are punished in accordance with domestic violence rules. This option only leaves men as possible active subjects,

In Mexico, where the types of crime of femicide have a broader and more complex character, as well as different elements in the various states, an analysis of the first judgments handed down in the State of Mexico and Mexico City confirms that most convictions are made in cases of intimate partner femicide, as these crimes are easier to identify as such and involve more straightforward investigation, compared with those in which the perpetrator is unknown⁵⁴. This leaves a margin of doubt on the effectiveness of the legal system's operation in relation to femicides committed by individuals who are unknown to the victim. This circumstance is worrying in terms of the organised crime and "war on drugs" in Mexico and Central America, as it has disproportionate effects on women⁵⁵. Also, impunity, as a consequence of

which would fit both the preventive purposes of the rule - by directing the message at potential offenders (Ruiz A., "La ley contra la violencia de género y la discriminación positiva", in *Jueces para la Democracia*, No. 55, 2006, p. 44) - and the greater damage in these behaviours, as indicated by the Spanish Constitutional Court, since it damages the safety, freedom and dignity of the victims (STCE 59/2008, of 14 May).

⁵⁴ Toledo P., "Limits and difficulties in implementing the recommendations of international human rights bodies on the classification of femicide as a crime in México: first laws and judgments", in Anaya Muñoz A., García Campos A. (compilers), *Recomendaciones Internacionales a México en materia de derechos humanos. Contrastes con la situación en el país*, Mexico City, Office in Mexico of the United Nations High Commissioner for Human Rights, 2013, pp. 55-78.

See, for example, the study *Estudio de la Implementación del Tipo Penal de femicide en México: Causas y consecuencias 2012 y 2013*, of the National Citizen's Observatory for Femicide (OCNF) in Mexico, which states that the perpetrator is only identified in 20% of the cases reported in the countries, precisely in the cases when this was the partner, a family member of another person close to the victim. In 80% of cases, the authorities do not know who the perpetrators are (Observatorio Ciudadano Nacional del Femicidio (OCNF), *Estudio de la implementación del tipo penal de femicidio en México: Causas y consecuencias. 2012-2013*, Mexico, 2014, p. 199, available at: <http://observatoriodefemicidiomexico.org.mx/wp-content/uploads/2015/01/17-NOV-Estudio-femicidio-en-Mexico-Version-web-1.pdf>

⁵⁵ Carcedo A. (Coord.), *No olvidamos ni aceptamos: Femicidio en Centroamérica 2000-2006*, CEFEMINA Feminist Centre for Information and Action, San José, Costa Rica, 2010; Toledo P., "The drug-war femicides / Femicidios de la guerra contra las drogas", *The Project Syndicate*, 9

inadequate or no investigation, has a more severe effect on femicides that occur "in the public life" - such as for example, in the *Cotton Field* case- in which the women's bodies are often found in the public space, and are apparently committed by individuals unknown to the victim. In these cases, the investigation is more complex than when it involves a woman that is murdered in her house or by people in her immediate environment, when the perpetrator is usually known by the victim and is often identified by family members or friends, or he even turns himself in to the authorities, facilitating the investigation.

In Argentina, also, there is some confusion in judges regarding the use of the aggravating circumstances related to femicide, in particular, when it is an intimate-partner femicide. While some judgments combine the aggravations of No. 1 (intimate-partner killing) and No. 11 (gender-based violence) of Article 80 in cases where there is evidence of violence exercised previously by the perpetrator against the victim⁵⁶, others only use the aggravation foreseen in No. 11⁵⁷. These two different aggravating circumstances create some level of confusion regarding, for instance, if when there is no evidence of previous violence, is it possible to sustain that homicides committed by a man against a woman that is or has been his partner can be considered to be committed "owing to

August 2011, available at: <http://www.project-syndicate.org/commentary/the-drug-war-femicides>

⁵⁶ Oral Court of Corrientes, Case No. 97877/13 "Sosa García Adrián Walter Edgardo p/sup. Lesiones graves calificadas. Vic. Elizabeth Antonia Verón", judgment of 08/08/2013. Fourth Chamber, Salta, Case No. 2337/14, "Salva, Horacio Perfecto por los delitos de homicidio en grado de tentativa, lesiones agravadas por el vínculo y amenazas con arma en concurso real", judgment of 26/05/2014.

⁵⁷ For example, Judgment No. 15/2014 of 4 July 2014 of the First District Criminal Court Chamber of Catamarca; Pre-trial detention order of 17 February 2014, of the Court of Guarantee No. 4 of Mar del Plata, in Case No. 876-15 for attempted femicide.

gender-based violence". Considering the definition of violence against women already referred to, the answer is yes. But while it is possible that these cases are aggravated simply through No. 1 of Article 80, it is important to create visibility for the gender elements that are nearly always present in these crimes⁵⁸, which is why they constitute manifestations of violence against women.

Justifying the differences between the various provisions introduced into the Criminal Code due to this reform, Argentinian case-law and doctrine encompass distinctions, often based on parliamentary debates, which contribute little to understanding the complexity of femicide and violence against women. In this way, by understanding that "femicide" is criminalised in No. 11, it is considered, paradoxically, that "homicides due to gender hate" committed against women would not be femicides or, in other words, that they do not incorporate gender-based violence.

Despite the diversity of criteria for applying one or the other aggravation, these judgments show that the criminalisation of femicide is endorsed by the judiciary, especially in relation to violence in partner relationships. This does not mean, however, that these judgments prove an in-depth understanding of this phenomenon: even certain expressions implicitly make women responsible for the violence that they suffer⁵⁹, or consider that they are

"unhealthy relationships"⁶⁰. These prejudices may not be so significant in cases of femicide, but they most definitely are in the numerous cases where the violence was not fatal.

5. Final remarks.

The complexity and diversity of elements present in the laws that criminalise femicide/feminicide in the various Latin American countries and the variety of contexts in which these crimes are committed, prevent general or simple conclusions regarding these new types of criminal offences.

As this text shows, the greater social, political and legal recognition of violence against women as a serious violation of human rights has been the basis on which the criminalisation of this gender-specific phenomenon is founded as well as understanding the obligation of the States to act against this violence, which historically they justified. The criminalisation of femicide/feminicide, as well as other gender-specific criminal offences in diverse countries, allow for the express recognition at criminal level of the unneutral character of violence against women, a violence that affects women because they are women in patriarchal societies.

While these processes are specific to Latin American countries, it is interesting to consider the evolution in the Spanish legislation, where a general

⁵⁸ There may be some exceptions in cases when the death of a spouse, partner or girlfriend is committed in the context of an attack on a collective where the woman is not the motive but simply another victim, e.g. if a man kills his parents, parents-in-law, spouse and other family members in a context of violence initially directed at his parents. The reality, however, demonstrates that the majority of attacks on entire families (as in cases when the perpetrator kills the spouse and children and then commits suicide) constitute an expression of violence against women.

⁵⁹ For example, the judgment of 26 May 2014 of the Fourth Chamber in the Criminal Court of Salta, in Case CAM No. 2.337/14, states: "Both the accounts of Ms. R. and her children, and the accounts of the neighbours, clearly prove a

situation of family violence over a long time, which are validated by the records of family violence files (...) brought *ad effectum videndi et probandi*, which contain several exclusions from the home and coming within a certain distance (...), **which was increasingly aggravated over the years, mainly because of the indecision of the aforementioned woman to put an end to it**, for whatever reason" (Own highlighting).

⁶⁰ The Bill of Indictment of 25 November 2014 of the National Criminal Instruction Courthouse No. 13 of Buenos Aires, CCC 43587/2014 states: "(...) it does not seem to be wrong to conclude that to accredit femicide or feminicide (sic), it should be proven that the perpetrator and the victim, before the death, had had a relationship over time, although I repeat, more than just for a short time, **for this unhealthy relationship to materialise**" (Own highlighting).

aggravating circumstance was introduced in 2015, to punish crimes motivated by gender⁶¹. It could be argued that this provision, when applied to homicides of women, is also criminalising femicide/feminicide, as it was in the first judgment that introduced it in the conviction of a man who had killed his partner in 2017⁶².

It has also to be considered that, despite the intentions of the laws that criminalise femicide/feminicide, it seems that the legal definitions might difficult their application, or give rise to artificial distinctions that prevent the entire recognition of this phenomenon and the underpinning violence.

The challenges, thus, persist in femicide/feminicide's concrete formulation, the interpretation of its elements or even the general understanding of the phenomenon of violence against women by legal practitioners, becoming the main obstacles for its proper application. Most of the interpretation problems are the consequence of a criminal understanding of violence against women that tends to transform a social problem of male violence into individual acts, without understanding the specificities of structural violence against women⁶³.

⁶¹ It was introduced by Organic Law 1/2015 in article 22, 4^o of the Spanish Criminal Code, among other 'hate crime' aggravating circumstances.

⁶² Judgment of 20 January 2017 of the Second Section of the Provincial Audience of Oviedo.

⁶³ Bodelón E., *Violencia de género y la respuesta de los sistemas penales*, Editorial Didot, Buenos Aires, 2012, p. 353.

Structural violence encompasses the socio-cultural, economic and political systems that perpetuate or condone physical, sexual and psychological violence against women, as well as reducing their quality of life and preventing them from living life to the full (Galtung J., "Violence, Peace and Peace Research", *Journal of Peace Research*, Vol. 6, No. 3, 1969, pp. 167-191).

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