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CALL IT BY ITS NAME

A critical analysis of the legal framework for dealing with femicides in EU
law and its latest developments

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“Per Giulia e per tutte”¹

¹ The calls of protest that sounded through the streets of Italy in November 2023, during the demonstrations following the murder of Giulia Cecchettin by her former boyfriend, see: Theresa Beckmann, “The Global Femicide Epidemic,” *Global Issues*, January 18, 2024, <https://www.globalissues.org/news/2024/01/18/35771>.

ABSTRACT

Femicide cases are on the rise globally and within Europe, revealing significant shortcomings in current legal frameworks. This thesis critically examines mechanisms in the legal scope of the European Union for addressing gender-based violence, focusing specifically on the implications of the recently adopted Directive 2024/1385 and the EU's accession to the Istanbul Convention. Despite these advancements, the lack of a clear, harmonised definition of femicide within EU law and the constraints of EU competences in criminal law hinder effective prevention and prosecution of femicides. Through an interdisciplinary approach that combines jurisprudential analysis with feminist theoretical perspectives, this thesis argues for the necessity of a universal legal definition of femicide to enable consistency in protection, prevention, prosecution and data collection across member states. Key areas of investigation include the difficulties in creating a universal definition, current legal developments and their impacts and the limitations provided by EU competence regulations for the harmonisation of criminal law. By addressing these critical issues, this thesis aims to highlight the urgent need for legal reforms that better protect women from gender-based violence and ensure justice for victims, ultimately contributing to the broader goal of gender equality and the upholding of human rights for women within the EU.

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Lastly, I want to thank my mother – who taught me strength in the hope I will never need it.

TABLE OF ABBREVIATIONS

ACUNS	Academic Council on the United Nations System
CEDAW	Committee on the Elimination of All Forms of Discrimination against Women
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COVID-19	Coronavirus Disease 2019
DEVAW	Declaration on the Elimination of Violence Against Women
DROI	European Parliament Subcommittee on Human Rights
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EIGE	European Institute for Gender Equality
EU	European Union
FRA	European Union Agency for Fundamental Rights
GA	General Assembly
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence
LGBTQ+	Lesbian, gay, bisexual, trans, queer and
MEP	Member of the European Parliament
NGO	Non-Governmental Organisation
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UN WOMEN	United Nations Entity for Gender Equality and the Empowerment of Women
WHO	World Health Organization

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I. INTRODUCTION

When the term "femicide" is mentioned, the first association is often with Latin American, rather than with European countries.² However, this impression of a regionally limited problem is deceptive. Femicides are a global issue as the latest respective research brief by UNODC and UN Women³ shows: It is recording 89,000 intentional killings of women in 2022 with more than half of them being killed by family members or intimate partners.⁴ Compared to general homicide cases, this development is particularly dramatic: While the majority of homicide victims are male,⁵ women are disproportionately victims of gender-based killings, particularly by the people closest to them: their partners, ex-partners, family members or people in their community.⁶ And in contrast to the general decline in homicide figures, the number of femicides has risen continuously for the last twenty years.⁷

Although the most prominent reports of femicides tend to focus on countries in the global South,⁸ Europe is experiencing a shocking increase in the killings of women. Especially the COVID-19 pandemic and consequent lockdown restrictions led to a large increase of cases of violence against women in the EU⁹ and a drastic rise in the murders of women in multiple member states such as Greece, Slovenia, Germany and Italy.¹⁰

² Caused by high incidence rates, high media coverage as well as specific laws and policies, see "Exploring the data: The prevalence of gender-based violence in Latin America," Wilson Center, accessed July 5, 2024, <https://www.wilsoncenter.org/explore-gbv-data>.

³ UNODC and UN Women, *Gender related killings of women and girls (femicide/feminicide), Global estimates of female intimate partner/family-related homicides in 2022*, research brief, 2023, https://www.unodc.org/documents/data-and-analysis/briefs/Femicide_brief_2023.pdf.

⁴ *Ibid.*, 2f.

⁵ *Ibid.*, 3: 80% in 2022.

⁶ *Ibid.*

⁷ *Ibid.*, Preface; Beckmann, *supra* note 1.

⁸ Just one example are the many reports of the many extremely violent cases in Ciudad Juárez in Mexico, leading to international outrage and protests, see e.g. Amnesty International, *Ending the brutal cycle of violence against women in Ciudad Juárez and the city of Chihuahua*, AMR 41/011/2004, 2004, <https://www.amnesty.org/fr/wp-content/uploads/2021/09/amr410112004en.pdf>; Thomas Milz, "'Oase des Grauens': In der mexikanischen Grenzstadt Ciudad Juárez sterben und verschwinden seit dreissig Jahren Frauen und Mädchen," *Neue Zürcher Zeitung*, November 30, 2022, <https://www.nzz.ch/international/ciudad-juarez-welthauptstadt-der-frauenmorde-ld.1712398>; Lucia Melgar, "Labyrinth der Straflosigkeit: Frauenmorde in Ciudad Juárez und extreme Gewalt in Mexiko heute," *GENDER - Zeitschrift für Geschlecht, Kultur und Gesellschaft* 3, no. 2, (2012): 90-97.

⁹ EIGE, *The Covid-19 pandemic and intimate partner violence against women in the EU*, report, 2021, <https://eige.europa.eu/publications-resources/publications/covid-19-pandemic-and-intimate-partner-violence-against-women-eu>.

¹⁰ According to numbers from the independent EU-wide investigation by EDJNet and MIIR: Janine Louloudi et al., *The undeclared war on women in Europe, A systemic failure to prevent femicides, Part 3*, report, 2023, <https://miir.gr/en/the-undeclared-war-on-women-in-europe-part-3/>.

While it is difficult to obtain concrete figures,¹¹ the numbers that are available paint a shocking picture: 720 women were killed by their partner, ex-partner or family member in Europe in 2021.¹² In Germany, around every third day a woman dies from the hands of her spouse or former spouse: 155 women in 2023.¹³ Spain counted 103 femicides in 2023.¹⁴ In Vienna, Austria, in February 2024, 5 women were killed by men in a time span of 24 hours– as many as in all of 2023.¹⁵ In Italy already 44 intentional killings of women in the family and 24 by (ex-) partners have been registered in 2024 according to the *ministero dell'interno*¹⁶ – just to name a few numbers. At the same time, Women’s Rights NGOs criticise the spread of trivialising narratives regarding these cases, not only in the media but also in political contexts and jurisdiction.¹⁷

The recent accession of the EU to the *Council of Europe Convention on preventing and combating violence against women and domestic violence*¹⁸ represented a ray of hope regarding the fight against violence against women.¹⁹ Soon after, the European Commission presented the proposal for a directive on combating violence against women and domestic violence,²⁰ which sought to help with the implementation of the Istanbul Convention in the EU’s member states and fill still existing gaps.²¹ This Directive has now been adopted²², however the legislative procedure proved a rocky road, with member states raising concerns about the EU’s competence

¹¹ Due to a lack of comparable data in the EU, see “Gender Equality Index, Violence in European Union in 2023 edition,” EIGE, accessed July 5, 2023, <https://eige.europa.eu/gender-equality-index/2023/domain/violence>.

¹² Ibid.

¹³ “Femizide: wenn Gewalt gegen Frauen eskaliert,” Terre des femmes, accessed July 5, 2024, <https://frauenrechte.de/unsere-arbeit/haeusliche-und-sexualisierte-gewalt/hintergrundinformationen/femizide>; Federal Republic of Germany, Bundeskriminalamt, “Häusliche Gewalt im Jahr 2023 um 6,5 Prozent gestiegen,” press statement, June 7, 2024, https://www.bka.de/DE/Presse/Listenseite_Pressemitteilungen/2024/Presse2024/240607_PM_BLB_Hauesliche_Gewalt.html.

¹⁴ “Listado de feminicios y otros asesinatos de mujeres cometidos por hombres en España en 2023,” Femicidio.net, accessed July 5, 2023, <https://femicidio.net/listado-de-feminicios-y-otros-asesinatos-de-mujeres-cometidos-por-hombres-en-espana-en-2023/>.

¹⁵ Autonome Österreichische Frauenhäuser, “Fünf Femizide erschüttern Wien,” Presseinformation, February 24, 2024, <https://www.aoeff.at/index.php/presseaussendungen/692-pa-24-02-2024-fuenf-femizide-erschuettern-wien>.

¹⁶ Until June 30: Italian Republic, Ministero dell’interno, *Omicidi volontari*, report, July 1, 2024, 5, https://www.interno.gov.it/sites/default/files/2024-07/settimanale_omicidi_al_30_giugno_2024.pdf.

¹⁷ See e.g. Terre des femmes, supra note 13.

¹⁸ *Council of Europe Convention on preventing and combating violence against women and domestic violence*, opened for signature November 5, 2011, CETS No. 210 <https://rm.coe.int/168008482e> [hereinafter Istanbul Convention].

¹⁹ See e.g. European Women’s Lobby, “Historic decision of the Council on the EU accession to the Istanbul Convention,” Statement, June 2, 2023, <https://womenlobby.org/EUIstanbulConvention?lang=en>.

²⁰ European Commission, *Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence*, COM/2022/105 final, March 8, 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0105> (in the following: “proposal”).

²¹ Ibid., 3.

²² *Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence*, O.J. L, May 24, 2024, <http://data.europa.eu/eli/dir/2024/1385/oj>.

to adopt such legislative measures in the area of criminal law.²³ These concerns ultimately lead to a narrower scope of the directive – for many supporters of the proposed framework such as Women’s and Human Right’s NGOs very disappointingly.²⁴

To identify current gaps, this thesis seeks to analyse how legal measures in the scope of EU law, particularly these new developments, affect the protection of women from falling victim to femicides. It will analyse how the lack of a comprehensive femicide definition contributes to the insufficiency of legal action at different social levels and examine the possibility of harmonising member state law by introducing such a definition into criminal law at the EU level.

Therefore, the following research question will be central to this thesis: How do the shortcomings of EU law in preventing and prosecuting femicides, along with the impact of criminal law competences, affect the effectiveness of addressing gender-based violence in the EU?

In order to comprehensively address this question, several sub-questions will be explored:

- a) What are the current legal developments on gender-based violence against women in the EU and their implications and shortcomings regarding the persecution of femicides?
- b) What changes does the new EU Directive 2024/1385 introduce regarding the criminal prosecution of violence against women, specifically femicides?
- c) What are the arguments for a specific definition and criminal regulation regarding femicides in EU law?
- d) How do the limitations of the EU competences in criminal law affect the implementation of harmonised regulations across member states?

To answer these questions, the thesis will be structured as follows:

²³ Clara Bauer-Babef, “Netherlands side with conservative EU countries in split over rape definition,” *euractiv*, January 16, 2024, <https://www.euractiv.com/section/health-consumers/news/france-germany-netherlands-side-with-conservative-eu-countries-in-split-over-rape-definition/>.

²⁴ See e.g. Gabriela Galindo, “Why the EU’s gender justice bill leaves the most vulnerable behind,” *The Parliament*, March 4, 2024, <https://www.theparliamentmagazine.eu/news/article/ngos-warn-eu-gender-justice-bill-leaves-most-vulnerable-behind>; Amnesty Europe, “EU Directive on violence against women and domestic violence: Negotiators must act now to urgently adopt a robust text,” *Letters*, January 24, 2024, <https://www.amnesty.eu/news/eu-directive-on-violence-against-women-and-domestic-violence-negotiators-must-act-now-to-urgently-adopt-a-robust-text/>; European Women’s Lobby, “Shame on the German and French Governments for letting all women and girls down in Europe!,” Press release, January 23, 2024, <https://womenlobby.org/time-to-act?>.

The first chapter, **Methodology and Socio-Theoretical Background**, will outline the interdisciplinary approach employed, combining jurisprudential and empirical legal research with feminist theoretical perspectives to critically analyse the current legal frameworks. Additionally, it will explain the socio-theoretical background to the crime of femicide by examining the ecological model used to assess risk factors for femicide in society that is present in multiple non-criminal legal frameworks.

The next chapter, **Definitions** will provide a detailed examination of the terms “gender-based violence against women,” “femicide,” and “woman” as used within the scope of this thesis.

In the chapter **Existing Legal Framework Targeting Femicide** a thorough analysis of the legal provisions regarding the prevention, protection from or prosecution of femicides on an international level, in EU member states’ national law systems and in EU law will be provided with a particular focus on recent legislative developments by EU institutions. Each of these legal levels will be critically assessed regarding their shortcomings with a focus on revealing the legal uncertainties caused by the differing approaches of the member states, the lack of consideration for the need for far-reaching societal changes and the political disagreements in the EU regarding policies combating violence against women.

Lastly, in the chapter **Possibility of a Harmonised Definition Regarding Femicide in the EU** the need for tackling shortcomings in current frameworks by introducing a criminal femicide definition on EU level will be summarized and both the potential for a unified legal definition and the limitations posed by EU competence regulations for the harmonisation of criminal law will be explored, focusing on Article 83 (2) TFEU²⁵ and its interpretation. Additionally, the alternative option of improved and unified data collection regarding femicide cases will be examined, showing both the importance of such measures and the current inconsistencies with gathering statistics on the killings of women in the EU.

By providing a comprehensive analysis of these areas, this thesis aims to contribute to the ongoing discourse on gender-based violence and femicide, advocating for more effective legal frameworks and policies to protect women and ensure justice for victims across the European Union.

²⁵ *Treaty on the Functioning of the European Union*, Consolidated Version, O.J. C 326/47, October 26, 2012.

I. METHODOLOGY AND SOCIO-THEORETICAL BACKGROUND

For the following analysis, an interdisciplinary approach is necessary. The methodologies employed will be a combination of empirical and jurisprudential legal research and comparative legal analysis. Feminist jurisprudence is used as a critical perspective to analyse the current legal landscape. This chapter will explain the feminist outlook that will be used (1.) and the need for an interdisciplinary approach and the sociological background (2.) crucial to understanding current policies dealing with femicides.

1. Feminist legal theory and the role of criminal law in transforming patriarchal structures

For the analysis of the current international, national and EU frameworks this thesis will employ perspectives of feminist legal theory. There are different outlooks on the reasons for violent crimes against women and the role criminal law can or should play in the fight against them in leading feminist theories. At this point, only a superficial overview of the different streams and developments within feminist legal theories is possible. Nevertheless, the considerations on which the basic premise of this thesis - the need for a legal definition of femicide - is based, should be outlined.

Seeing that historically, laws more often than not were used as a tool for enabling and upkeeping social inequalities rather than fighting them, it is not surprising that within feminist theories the construct of law itself is often viewed critically:²⁶ While in the past the fight for women's rights mostly concentrated on reforming existing law, and changing legal differences between the sexes, from the 1980s onward many feminists have grown critical of the notion of equal treatment and its sameness-approach towards women and men.²⁷ Instead, radical feminist scholars like Catherine MacKinnon have resorted to questioning the underlying causes of inequality and the hierarchical patriarchal structures that create relationships of power between genders.²⁸

²⁶ See Juliet A. Williams, "Feminist Jurisprudence," In *Oxford Handbook of Feminist Theory*, ed. Lisa Ditsch and Mary Hawkesworth (Oxford: Oxford University Press, 2016), 247f.

²⁷ *Ibid.*, 249f.

²⁸ E.g. Catherine MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987).

At the same time, the study of masculinities and how social ideas of male behaviour contribute to violent behaviour has evolved during the last decades, stressing that male dominance and social understandings of masculinity as the “norm” cannot be tackled without understanding men as gendered.²⁹ Therefore in feminist jurisprudence it must not only be asked how laws fail to take the experiences and needs into account that predominantly affect women in society (“the woman question”) but also how law is tailored to male experiences (“the man question”).³⁰ At the same time, legal structures can be seen as enforcing societal notions of masculinity and influencing a social climate that prevents men from showing emotional vulnerability³¹ which in turn can encourage aggressive behaviour.³² Both masculinity and femininity therefore have to be seen as social constructions, both reflected and historically reinforced by law.³³

Meanwhile, feminist theories have evolved beyond the differentiation of either striving for equality or acknowledging inherent social differences due to power imbalances: Joan Scott warned already in 1988 that such an approach could lead to enforcing the binary construction of genders even further.³⁴ Many now take differentiated approaches to feminist legal theory, such as the one propagated by Judith A. Baer, arguing that neither reformist nor radical feminist theories are sufficient alone but must be applied to law as is appropriate.³⁵ A similar approach can be found in the work of legal scholar Patricia Williams: She argues for maintaining rights to empower disadvantaged groups while questioning the role of law in maintaining the privileges and exclusions in society and recognizing the need to address systemic inequalities.³⁶

Patriarchy, as “*the ordering of society under which political, economic, legal and social standards are set by, and fixed in the interests of, men*”³⁷ affects not only individual behaviours, but societal structures and institutions handling of gender biases and neglecting of the voices

²⁹ Williams, *supra* note 26, at 255.

³⁰ Nancy Dowd, *The Man Question: Male Subordination and Privilege* (New York: New York University Press, 2010), 57ff.

³¹ *Ibid.*

³² Elisabeth Malonda-Vidal et al., “Traditional Masculinity and Aggression in Adolescence: Its Relationship with Emotional Processes,” *International Journal of Environmental research and Public Health* (September 2021), 9802, <https://doi.org/10.3390/ijerph18189802>.

³³ Williams, *supra* note 26, at 255f.

³⁴ Joan Scott, “Deconstructing Equality-versus-Difference; or, the Uses of Poststructuralist Theory for Feminism,” *Feminist Studies* 14, no. 1 (Spring 1988): 47f.

³⁵ Judith A. Baer, “Feminist Theory and the Law,” In *The Oxford Handbook of Law and Politics*, ed. Gregory A. Caldeira, R. Daniel Kelemen and Keith E. Whittington (Oxford: Oxford University Press, 2008), 437-450.

³⁶ See Patricia Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991), 10f; Faisal Bhabha, “‘Islands of Empowerment’: Anti-Discrimination law and the question of racial emancipation,” *Windsor Yearbook of Access to Justice* 31 (2013): 66, 87.

³⁷ John G. Riddall, *Jurisprudence* (London: Butterworths, 1999), 272.

and realities of those “unequal”:³⁸ This means that discrimination does not stop at the door of police offices, courts or medical establishments. Because gender biases and patriarchal structures are deeply engrained in institutional power hierarchies, it is crucial to acknowledge that the reform of laws cannot be sufficient to achieve equality if the ones making and enforcing them are part of exactly the power dynamics the laws must seek to abolish.³⁹

When it comes to criminal law and crimes with an inherent gendered perspective like femicides, there are two crucial questions to be asked: On the one hand, why a gendered approach to some offences is needed, on the other hand there is disunity within feminist legal theories on the question of whether the penal system is the best way to approach them.

Feminist theorists like MacKinnon emphasise how women’s experiences are often overlooked and misrepresented by male-coined criminal law structures.⁴⁰ Especially when it comes to violent crimes against women, society and the criminal system tend to inadequately respond, ignore or trivialise women’s experiences.⁴¹ Consequently it is necessary to reform the criminal justice system to include women’s experiences, address gender biases and inequalities and ensure gender-sensitive approaches to the investigating and sentencing of perpetrators as well as protection measures for victims. Advocates of the feminist movements emphasising the need for such expansions of criminal law are also often calling for harsher sentences for perpetrators.⁴² In regards to femicides, it is criticised how especially the killings of women in the intimate or family sphere are often subject to remarkably mild sentencing.⁴³ Feminist and activist movements like this can be impactful, as could be seen in the context of the so-called #metoo movement, which contributed to reforms of criminal justice practices.⁴⁴ Opposed to these calls that are relying on the penal system, there is also feminist voices arguing that the traditional justice system fails to take root causes of violence into account and perpetuates

³⁸ Celeste Montoya, “Institutions,” in *Oxford Handbook of Feminist Theory*, ed. Lisa Ditsch and Mary Hawkesworth (Oxford: Oxford University Press, 2016), 367f; Catherine MacKinnon, *Women’s Lives, Men’s Laws* (Boston: Harvard University Press, 2005), 59.

³⁹ Catherine MacKinnon, *Women’s Lives, Men’s Laws*, 59f.

⁴⁰ *Ibid.*, 184 ff.

⁴¹ *Ibid.*, 185; Loraine Gelsthorpe, “Feminist Perspectives on Gender and Crime: making women count,” *Criminal Justice Matters* 53 (Autumn 2003): 8.

⁴² In the US the term “Carceral feminism” was introduced to describe this perspective: see Elizabeth Bernstein, “Military Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns,” *Journal of Women in Culture and Society* 36, no.1 (2010): 46.

⁴³ Myrna Dawson, “Punishing femicide: Criminal justice responses to the killing of women over four decades,” *Current Sociology* 64, no.7 (November 2016): 1011.

⁴⁴ Tatjana Hörle, “Evaluating #MeToo: The Perspective of Criminal Law Theory,” *German Law Journal* 22 (2023): 845.

systemic inequalities.⁴⁵ “Abolitionist feminism” therefore advocates for alternative solutions focused on community-based support, transformative justice⁴⁶, and addressing social inequalities rather than individual punishment.⁴⁷ This theory serves as a reminder that crimes against women have structural causes that cannot be simplified by only focusing at individual perpetrators and ignoring societal responsibility.⁴⁸ While it can be rightfully questioned whether criminal law is the most effective means of preventing violent crimes against women, it must however be stressed that the change of criminal law measures in a society built around a legal system as such can function as one way of introducing social change and break up existing structures.⁴⁹ This discussion cannot be resolved at this point as it showcases the limits of this study: The perspective of this thesis will focus on the investigation of current shortcomings and the possibility of introducing a specific definition of femicide within the realm of criminal law on EU level – as one way to counter current shortcomings - without disregarding the need for the structural change of society.

This thesis therefore assumes that while law is constructed to reflect societal realities, that it mostly does so for male-biased realities,⁵⁰ since Western societal structures are inherently patriarchal,⁵¹ which inevitably manifests itself in legal structures.⁵² Legal systems must therefore take into account the crimes women disproportionately often fall victim to and design laws that tackle these specifically. Gender justice cannot be achieved without changing a legal system that is inherently designed by and for men and therefore makes it more likely for men’s claims to be heard than women’s.⁵³ This means the necessity to question whether laws are

⁴⁵ Angela Davis, *Are Prisons Obsolete?* (New York: Seven Stories Press, 2003), 106f; Anna Terwiel, “What is Carceral Feminism,” *Political Theory* 48, no. 4 (2020): 422, 431.

⁴⁶ Involving community work to hold perpetrators accountable and address the causes for violence: Terwiel, “What is Carceral Feminism,” 422.

⁴⁷ *Ibid.*, 427f.

⁴⁸ See the concept of structural violence: Johan Galtung, “Violence, Peace and Peace Research,” *Journal of Peace Research* 6, no. 3 (1969): 171.

⁴⁹ See also Catherine MacKinnon, “Rape Redefined,” *Harvard Law & Policy Review* 10 (2016): 477 (“*The real point of law is not incarceration or damage awards anyway but voluntary compliance, otherwise known as legal socialization or education*”); similarly Terwiel, *supra* note 45, at 423f.

⁵⁰ Judith A Baer, “Feminist Theory and the Law,” In *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008), 448.

⁵¹ Marceline Naudi et al., *EU Policy Brief on Femicide Prevention, FEM-United Project*, EU policy brief, 2022, 19ff, https://www.ifes.fau.de/files/2022/12/FEM-UnitED_EU-Policy-Brief-FINAL.pdf; Kelly A. Train, “Patriarchy and the ‘Other’ in the Western imagination: Honour killings and violence against women,” *International Journal of Child, Youth and Family Studies* 12, no.1 (Spring 2021): 143 – 157.

⁵² E.g. Oluwabunmi Anjolaoluwa Adaramola, “The Gender Influence in Law, Legal Concepts and Judicial Reasoning: Assessing its Contribution to Denying the Reasonable Person in English Law from Feminist Perspectives,” *Journal of Intersectional Social Justice* (Summer 2022): 3f, <https://eprints.whiterose.ac.uk/197067/1/3gnss89wikg2fhirs9pcmn5df6978p7b.pdf>.

⁵³ Accordingly: Eleanor Gordon, “Justice and Gender,” in *Gender and Security Toolkit* (Geneva: DCAF, OSCE/ODIHR, UN Women, 2019), 13, <https://www.osce.org/files/f/documents/8/9/442525.pdf>.

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designed to only reflect male realities, to reform them where appropriate to adapt to women's needs and hold both individuals and institutions accountable.

At the same time, legal approaches to combat femicides have to be integrated into a broader social justice approach to effectively address its underlying causes. The following paragraph will therefore introduce a socio-analytical tool for assessing the underlying causes of femicides and examining policies based on their suitability to tackle social risk factors for femicides.

2. The Need for an Interdisciplinary Approach and Socio-theoretical background

In the interest of this thesis, the legal frameworks analysed can be divided into two categories: The approaches that explicitly deal with femicide as a distinct criminal regulation, and the non-criminal laws that focus on different strategies for prevention and protection. While this thesis investigates a criminal definition of femicide, it acknowledges that the underlying issues and causes are social in nature. Defining femicide as a distinct crime is essential to give visibility to the gender-specific nature of these crimes and the systemic discrimination women face within a criminal law system.⁵⁴ However, criminal law alone cannot be sufficient to change systemic discrimination structures. For both prosecution and prevention measures against femicides, it is crucial to understand their social causes.⁵⁵ Therefore, also the non-criminal laws that directly or indirectly refer to femicides will be analysed in the following.

As established, crimes like the killings of women have to be treated as the result of societal oppression mechanisms that continue to dehumanise women and enforce power imbalances.⁵⁶ Without addressing structural inequalities that allow men to hold positions of power over women and treat them as possessions or objects of domination, eradicating the legitimization of violence against women in many societies is impossible.⁵⁷ It is therefore necessary to consider cultural particularities when assessing femicides as these influence public policies and state actions.⁵⁸ Different types of violence may be endorsed by specific cultural and social norms: Traditional ideologies asserting male authority over women can render women susceptible to intimate partner violence, as they are perceived as permissible targets for control or discipline.⁵⁹ European countries are formed by various cultural specificities that perpetuate

⁵⁴ EIGE, *Femicide: Shedding light on the 'invisible victims'*, policy brief, 2023,

<https://eige.europa.eu/publications-resources/publications/femicide-shedding-light-invisible-victims>.

⁵⁵ Claire Laurent et al., *Femicide: A Global Issue that Demands Action*, Volume II (Vienna: ACUNS, 2014), 61.

⁵⁶ Christiana Kouta et al., "Understanding and preventing femicide using a cultural and ecological approach," in *Femicide across Europe. Theory, research and prevention*, ed. Shalva Weil, Consuelo Corradi and Marceline Naudi (Bristol: Bristol University Press, 2018), 56f; UN GA, *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo*, UN Doc. A/HRC/20/16, May 23, 2012, 4f.

⁵⁷ OAS, *Inter-American Model Law on the Prevention, Punishment and Eradication of the Gender-Related Killing of Women and Girls (Femicide/Feminicide)*, Report, 2018, Prologue, <https://www.oas.org/en/mesecvi/docs/LeyModeloFemicidio-EN.pdf>; Naudi et al., supra note 51, at 26.

⁵⁸ Kouta et al., supra note 56.

⁵⁹ Ibid.; WHO, "Changing cultural and social norms that support violence," in *Violence prevention – the evidence*, briefing series, 2009, 4, <https://iris.who.int/handle/10665/44147>.

misogynistic views, power relationships and subordination structures that form complex realities of violence.⁶⁰

The UN recommends taking a multidisciplinary approach to femicides by illuminating different social levels.⁶¹ The importance of this multicausal perspective when it comes to tackling these crimes, is reflected by the so-called ecological model⁶², that is used in social sciences to analyse the structural issues underlying femicide.⁶³ This model recognises that violence against women is influenced by multiple levels and is now increasingly integrated into policy developments for violence against women such as the *Latin American Model Protocol for the investigation of gender-related killings of women (femicide/feminicide)*.⁶⁴ Also newer legal developments focused on different forms of violence against women emphasise a multicausal approach as can be seen in the new EU Directive 2024/1385.⁶⁵ An extensive description of the model and the associated risk factors in regards to femicide can be found in an European Parliament Briefing from 2021 that was requested by the Subcommittee on Human Rights (DROI) and that already defines femicide as “*the end-result of combined risk factors existing at the level of the individual, interpersonal relations, community and society.*”⁶⁶

Risk factors can always be assessed from both perpetrator and victim perspective: On the individual level this includes for example the violation of a protection order issued because of previous cases of domestic violence or mental health problems on the perpetrators side.⁶⁷ Therefore, stricter enforcement and investigation measures in cases of domestic violence can help to reduce this risk. For victims, heightened risk factors can be a pregnancy during a violent relationship or being a rape victim - an emphasis for protection policies must therefore be on support systems, shelters and lowering the barriers for seeking help.⁶⁸

⁶⁰ Kouta et al., supra note 56.

⁶¹ UN GA, *Resolution 65/228, Strengthening crime prevention and criminal justice responses to violence against women*, UN Doc. A/RES/65/228, 2011, 11, 17; UN GA, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Morris Tidball-Binz*, UN Doc. A/78/254, 19 July 28, 2023, para. 84.

⁶² Sometimes also socio-ecological model or feminist ecological model.

⁶³ First used to analyse intimate femicides: Karen Stout, “Intimate Femicide: An Ecological Analysis,” *The Journal of Sociology & Social Welfare* 19, no. 3 (1992): Article 3.

⁶⁴ UN Women and OHCHR, *Latin American Model Protocol for the investigation of gender-related killings of women (femicide/feminicide)*, 2014, 40, <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2014/LatinAmericanProtocolForInvestigationOfFemicide.pdf>.

⁶⁵ Can be seen e.g. in Introductory Section (78) or Article 34.

⁶⁶ Consuelo Corradi, *Femicide, its causes and recent trends: What do we know?*, European Parliament Briefing, 2021, 8, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/653655/EXPO_BRI\(2021\)653655_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/653655/EXPO_BRI(2021)653655_EN.pdf).

⁶⁷ *Ibid.*, 9.

⁶⁸ *Ibid.*

The interpersonal Level examines close relationships of victims and perpetrators:⁶⁹ Risk factors observed on this level include being subjected to witnessing domestic violence in the family and particularly often previous acts of violence from the perpetrator against the victim, so again, the prevention of domestic violence can decrease the risk of femicides.⁷⁰

At community level, it is mostly the upholding of gender roles and biases like ‘masculine’ aggression or the devaluation of women that are posing the highest risk, combined with isolation in the community due to for example migration.⁷¹ Particularly vulnerable groups are therefore in need of protection services in their community, along with the specialised training of medical staff, social workers and police officers to recognise risk patterns and offer help services.

The Societal Level addresses the broader societal factors that are causal for a social climate in which violence against women is tolerated or even encouraged: It includes social norms and cultural beliefs, patriarchal structures, legal policies, the level of gender equality of women in a state and if other forms of violence against women occur.⁷² Specifically factors like perceived impunity, low access to justice or low criminal prosecution rates can increase the risk of femicides occurring and the vulnerability of victims.⁷³ Interventions at this level aim to change laws and policies, reduce gender inequality, and challenge cultural norms that support violence. Conversely, the cultural influences shaping these levels form the states’ responses and public policies regarding femicides.⁷⁴

Evidently, the necessity for societal change prevalent in feminist theory can also be seen as reflected in the social causes of femicide. While impacts of all of the discussed levels will be reflected in the frameworks and policies examined in the following, this thesis will focus mainly on the gaps regarding reforms at the societal level. This is where patriarchal structures are most visible, and legal reforms need to be introduced.

⁶⁹ Corradi, *supra* note 66, at 9.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Kouta et al., *supra* note 56, at 54.

⁷³ Corradi, *supra* note 66, at 9; EIGE, *Improving legal responses to counter femicide in the European Union: Perspectives from victims and professionals*, Report, 2023, https://eige.europa.eu/publications-resources/publications/improving-legal-responses-counter-femicide-european-union-perspectives-victims-and-professionals?language_content_entity=en.

⁷⁴ Kouta et al., *supra* note 56, at 53.

II. DEFINITIONS

Given the multifaceted nature of the terms the following legal analysis is based on, their definitions are frequently subject to various interpretations within both legal and societal spheres. Consequently, the focus of this thesis makes the establishment of definitions for these terms necessary. This section therefore intends to have a look at existing definitions for the terms upon which subsequent chapters are based: “Gender-based Violence” (1.), “Femicide” (2.) and “Woman” (3.). These considerations and definitions however are not meant to assert universal validity but rather aspire to reflect the current state of the discourse.

1. Gender-based Violence against Women

“Violence against Women” is the term most used in the later discussed legal framework, both international, at EU and national level. It is usually being interpreted to include femicide as the most extreme form of violence against women⁷⁵ or the exacerbation of violence against women that has already been going on for some time.⁷⁶ “Violence against Women” is understood to be equivalent to the term “gender-based violence”.⁷⁷ Both terms are however not referring to all forms of violence against women and girls, but to gender-specific violence, which is violence perpetrated because of a person's biological or social gender or that affects a gender disproportionately.⁷⁸ Violence against women is a human rights violation as per the Istanbul Convention⁷⁹ and regards among others the right to health, the right to be free from torture, inhumane and degrading treatment and the right to life.⁸⁰

The main aspect of the definition of gender-based violence is the causal connection of gender and the act of violence: violence directed against a woman *because* she is a woman. This can either mean an act of violence that directly targets a person’s gender or sex characteristics –

⁷⁵ ECtHR, “Gender-based violence and femicide in the Court’s case-law,” Speech by Robert Spano, Sarajevo, March 25, 2022, https://www.echr.coe.int/documents/d/echr/Speech_20220325_Spano_Conference_Sarajevo_ENG; UNODC and UN Women, supra note 3, at Preface.

⁷⁶ Corradi, supra note 66, at 1 (“*Femicide is very often the last act in an abusive relationship and is therefore included in the overarching category of VAWG*”); EEAS, *EU Guidelines on Violence against women and girls and combating all forms of discrimination against them*, 2018, 10, https://www.eeas.europa.eu/sites/default/files/03_hr_guidelines_discrimination_en_0.pdf.

⁷⁷ Jara Streuer, *Feminizid: Diskursbegriff, Rechtsbegriff, Völkerstrafrechtsbegriff*, Schriften zum Internationalen und Europäischen Strafrecht, Band 68 (Baden-Baden: Nomos, 2023), 40f.

⁷⁸ Ibid.; *Istanbul Convention*, Art. 3d (“*violence directed against a woman because she is a woman or which disproportionately affects women*”); “Geschlechtsspezifische Gewalt,” Deutsches Institut für Menschenrechte, accessed May 25, 2024, <https://www.institut-fuer-menschenrechte.de/themen/geschlechtsspezifische-gewalt>.

⁷⁹ *Istanbul Convention*, Preamble.

⁸⁰ Susan T. Fried, “Violence against Women, Health and Human Rights,” *Violence, Health, and Human Rights* 6, no. 2 (December 2003): 96; “Violence against Women,” Amnesty International UK, accessed May 25, 2024, <https://www.amnesty.org.uk/violence-against-women>.

such as in cases of female genital mutilation, abortions or sexualised violence – or violence that affects a gender disproportionately.⁸¹ In the latter cases, it is essential to take the social causes for violence against women into account. Violence directed at women arises from and contributes to the existing inequality between genders.⁸² This can specifically be seen in the prevalence of sexualised and domestic violence, which predominantly affects women, although not exclusively.⁸³ Sexualised violence is therefore to be considered a sub-area of gender-based violence, although it is sometimes incorrectly equated.⁸⁴ Although in most instances the term "gender-based violence" is used to refer exclusively to violence against women, because most of its forms are mainly directed against women, it is important to bear in mind gender-based violence also exists against non-binary people, men and boys.⁸⁵

2. Femicide

Since the argument of this thesis evolves around the lack of a definition of the term "femicide" on EU level, it is imperative to set a basis of understanding of the term and why it requires a definition early on in this thesis. The lack of a clear definition of "femicide" is regularly causing disputes in legal, social and even medical discourse and makes it difficult to identify both the cases and the underlying issues, leading to difficulties in taking appropriate legal action to both prevent and prosecute these cases.⁸⁶ To address this, a comprehensive definition based on in-depth analysis of social, legal and political circumstances is needed. The following paragraph, however, is merely an attempt to formulate a preliminary definition based on existing definitional approaches.

The terms femicide (or also: feminicide) have been used to analyse and protest violent acts against women since the 1970s with the aim of tackling high rates of the killings of women around the world and improve legislative acts for their prevention and prosecution.⁸⁷ There has been a long development through different disciplines from the first definitions of femicide:

⁸¹ WHO, "Promoting gender equality to prevent violence against women," in *Violence prevention – the evidence briefing series*, 2009, 81, https://iris.who.int/bitstream/handle/10665/44098/9789241597883_eng.pdf.

⁸² Ibid.

⁸³ "Geschlechtsspezifische Gewalt," Deutsches Institut für Menschenrechte, accessed May 25, 2024, <https://www.institut-fuer-menschenrechte.de/themen/geschlechtsspezifische-gewalt>; Amnesty International UK, supra note 80.

⁸⁴ Streuer, supra note 77.

⁸⁵ Ibid.

⁸⁶ Magdalena Grzyb, Marceline Naudi, and Chaima Marcuello-Servós, "Femicide definitions," in *Femicide across Europe. Theory, research and prevention*, ed. Shalva Weil, Consuelo Corradi, and Marceline Naudi (Bristol: Bristol University Press, 2018), 21ff; Rossana Cecchi et al., "A medico-legal definition of femicide," *Legal medicine* 59 (November 2022): 102101; "Femicide: Name it, count it, end it!," EIGE, accessed May 25, 2024, <https://eige.europa.eu/print/news/femicide-name-it-count-it-end-it>.

⁸⁷ Cecchi et al., "A medico-legal definition of femicide," 1.

They reach from simply “*the killing of a woman*”⁸⁸ to definitions not only involving extensive legal, sociological or criminological studies, but also research from disciplines such as gynaecology, epidemiology or economy.⁸⁹ Often cited as the first person to use the term publicly is Diana Russell, who referred to femicide at the International Tribunal on Crimes against Women in Brussels in 1976,⁹⁰ defining it implicitly as a hate killing of females by males but later redefining it as “*the killing of females by males because they are female*”,⁹¹ a definition that is still very commonly used.⁹² Femicide as a concept shares a connection with terms like “Gendercide” or “gendericide” which were introduced by Mary Anne Warren in 1985, meaning the systematic elimination of individuals belonging to a specific sex.⁹³ The term then became widespread from the early 1990s.⁹⁴

Since academics, activists and the public all over the world have become more aware of the phenomenon, considerations about the definition of femicides have become increasingly complex, evolving around the particularly affected societal groups, data collection and research, better prevention mechanisms and appropriate prosecution.⁹⁵ Underlying all of this is the question, how and if states are complicit in the issue by contributing to it through inadequate measures.⁹⁶

So far, there is no universally valid legal definition of femicide as a separate criminal offense in the international legal community. For a better understanding of the following analysis, however, a brief overview of the definitions developed to date should be provided:

⁸⁸ When the term was first used it did not yet refer to a criminal offence but a “social death”: John Corry, *A satirical view of London at the commencement of the nineteenth century*, (Oxford: Kearsley, 1801); Jara Streuer, “Worüber wir sprechen, wenn wir über Femizide sprechen. Eine Annäherung,” *Gender & Crime* 54 (2022): 146.

⁸⁹ Myrna Dawson et al., “Femicide,” In *Oxford Bibliographies in Criminology*, ed. Beth M. Huebner, (Oxford: Oxford University Press, 2019), Introduction, <https://doi.org/10.1093/OBO/9780195396607-0270>.

⁹⁰ Diana E.H. Russell, “Preface,” in *The Politics of Woman Killing*, ed. Jill Radford and Diana E.H. Russell, (New York: Twayne Publishers, 1992), 15; see Caroline L. Davidson, “Femicide as gender persecution,” *Harvard Journal of Law and Gender* 46, no. 2 (Summer 2023): 330f.

⁹¹ Davidson, “Femicide as gender persecution,” 330f.

⁹² E.g. by EIGE: “Femicide,” EIGE, accessed June 26, 2024, <https://eige.europa.eu/gender-based-violence/femicide>.

⁹³ Mary Anne Warren, *Gendercide: The Implications of Sex Selection* (New York: Rowman & Allanheld, 1985); Davidson, *supra* note 90, at 332.

⁹⁴ See e.g. the collection of essays dealing with femicide in Jill Radford and Diana E.H. Russell, ed., *The Politics of Woman Killing*; Jane Caputi and Diana Russell, “Femicide: Speaking the Unspeakable,” in *50 Years of Ms.*, ed. Katherine Spillar (New York: Alfred A. Knopf, 2023), 188-192.

⁹⁵ Dawson et al., *supra* note 89; See e.g. WHO, *Understanding and addressing violence against women, Femicide*, publication, 2012, http://apps.who.int/iris/bitstream/10665/77421/1/WHO_RHR_12.38_eng.pdf.

⁹⁶ Dawson, *supra* note 89.

Femicides are often categorised according to the relationship between victim and perpetrator.⁹⁷ Most commonly referred to as femicides are killings by a current or former intimate partner (“Intimate femicides”), which are to be distinguished from non-intimate femicides, committed by perpetrators without a personal relationship to the victim such as the conflict-related killings of women or the killings of women because of their sexuality.⁹⁸ In some contexts, non-intimate femicides can also be referred to as “femigenocides”, when it comes to the categorical killing of women.⁹⁹ Another category of femicides are cases in the realm of family relations or other known perpetrators like employers, teachers or priests, such as so called “honour” killings.¹⁰⁰ The latter are topic to critical discussion from a feminist viewpoint, both in terms of terminology and the notion of culture apparent in approaches to these crimes.¹⁰¹

This discourse on a definition of which specific crimes are associated with the term femicide, which previously took place primarily in sociological and feminist-theoretical circles, has gained legal legitimacy at an international level since 2012, particularly through the Vienna Declaration on Femicide. It lists 11 different forms of femicide, which help to provide a differentiated picture of the crimes associated with the term:

“... femicide is the killing of women and girls because of their gender, which can take the form of, inter alia: (1) the murder of women as a result of intimate partner violence; (2) the torture and misogynist slaying of women (3) killing of women and girls in the name of “honour”; (5) targeted killing of women and girls in the context of armed conflict; (5) dowry-related killings of women; (6) killing of women and girls because of their sexual orientation and gender identity; (7) the killing of aboriginal and indigenous women and girls because of their gender; (8) female infanticide and gender-based sex selection foeticide; (9)

⁹⁷ E.g. Shelah S. Bloom, *Violence against women and girls: A compendium of monitoring and evaluation indicators*, Manual, 2008, 178, <https://www.endvawnow.org/uploads/browser/files/M&E%20Indicators-MEASURE-2008.pdf>.

⁹⁸ Myrna Dawson and Michelle Carrigan, “Identifying femicide locally and globally: Understanding the utility of sex/gender-related motives and indicators,” *Current Sociology* 69, no. 5 (September 2021): 686.

⁹⁹ Rita Segado and Livia Vitenti, “Femigenocide,” in *The Routledge International Handbook on Femicide and Feminicide*, ed. Myrna Dawson and Saide Mobayed Vega (London: Routledge, 2023), <https://doi.org/10.4324/9781003202332>.

¹⁰⁰ See: EIGE, *Femicide: a classification system*, Report, 2021, https://eige.europa.eu/sites/default/files/documents/mh0321355enn_002.pdf; CoE Committee on Equal Opportunities for Women and Men, *So-called ‘honour-crimes’*, Report, Doc. 9720, March 7, 2003, <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10068&lang=EN>.

¹⁰¹ See e.g. Shahrzad Mojab and Amir Hassanpour, “The Politics and Culture of ‘Honour Killing’: The Murder of Fadime Şahindal,” *Atlantis: A Women’s Studies Journal*, Feminist Knowledge Network Special Issue 1 (January 2003): 56-70; Polly Harrar, “Who’s policing whom? A look into the policing responses to harmful practices and the role of civic society,” *Journal of Global Faultlines* 8, no. 1 (Spring 2021): 81-90; Train, *supra* note 51.

genital mutilation related deaths; (10) accusations of witchcraft; and (11) other femicides connected with gangs, organized crime, drug dealers, human trafficking and the proliferation of small arms,”¹⁰²

UN Special Rapporteur Rashida Manjoo made the very important distinction between direct and indirect femicides:

*“The killings can be active or direct, with defined perpetrators, but they can also be passive or indirect. The direct category includes: killings as a result of intimate-partner violence; sorcery/witchcraft-related killings; honour-related killings; armed conflict-related killings; dowry-related killings; gender identity- and sexual orientation-related killings; and ethnic- and indigenous identity-related killings. The indirect category includes: deaths due to poorly conducted or clandestine abortions; maternal mortality; deaths from harmful practices; deaths linked to human trafficking, drug dealing, organized crime and gang-related activities; the death of girls or women from simple neglect, through starvation or illtreatment; and deliberate acts or omissions by the State.”*¹⁰³

The WHO distinguishes femicide according to killings in the name of “honour”, dowry-related femicide, intimate and non-intimate femicide and defines them as follows:

*“Femicide is generally understood to involve intentional murder of women because they are women, but broader definitions include any killings of women or girls. (...) Femicide is usually perpetrated by men, but sometimes female family members may be involved. Femicide differs from male homicide in specific ways. For example, most cases of femicide are committed by partners or ex-partners, and involve ongoing abuse in the home, threats or intimidation, sexual violence or situations where women have less power or fewer resources than their partner.”*¹⁰⁴

UN institutions most commonly use the broad definition “*the gender-related killing of women and girls*”.¹⁰⁵ Other approaches to a definition sometimes contain additional characteristics like: “*killings motivated by hatred and unequal power relations between men and women*”¹⁰⁶ or “*extreme violence of the physical, psychological, economic, and systemic kind perpetrated by*

¹⁰² UN ECOSOC, *Vienna Declaration on Femicide*, February 1, 2013, UN Doc. E/CN.15/2013/NGO/1.

¹⁰³ UN GA, *supra* note 56, at 5.

¹⁰⁴ WHO, *supra* note 95, at 1.

¹⁰⁵ E.g. UNODC and UN Women, *supra* note 3, at Preface.

¹⁰⁶ E.g. Dawson et al., *supra* note 89.

males against women because they are women"¹⁰⁷. According to the latter definition killings are the most extreme form of femicides, but not the only ones.

As a conclusion four main characteristics can be found that the understanding of the term "femicide" is mostly based on:

The first aspect most definitions have in common is some **reflection of unequal power relations between women and men** in society. This also includes the victim and perpetrator groups: Direct Victims of femicide (at least first degree) can only be women. What is to be understood by "women" is to be discussed in the next paragraph. Perpetrators are disproportionately often men¹⁰⁸ (perpetrator-victim relationship).

Secondly, femicides can be **both direct and indirect killings, active or passive**. Indirect killings can also involve death resulting from harmful practices, such as forced abortions or female genital mutilation (act of perpetration).

Thirdly, the overwhelming majority of definitions focus on the **causal connection**: the killing of a woman *because* she is a woman. According to the definition of gender-based violence this will be understood as being either connected to gender specific characteristics the crime is based on or a motivation that is associated with a characteristic that predominantly affects women (causal connection).

At last, in terms of the result of the offence, the majority of definitions presuppose the death of the victim, but some also include non-lethal violence (result).

Most definitions require the perpetrator's intent. Some also involve a **subjective element** in terms of motivation, usually being referred to as hatred, machismo or misogyny, although these characteristics relate to individual and not necessarily clear-cut motives.

¹⁰⁷ Fabio Piacenti and Paolo de Pasquali, "Femicide in Italy, between the years 2000–2012," *Italian Journal of Criminology* 8, no. 3 (2014): 181.

¹⁰⁸ Corradi, *supra* note 66, at 1f.

3. Woman

The regulation of femicide involves addressing the question of who constitutes a woman. One potential challenge in defining femicide is ensuring equal protection for all genders, including those who do not align with the traditional binary but still suffer from violence based on patriarchal structures.¹⁰⁹ There is critique of international instruments dealing only with women's rights, arguing that this reinforces a binary that is part of the underlying patriarchal causes.¹¹⁰ The interpretation of the term "woman" itself is a complex issue, involving considerations like biological sex characteristics, gender identity, or legal gender, which is in most cases constituted through assignment at birth.¹¹¹

Since the late 90s, there is multiple controversies surrounding the term and the question if there even should be a clear-cut definition of who is a woman according to feminist theory.¹¹² However, this development has not yet been reflected in international treaties or their application. Also the *United Nations Convention on the Elimination of All Forms of Discrimination against Women*¹¹³ as the most ratified Women's Rights treaty, does not include a definition of who constitutes a woman. However, in its General Recommendations that form the most important method of interpretation for the CEDAW Convention,¹¹⁴ the CEDAW Committee reflects a traditional binary understanding of gender and biological sex.¹¹⁵

¹⁰⁹ Government Offices of Sweden, *Patriarchal violence – an attack in human security: A broad survey of measures to combat patriarchal violence and oppression, particularly acts committed in the name of honour directed at women, homosexuals, bisexuals and transgender persons*, Report, 2006, 10ff, <https://www.government.se/contentassets/87a9c5e22af14395aff3411dbd197f58/patriarchal-violence---an-attack-on-human-security>.

¹¹⁰ E.g. Darren Rosenblum, "Unsex CEDAW, or What's Wrong With Women's Rights," *Columbia Journal of Gender and Law* 20, no. 2 (June 2011): 104.

¹¹¹ Julie A. Greenberg, "Defining Male and Female: Intersexuality and the Collision between Law and Biology," *Arizona Law Review* 41, no. 4 (1999): 309.

¹¹² Victoria Barker, "Definition and the Question of 'Woman'," *Hypatia* 12, no. 2 (1997): 185–215.

¹¹³ UN GA, *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature December 18, 1979, U.N.T.S. 1249, 13 [hereinafter CEDAW Convention].

¹¹⁴ "General Recommendations," UN Women, accessed June 26, 2024, <https://www.un.org/womenwatch/daw/cedaw/recommendations/index.html>.

¹¹⁵ See: CEDAW, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, December 16, 2010, CEDAW/C/GC/28, para. 4, 5; CEDAW, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, July 26, 2017, UN Doc. CEDAW/C/GC/35, para. 12; OHCHR, *Position paper on the definition of "woman" in international human rights treaties, in particular the Convention on the Elimination of All Forms of Discrimination Against Women, Special Rapporteur on violence against women and girls, Reem Alsalem*, Position paper, 2024, 2, <https://www.ohchr.org/sites/default/files/documents/issues/women/sr/statements/20240404-Statement-sr-vawg-cedaw-convention.pdf>.

Despite this binary perspective, some scholars argue that the term “woman” in CEDAW is also inclusive of non-binary individuals,¹¹⁶ arguing the compulsion to separate people into only two categories means everyone must be considered one or the other.¹¹⁷ Under this interpretation, preventing discrimination against “women” includes preventing violence against everyone but cisgender men. Seeing that patriarchal societal structures are a huge factor influencing the underlying causes of both the perpetrators of femicides and the states not preventing and prosecuting these crimes accordingly,¹¹⁸ there are good reasons for adopting such a broad definition to protect all individuals who fall victim to patriarchal violence.

The Istanbul Convention also seems to take a binary approach in its definition of gender, stating that violence against women as a result of inequalities and stereotypes is not the result of biological differences but “*the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men,*”¹¹⁹ however its Article 4 paragraph 3 that is obliging state parties to implement all measures in the convention without discrimination on grounds of sexual orientation or gender identity, is interpreted to cover “*groups of persons that do not correspond to what society has established as belonging to ‘male’ or ‘female’ categories*”¹²⁰ by the Convention’s Explanatory Report. This allows for a broader definition of the term “women” in European frameworks aligning with or based on the Istanbul Convention.

Still, there is no uniformity in international laws’ interpretation of which persons constitute victims of femicide. One approach to inclusivity is to incorporate gender-based homicides in laws alongside femicides as a specific criminal offence.¹²¹ This allows for a broader and more accurate depiction of gender-based violence, ensuring that all affected groups receive adequate protection, without taking away from the need to regulate femicides as a distinct category within gender-based violence with specific underlying social patterns and power imbalances.

¹¹⁶ Elise Meyer, “Designing Women: The Definition of ‘Woman’ in the Convention on the Elimination of All Forms of Discrimination against Women,” *Chicago Journal of International Law* 16, no. 2 (Winter 2016): 553-590 (Meyer argues for “*the definition of the term ‘woman’ as any person who is biologically, anatomically, and/or genetically female and/or who performs and/or identifies as a woman*”).

¹¹⁷ *Ibid.*, 590.

¹¹⁸ See Margaret Schmuhl, “Patriarchy and Varieties of Violence against Women: A Contextual Analysis” (PhD diss., City University of New York, 2017), 150f.

¹¹⁹ *Istanbul Convention*, Art. 3c.

¹²⁰ CoE, *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, November 5, 2011, CETS No. 210, para. 53, <https://rm.coe.int/1680a48903>.

¹²¹ As e.g. in the Belgian ‘Stop Femicide Law’: Kingdom of Belgium, *Loi sur la prévention et la lutte contre les féminicides, les homicides fondés sur le genre et les violences*, July 13, 2023, https://etaamb.openjustice.be/fr/loi-du-13-juillet-2023_n2023044133.html.

CALL IT BY ITS NAME

When the term “women” is used in the following, it refers to female persons regardless of age in accordance with the Istanbul Convention.¹²²

¹²² *Istanbul Convention*, Art. 3f.

III. EXISTING LEGAL FRAMEWORK TARGETING FEMICIDES

This chapter will analyse the existing legal framework targeting femicides either specifically or indirectly by using the term gender-based violence, that applies to EU institutions and its member states. To do so, it will examine the different levels of law in the realm of the EU and their relationship (1.), the international (2.) and national (3.) legal provisions, and lastly, the legal framework of the EU (4.) connecting to femicides directly or indirectly. This analysis will show the lack of distinct femicide definitions and concrete mechanisms in national laws in the EU, the fragmentation of provisions tackling violence against women across various international and EU instruments and regulatory areas and how new developments at the EU level fall short of their objectives.

1. Interplay between International Law, EU law and National Law

Before having a closer look at the existing femicide regulations, it is important to clarify the impacts and relation of the three legal levels to be analysed: International law, EU law and national law of the member states, and the impacts this interplay has on their effectiveness.

EU law is seen as “a new order of international law”¹²³ as it is also composed of separate treaties, but different in the aspect that it unfolds supranational effects: Decisive for the special nature of this effect is the principle of supremacy of EU law, which mandates that EU law takes precedence over national law in cases of conflict.¹²⁴ This ensures uniform application of EU legislation across member states, facilitated by the Court of Justice of the European Union (CJEU).¹²⁵ In order to allow this supremacy of EU law, under the principle of conferral the

¹²³ ECJ, Case 26/62, Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

¹²⁴ See Marcus Klamert, “Rationalizing Supremacy, Supremacy, effectiveness, and two standards of equality in EU law,” *Verfassungsblog* (October 2021), <https://verfassungsblog.de/rationalizing-supremacy/>.

¹²⁵ Matthias Ruffert, “EU Institutional Framework,” In *The Oxford Encyclopedia of EU Law*, ed. Sacha Garben and Laurence Gormley (Oxford: Oxford University Press, 2022), para. 21, <https://opil.ouplaw.com/display/10.1093/law-oeul/law-oeul-e45>.

member states limit their sovereign rights in certain selected fields and transfer competences to the EU thus mandating its institutions with the regulation of these fields.¹²⁶

As far as primary law is concerned, EU law invokes direct effect, allowing individuals to refer to EU law directly before national courts.¹²⁷ In terms of secondary law, the same is true for regulations that are directly applicable in the member states as long as they are sufficiently clear and precise.¹²⁸ Directives usually require transposition into national law before they take legal effect, but in certain cases, where this is necessary to protect the rights of individuals, the European Court of Justice (ECJ) stated they can also have direct (vertical) effect in its *Van Duyn v Home Office* judgment.¹²⁹ Also certain international agreements can impose direct (vertical) effect.¹³⁰ The requirement that national law must comply with EU law as set in directives and regulations fosters legal integration and harmonisation across member states. National courts play a critical role in this process by referring questions about EU law interpretation to the ECJ through the preliminary ruling procedure, ensuring consistency and coherence in the application of EU law.¹³¹

International law influences both EU and national legal systems. In monist systems, international treaties become part of national law automatically, while in dualist systems, such treaties require legislative incorporation.¹³² The EU as an international actor is usually not bound by international treaties directly, unless it enters into them with other states and international organisations as a separate party from its member states. In that case, the corresponding treaty becomes an integral part of EU law and binds not only the EU, but also takes supremacy over member state law.¹³³

¹²⁶ Art. 5(2) TEU (“the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”); Ruffert, “EU Institutional Framework,” para. 50.

¹²⁷ ECJ, Case 26/62, Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

¹²⁸ Article 288 TFEU.

¹²⁹ ECJ, Case 41/74, Judgment of the Court of 4 December 1974, *Yvonne van Duyn v Home Office*, ECLI:EU:C:1974:133.

¹³⁰ ECJ, Case 12/86, Judgment of the Court of 30 September 1987, *Meryem Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400, para. 14.

¹³¹ Kai Purnhagen and Laurence W Gormley, “Court Cases,” In *The Oxford Encyclopedia of EU Law*, ed. Sacha Garben and Laurence Gormley (Oxford: Oxford University Press, 2022), para. 6, <https://opil.oup.com/display/10.1093/law-oeu/law-oeu-e159>.

¹³² See Pierre-Hugues Verdier and Mila Versteeg, “International Law in Domestic Legal Systems: An Empirical Perspective,” *The American Journal of International Law* 109, no. 3 (July 2015): 514-533.

¹³³ Ramses A. Wessel, “Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?,” In *International Law as Law of the European Union*, ed. E. Cannizzaro et al., (Boston/Leiden: Martinus Nijhoff Publishers, 2011), 3ff.

Therefore, even if an area of legislation is already covered by an international treaty like the Istanbul Convention, that both the EU itself and most of its member states have ratified,¹³⁴ the EU may develop legal instruments in the same areas to ensure consistent and effective implementation across member states and harmonise national laws.¹³⁵ Directives such as the new *Directive 2024/1385 on combatting violence against women and domestic violence* can help reduce legal divergences, enhance enforcement mechanisms, and adapt international standards to EU-specific needs. They also strengthen commitments and accountability within the EU, allowing for quicker responses to new developments and ensuring policy coherence through the CJEU's mechanisms.¹³⁶

2. Background in International Law

The EU and its member states are on a first level bound by the International Conventions dealing with gender-based violence and femicide they are party to. While there are no binding international Conventions explicitly dealing with femicides, there is some agreements that can be considered 'soft law'¹³⁷: Above all the Vienna Declaration on Femicide, that was adopted in 2012 by participants of a one-day symposium convened by the Academic Council on United Nations System (ACUNS) described 11 different forms of femicide and reminded states of their due diligence obligation to protect women and prevent and prosecute femicide.¹³⁸ Soon after, the United Nation's General Assembly adopted a resolution calling on the international community to strengthen criminal justice responses to gender-related killings of women.¹³⁹

The legal framework for dealing with femicide at the international level is therefore mostly determined by agreements that regulate gender-based violence in general. Such on the one hand include 'soft law' like the *UN Declaration on the Elimination of Violence against Women* of 1993, that recognised not only the widespread prevalence of violence against women, but also

¹³⁴ European Parliament, "EU accession to the Council of Europe Convention on preventing and combating violence against women ('Istanbul Convention')," in *A New Push for European Democracy, Legislative Train Schedule*, May 20, 2024, <https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-eu-accession-to-the-istanbul-convention>.

¹³⁵ Ruffert, *supra* note 125, para. 44.

¹³⁶ *Ibid.*

¹³⁷ And as such important legal sources for assessing the political will of states, see Michèle Olivier, "The relevance of 'soft law' as a source of international human rights," *The Comparative and International Law Journal of Southern Africa* 35, no. 3 (November 2002): 293ff.

¹³⁸ UN ECOSOC, *supra* note 102, at 1.

¹³⁹ UN GA, *Resolution 68/191, Taking action against gender-related killing of women and girls*, UN Doc. A/RES/68/191, February 11, 2014.

its origins in historically shaped hierarchical power relations between women and men and its use to subordinate women.¹⁴⁰ It defined violence against women as:

*“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”*¹⁴¹

On the other hand, an International Treaty that constitutes binding ‘hard law’ and implicitly deals with violence against women is the CEDAW Convention. While not regulating the issue specifically, the CEDAW Committee’s General Recommendation No. 19 stated in 1992 that gender-based violence constitutes a violation of Article 1 of the CEDAW Convention as “a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men”.¹⁴² General Recommendation No. 35, that updates General Recommendation No. 19, elaborates on the obligations of states to establish and implement comprehensive legal frameworks that criminalise **all** forms of gender-based violence.¹⁴³

In 1994 the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*¹⁴⁴ was ratified by the OAS as the first binding instrument under international law to explicitly combat gender-based violence against women and girls.¹⁴⁵ The Istanbul Convention is said to be the “European counterpart” to this so-called Belém do Pará Convention as the first European binding instrument in the field of targeting violence against women.¹⁴⁶ It developed the UN DEVAW’s definition further by adding the notion of economic harm and stating that “‘violence against women’ is understood as a violation of human rights and a form of discrimination against women”.¹⁴⁷

The Istanbul Convention acknowledges the use of violence against women as a structural social mechanism to subordinate women.¹⁴⁸ It is the most extensive International Treaty to specifically tackle violence against women and domestic violence by using a “four-pillar” multidimensional

¹⁴⁰ *United Nation Declaration of the Elimination of Violence against Women*, February 23, 1993, UN Doc. A/RES/48/104 [hereinafter DEVAW].

¹⁴¹ UN DEVAW, Article 1.

¹⁴² CEDAW, *General recommendation No. 19: Violence against women*, 1992, UN Doc. CEDAW/C/GC/19, Background 1.

¹⁴³ CEDAW, *General recommendation No. 35*, Para. 29 (a) and 32(a).

¹⁴⁴ *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belém do Pará,”* June 9, 1994, <https://www.oas.org/juridico/english/treaties/a-61.html>.

¹⁴⁵ Elisabeth J. Friedman, “Re(gion)alizing Women’s Human Rights in Latin America,” *Politics & Gender* 5 (2009): 361; Streuer, *supra* note 77, at 204.

¹⁴⁶ Streuer, *supra* note 77, at 213.

¹⁴⁷ *Istanbul Convention*, Art. 3a.

¹⁴⁸ *Istanbul Convention*, Preamble.

approach: prevention, protection, prosecution and policy coordination.¹⁴⁹ The provisions for Prevention in Chapter III include awareness-raising (Article 13), challenging gender stereotypes, training professionals (Article 15) , the Protection measures in Chapter IV the encouraging of the reporting of violence (Article 27 and 28) and providing victims with immediate access to shelters and medical support services such as medical and trauma care (Article 25), and Chapter V the Substantive Law in relation to criminal offences. Articles 33 to 40 include a list of criminal conduct that the state parties must ensure is criminalised – unfortunately without specifically naming femicides. The fourth pillar – policy coordination can be found in Chapter II.

The most groundbreaking aspect of the Convention is that it considers violence against women to be a distinct human rights violation.¹⁵⁰ The Convention specifically regulates the State’s due diligence obligation to implement comprehensive measures to prevent and combat violence against women in Article 5. It therefore holds states responsible to protect women from violence, not only individual perpetrators. While not targeting them specifically, the Istanbul Convention is necessarily connected with the topic of femicides: For example, Article 46a of the Istanbul Convention provides for aggravated sentences that take into account, if “*the offence was committed against a former or current spouse or partner (...), by a member of the family, a person cohabiting with the victim or a person having abused her or his authority*”. This is directly applicable to femicide cases such as intimate femicides. Article 51 sets out the obligation to “*take the necessary legislative or other measures to ensure that an assessment of the lethality risk (...) is carried out*” and if necessary coordinated safety and support is provided, in other words, prevention measures before a femicide can occur. Other preventive measures regulated in the Convention include barring orders (Article 52), Restraining or protection orders (Article 53) and other measures of protection for witnesses and during investigations and judicial proceedings (Article 56).

While most national measures regarding violence against women in the EU are based on the Istanbul Convention’s provisions,¹⁵¹ according to the evaluation reports by GREVIO, the Istanbul Convention’s monitoring and compliance mechanism, the implementation in the state

¹⁴⁹ Lorena Sosa and Ruth Maria Mestre i Mestre, “The Istanbul Convention from an intersectional Perspective,” in *Preventing and Combating Violence Against Women and Domestic Violence*, ed. Sara de Vido and Micaela Frulli, (Cheltenham: Edward Elgar Publishing, 2023), A.002.

¹⁵⁰ *Istanbul Convention*, Preamble.

¹⁵¹ European Commission, *Proposal*, 3.

parties' national systems is lacking in several areas:¹⁵² Emphasised by GREVIO was particularly the incomprehensiveness of several countries' policies which mainly focus on domestic violence while disregarding many other forms of violence against women,¹⁵³ the insufficiency of shelters for victims¹⁵⁴, the lack of comparable and comprehensive data collection on cases of violence against women,¹⁵⁵ and the fragmentation and inconsistency of approaches due to the lack of use of harmonised definitions.¹⁵⁶

On top of that, also the provisions of the ECHR are relevant to the obligations of European states to tackle femicides, especially Article 2 (1) ECHR: The regulation requires the state to “*take appropriate steps to safeguard the lives of those within its jurisdiction*”.¹⁵⁷ The ECHR has a close relationship to the Istanbul Convention, as its creation took into account previous case law of the ECtHR¹⁵⁸ and its provisions now influence the Court's interpretation in cases of violence against women.¹⁵⁹ One case that particularly influenced the understanding of the state obligation to protect women from violence was the landmark judgement *Opuz v. Turkey*¹⁶⁰ in 2009, in which the ECtHR regarded the intentional killing of a woman a form of discrimination on the basis of gender. The decision did not call the killing of Medine Memi, the mother of the case's applicant, a femicide, but it was acknowledged that states have the positive obligation to protect women from domestic violence and the failure to do so can constitute a form of gender discrimination. Subsequently, the *Opuz v. Turkey* case has been cited in numerous cases of the ECtHR,¹⁶¹ establishing the importance of states' due diligence when it comes to preventing and prosecuting violence against women.¹⁶²

¹⁵² see GREVIO, *Mid-term Horizontal Review of GREVIO baseline evaluation reports*, 2022, <https://edoc.coe.int/en/violence-against-women/11030-mid-term-horizontal-review-of-grevio-baseline-evaluation-reports.html>.

¹⁵³ *Ibid.*, 31, citing GREVIO's baseline evaluation reports on Albania, Andorra, Austria, Malta, Montenegro, the Netherlands, Serbia, Spain and Turkey.

¹⁵⁴ *Ibid.*, 80, citing e.g. GREVIO's baseline evaluation reports on France and Italy.

¹⁵⁵ *Ibid.*, 40f, referring e.g. to the lack of sex disaggregated data on victims and perpetrators in the criminal justice sector in Belgium, Denmark, Malta, Monaco, Montenegro and the Netherlands.

¹⁵⁶ *Ibid.*, 21.

¹⁵⁷ see ECtHR, Case of *L.C.B. v. the United Kingdom*, Case No. 14/1997/798/1001, June 9, 1998, § 36, <https://hudoc.echr.coe.int/fre?i=001-58176>.

¹⁵⁸ See *Istanbul Convention*, Preamble.

¹⁵⁹ Sara de Vido, “Relationship with other International Instruments,” in *Preventing and Combating Violence Against Women and Domestic Violence*, ed. Sara de Vido and Micaela Frulli, (Cheltenham: Edward Elgar Publishing, 2023), 71.007ff.

¹⁶⁰ ECtHR, Case of *Opuz v. Turkey*, App. No. 33401/02, June 9, 2009, <https://hudoc.echr.coe.int/fre?i=001-92945>.

¹⁶¹ E.g. in ECtHR, Case of *Volodina v. Russia*, App. No. 41261/17, July 9, 2019, para. 71, <https://hudoc.echr.coe.int/fre?i=001-194321>; ECtHR, Case of *Talpis v. Italy*, App. No. 41237/14, March 2, 2017, para. 56, <https://hudoc.echr.coe.int/eng?i=001-171994>.

¹⁶² CAHVIO, *The Duty of Due Diligence*, CAHVIO (2010) 7, Briefing, 2010, <https://rm.coe.int/1680593fc8>.

3. National laws and policies dealing with femicides in EU Member States

Measures at EU level must respect the principle of subsidiarity, which means they may only be taken if the member states are not able to sufficiently achieve the same objectives on national level.¹⁶³ Therefore this chapter seeks to analyse the current state of provisions dealing with femicide directly or indirectly.

Until recently, explicit national regulations on femicide mostly existed in Latin America.¹⁶⁴ Since 2022 European countries have increasingly started to recognise the need for explicitly combating femicides: However, so far only four EU countries incorporate a distinct femicide definition in their legislation with only three of them regulating them as a specific crime: Malta¹⁶⁵, Cyprus¹⁶⁶, and Croatia¹⁶⁷.

An EIGE Study published in 2023, that is analysing and comparing perspectives from both victims and professionals in the member states France, Germany, Portugal, Romania and Spain for the sake of improving legal responses to counter femicide in the EU, shows that while both human rights instruments and EU policy frameworks emphasise the importance of tackling violence against women, femicide is “*rarely explicitly mentioned in policies at national level*”.¹⁶⁸

This chapter will first shed light on the four national laws in European Member States that explicitly address femicide (a.), and secondly other measures taken by EU Member States that do not explicitly address femicide but impact the earlier established ecological risk levels (b.) and establish, why this thesis argues a comprehensive approach on EU-level is needed (c.).

¹⁶³ “Fact Sheets on the European Union, The Principle of Subsidiarity,” European Parliament, accessed June 21, 2024, <https://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity>.

¹⁶⁴ E.g. United Mexican States, Camara de Diputados del H. Congreso de la Unión, *Código Penal Federal*, Artículo 325, <https://www.diputados.gob.mx/LeyesBiblio/pdf/CPF.pdf>.

¹⁶⁵ Republic of Malta, “Criminal Code, Section 211A,” in European Parliament, *The legislative frameworks for victims of gender based violence (including children) in the 27 Member States*, Report, October 27, 2022, 19, [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/738126/IPOL_STU\(2022\)738126_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/738126/IPOL_STU(2022)738126_EN.pdf).

¹⁶⁶ Republic of Cyprus, *77th Session of the General Assembly Statement by the Delegation of the Republic of Cyprus in the 3rd Committee on Agenda Item 26 - Advancement of Women*, October 6, 2022, https://www.pio.gov.cy/assets/pdf/newsroom/2022/10/12102022_ParemvasiMonimouAntiprosopou.pdf.

¹⁶⁷ Giulia Carbonaro, “Croatia announces new bill to recognise femicide in country’s criminal code,” *euronews*, September 15, 2023, <https://www.euronews.com/2023/09/15/croatia-announces-new-bill-to-recognise-femicide-in-countrys-criminal-code>.

¹⁶⁸ EIGE, *supra* note 73, at 3.

a. Distinct femicide laws in EU member states

Malta introduced femicide as a form of motivation regarding the crime of homicide in June 2022. The definition of femicides reads as such: “*the wilful homicide or the attempted wilful homicide of a person of the female gender*”.¹⁶⁹ It provides a list of seven characteristics that constitute aggravating factors, including intimate partner violence, misogynist motives, honour killings, religiously motivated practices such as genital mutilation and killings as a result of sexual violence or sexual exploitation.¹⁷⁰ An important aspect of the reform is also that the new Section 227 (c) of the Maltese criminal code ensures that the defence of a “crime of passion” is no longer recognised as a mitigating circumstance.¹⁷¹

Cyprus’ Law of July 2022 recognises femicide as own separate offence.¹⁷² Femicide is defined in Section 10A (1) as “*the death of a woman by an unlawful act or omission*” and subparagraph (2) introduces aggravating factors including the death as a result of “*violence by a sexual partner, torture or violence due to misogyny, domestic violence, violence on grounds of honour, violence on grounds of religious belief, violence based on sexual orientation or gender identity, committing the offence of female genital mutilation, the use of violence for the purpose of or in connection with sexual exploitation and/or trafficking in persons and/or drug trafficking and/or organised crime; the use of force to achieve unlawful sexual intercourse; or targeted violence against women in the context of armed conflict*”.¹⁷³

Belgium enacted the so-called “Stop Femicide Law” in July 2023, a framework law aimed at preventing and monitoring femicides.¹⁷⁴ Although not a criminal law, it establishes a set of instruments to address and prevent femicide and enhance state assistance for victims of gender-based violence. The law addresses various manifestations of femicide, including intimate, non-intimate and indirect femicide: “*For the application and execution of this law, ‘femicide’ means the intentional homicide of a woman because of her gender or the death of a woman which results from practices which cause harm to women, whether the intentional homicide or harmful*

¹⁶⁹ Republic of Malta, “Criminal Code, Section 211A.”

¹⁷⁰ Ibid.

¹⁷¹ Republic of Malta, *Criminal Code*, Section 227 (c), <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=NIM:202100290>.

¹⁷² Republic of Cyprus, *supra* note 166.

¹⁷³ Republic of Cyprus, “Amendment to 115(I)/2021 on violence against women, Section 10A,” July 7, 2022, in European Parliament, *supra* note 165, at 19.

¹⁷⁴ Kingdom of Belgium, *Loi sur la prévention et la lutte contre les féminicides, les homicides fondés sur le genre et les violences*, July 13, 2023, https://etaamb.openjustice.be/fr/loi-du-13-juillet-2023_n2023044133.html.

*practices are committed by a partner, a family member or a third party,*¹⁷⁵ Additionally, it includes the notion of a gender-based homicide, which applies to every gender-based killing under the same requirements as the provisions on femicide, therefore including killings of LGBTQ+ individuals who don't fall under the Belgian law's definition of "woman".¹⁷⁶

Croatia's parliament approved changes to the country's criminal code in January 2024, making femicide a stand-alone criminal offense: The amendments to the Croatian Criminal Code provide for minimum sentences of ten years, include the possibility for victims to make their statements via video conferencing and also renders gender-related killings an aggravating factor when imposing sentences.¹⁷⁷

To summarise, all four member states define femicide as a form of gender-based violence and consider different forms of femicide explicitly. Each criminal legal system includes specific aggravating factors, specifically tailored to the crime of femicide. At the same time, the comparison of these laws goes to show, that while their definitions of femicide are all, explicitly or implicitly, based on the earlier established causal connection to gender, they go about regulating the crime in different ways and include different characteristics. It can be observed that while all laws seem to have a common minimal denominator in their understanding of femicide, every one of the member states adopted the regulation of femicide considering their existing laws and societal needs. Next to the obvious definitional divergences, such as Cyprus's law that includes femicides by omission even without intent and Malta's law that emphasises intent, the member states' approaches also differ in regard to the areas of regulation, most prevalent in Belgium's law that prioritises social prevention measures over the adoption of a criminal regulation.

¹⁷⁵ Kingdom of Belgium, *Loi sur la prévention et la lutte contre les féminicides, les homicides fondés sur le genre et les violences*, Art.4 §2, original: "*our l'application et l'exécution de la présente loi, il faut entendre par 'féminicide', l'homicide intentionnel d'une femme en raison de son genre ou la mort d'une femme qui résulte de pratiques qui causent un dommage aux femmes, que l'homicide intentionnel ou les pratiques dommageables soient commis par un partenaire, un membre de la famille ou un tiers*".

¹⁷⁶ Kingdom of Belgium, *Loi sur la prévention et la lutte contre les féminicides, les homicides fondés sur le genre et les violences*, Art. 4 §3.

¹⁷⁷ Carbonaro, supra note 167.

b. Other measures and laws applicable to femicide in EU member states

Other European countries have also taken steps to combat gender-based violence, but they have not codified femicide as a specific crime or defined it in other legal measures. While this paragraph does not aim to analyse the legislation of every member state in detail, it seeks to provide an overview of the diverse approaches within the EU. This overview will establish a foundation for discussing where harmonising measures of criminal law at the EU level could begin and what impacts such legal changes might have across member states.

Most European countries still treat femicide cases as gender-neutral homicides.¹⁷⁸ However, about half of the member states' criminal provisions allow for considering aggravated circumstances in some cases of femicides.¹⁷⁹ The factors that allow for this possibility are usually that the offence is committed against a spouse or partner (including past partners), a family member, based on sex, sexual orientation or gender identity.¹⁸⁰

Going beyond this, to show the divergence between two European member states without explicit criminal law femicide regulations, this thesis will use the examples of Spain and Germany:

Spain recognises femicide as a form of gender-based violence, although not explicitly defined in national law: In its *Pacto de Estado contra la Violencia de Género*¹⁸¹ that was valid until 2022, three measures specifically related to femicides: The bearing of funeral costs for femicide victims by local authorities (Measure 171), the collection of data regarding the femicide of mothers (Measure 234) and 'the accumulation effect' in cases of two successive cases of femicide that had a connection (Measure 239).¹⁸² On top of that, specific femicide definitions exist in some regional laws.¹⁸³

In addition, there is specific Spanish courts for dealing with violence against women with judges and lawyers trained on the manner.¹⁸⁴ Spain is also among the countries that considers a homicide by a former or current intimate partner an aggravating circumstance with the

¹⁷⁸ EIGE, supra note 54.

¹⁷⁹ European Parliament, supra note 165, at 20.

¹⁸⁰ Ibid.

¹⁸¹ See "Pacto de Estado contra la Violencia de Género," Delegación del Gobierno contra la Violencia de Género, accessed July 1, 2024, <https://violenciagenero.igualdad.gob.es/pacto-de-estado-contra-la-violencia-de-genero/>.

¹⁸² European Parliament, supra note 165, at 22.

¹⁸³ Navarre, the Canary Islands, Andalusia and Castilla-La Mancha, all with similar definitions without limiting it to intimate femicides: Marceline Naudi et al., supra note 51, at 13.

¹⁸⁴ European Parliament, supra note 165, at 28.

specification that a motivation based on the victim's gender must be considered an aggravating circumstance,¹⁸⁵ especially in all cases where the victim is a woman and the offence is committed by a man under the motivation to “*subject the woman to his will, demonstrating superiority or an attempt to dominate her*”¹⁸⁶. Even with no distinct national femicide law in place, according to EIGE's report, Spain stands out in comparison with the other analysed states as having the “*most holistic response to femicide*”.¹⁸⁷

Also worth mentioning is Spain's monitoring system for cases of gender violence (VioGén), which includes an algorithm to assess risks at five levels with associated protection measures and a time frame for reassessment.¹⁸⁸ While a pioneering step for prevention measures, this mechanism can only be started once a complaint is filed with the police which limits its efficiency.¹⁸⁹

German criminal law on the other side categorises all forms of killings in a gender-neutral way: Options of the country's criminal code include murder, manslaughter or bodily harm resulting in the death of the victim.¹⁹⁰ According to the German criminal provision of murder, a killing is only qualified as such if it fulfils certain criteria characterizing the act as particularly reprehensible or socially and ethically dangerous, such as the criterion of ‘base motives’.¹⁹¹ Such base motives can in theory include a variety of motivations, also misogyny, gender-based hatred or possessiveness.¹⁹²

In reality however, because of the gender-neutral provisions, this characteristic can be denied in court, even in cases of intimate femicide, which can be seen in the practice of German courts:¹⁹³ “*The very fact that a separation was initiated by the victim may be assessed as a*

¹⁸⁵ Kingdom of Spain, *Ley Orgánica N° 1/2015 de 30 de marzo de 2015 por la que se modifica la Ley Orgánica N° 10/1995, de 23 de noviembre de 1995, del Código Penal*, March 30, 2015, <https://www.wipo.int/wipolex/en/legislation/details/15758>; European Parliament, supra note 165, at 20; EIGE, supra note 73, at 31.

¹⁸⁶ Spanish Supreme Court, 444/2020, Judgment of 14 September 2020, ECLI:ES:TS:2020:2904; Spanish Supreme Court, 565/2018, Judgment of 19 November 2018, ECLI:ES:TS:2018:3757.; EIGE, supra note 73, at 31.

¹⁸⁷ EIGE, supra note 73, at 28.

¹⁸⁸ “VioGén,” EUCPN, accessed June 24, 2024, <https://eucpn.org/document/viogen>; EIGE, supra note 73, at 23.

¹⁸⁹ EIGE, supra note 73, at 23.

¹⁹⁰ Ibid., 31.

¹⁹¹ Federal Republic of Germany, *Strafgesetzbuch*, Section 211 (2) Var. 4, <https://www.gesetze-im-internet.de/stgb/> (original: “*niedrige Beweggründe*”).

¹⁹² Deutscher Juristinnenbund, *Strafrechtlicher Umgang mit (tödlicher) Partnerschaftsgewalt*, Policy paper, 2020, <https://www.djb.de/presse/pressemitteilungen/detail/st20-28>.

¹⁹³ Ursula Schneider, “Der Haustyrann und die Reform der Tötungsdelikte,” *Zeitschrift des deutschen Juristinnenbundes* 1 (2015): 21f.

*circumstance that speaks against the base motive.*¹⁹⁴ In fact, in several cases “base motives” were questioned if “*the victim separated and the perpetrator feels deprived of ‘something’ he does not want to lose*”¹⁹⁵ without taking the desire for power that might be the reason for such motivation, into account. A case from 2008 illustrates this particularly clearly: Here, the judgement of a regional court that had assumed the murder criterion of base motives because of the perpetrator’s excessive possessiveness, was overturned by the German Federal Court of Justice on appeal, arguing the decisive factor for the crime had been the “emotional state” of the defendant following the break up by the victim.¹⁹⁶ Also, gender-based violence is not considered an aggravating factor in German criminal law.¹⁹⁷

Germany released federal action plans to combat violence against women, the third one in 2021.¹⁹⁸ However, a significant part of this action plan involves external measures such as humanitarian aid and crisis management instead of reforms regarding the handling of cases in the member state’s legislation. Generally, there are multiple shortcomings regarding the implementation of the Istanbul Convention’s provisions in Germany, particularly regarding asylum and migration policies as documented by the NGO network “Bündnis Istanbul Konvention” in 2021.¹⁹⁹

Germany also uses a risk assessment tool, however limited to domestic violence cases: The so called *Ontario Domestic Assault Risk Assessment tool* allows to compare perpetrators to similar offenders in order to calculate the risk that they will repeat similar acts of violence in the future, considering for example factors on an individual level like substance abuse and on an interpersonal level like previous acts of domestic violence or children in the relationship.²⁰⁰

On top of those different approaches in tackling the killing of women, different coinages of the term “femicide”, apart from legal definitions, can be observed in different European countries.

¹⁹⁴ E.g. German Federal Court of Justice, Judgement of 21 February 2018, 1 StR 351/17, para. 10, <https://www.hrr-strafrecht.de/hrr/1/17/1-351-17.php>; German Federal Court of Justice, decision of 24 Oktober 2018, 1 StR 422/18, para. 20, <https://www.hrr-strafrecht.de/hrr/1/18/1-422-18.php>.

¹⁹⁵ See e.g. German Federal Court of Justice, Judgement of 25 July 2006, 5 StR 97/06, <https://www.hrr-strafrecht.de/hrr/5/06/5-97-06.php>; German Federal Court of Justice, decision of 15 May 2003, 3 StR 149/03, <https://www.hrr-strafrecht.de/hrr/3/03/3-149-03.php?referer=db>.

¹⁹⁶ German Federal Court of Justice, Judgement of 29 October 2008, 2 StR 349/08, <https://www.hrr-strafrecht.de/hrr/2/08/2-349-08.php>.

¹⁹⁷ Marceline Naudi et al., *supra* note 51, at 12.

¹⁹⁸ Federal Republic of Germany, Auswärtiges Amt, *Dritter Aktionsplan der Bundesregierung zur Umsetzung der Agenda Frauen, Frieden und Sicherheit*, 2021 bis 2024, Plan of action, 2021, <https://www.auswaertiges-amt.de/blob/216940/3596859eebe39f90fa327e81ede416a3/aktionsplan1325-data.pdf>.

¹⁹⁹ Bündnis Istanbul-Konvention, *Alternativbericht zur Umsetzung des Übereinkommens des Europarats zur Verhütung und Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt*, Report, 2021, <https://www.damigra.de/wp-content/uploads/Alternativbericht-BIK-2021.pdf>.

²⁰⁰ Marceline Naudi et al., *supra* note 51, at 18.

Two expressive examples are the predominant definitions in Spain and Italy: The Real Academia Española describes femicides as “*the murder of a woman at the hands of a man due to machismo or misogyny*”.²⁰¹ The Italian Accademia della Crusca however defines the term as “*causing the death of a woman, child or adult, by one's partner, husband, father, or any man, as a result of the victim's failure to physically or psychologically subdue her*”.²⁰²

c. Shortcomings

The legal responses to counter femicides therefore vary starkly between member states. Firstly, there are those EU countries that explicitly incorporate femicide provisions in their criminal law, secondly those that rely on non-criminal measures to tackle femicide as a form of gender-based violence and lastly those that consider femicide a gender-neutral homicide. As a result, in all but three Member States, the criminal provisions that are applicable in cases of femicides are of gender-neutral nature. This leads not only to legal uncertainty but also to the misjudgement of femicide cases. Overall, while it is promising that some member states have made recent developments in the direction of increasing visibility for femicides in their legal systems, training specialised professionals on different levels and heightening the community awareness for gender-based violence, legal measures to prosecute femicide cases in European member states remain limited to only a few countries.

In terms of the ecological model’s risk levels, it can be observed that most measures of member states to tackle violence against women concentrate on an individual, interpersonal or community level, while the societal level is less prioritised. Risk assessment tools like those in Spain and Germany can help tackle different risk levels for femicide, but are limited in their effectiveness, especially if they depend on the reporting of violence by the victim or focus solely on domestic violence cases. Especially the case laws of Germany showcases that without measures on a societal level to actually change social norms and a climate that tolerates violence against women, patriarchal biases continue to exist in the investigation and prosecution of femicide cases in front of courts.

²⁰¹ “Diccionario de la lengua española,” Real Academia Española, accessed June 26, 2024, <https://dle.rae.es/feminicidio> (original: “*Asesinato de una mujer a manos de un hombre por machismo o misoginia*”).

²⁰² Italian Republic, Senato della Repubblica, Ufficio Valutazione Impatto, *Femminicidio*, report, 2018, https://www.senato.it/application/xmanager/projects/leg18/Focus_femminicidio_1.pdf (original: “*provocare la morte di una donna, bambina o adulta, da parte del proprio compagno, marito, padre o di un uomo qualsiasi, in conseguenza del mancato assoggettamento fisico o psicologico della vittima*”).

This shows a need for respective regulations in normative law, so that misogyny or the desire for control or power over a woman will be taken sufficiently into account as underlying motivation in criminal proceedings. In order to do so, preceding acts of violence on the interpersonal level between perpetrator and victim need to be investigated thoroughly, which presupposes the specific training of legal practitioners and law enforcement officials that is currently not happening yet or not sufficiently in all member states.²⁰³ At the same time, both courts and media are often paying much attention to the victim's behaviour, for example if she was the one to end a relationship, which leads to the reinforcement of the social narrative of such crimes as 'relationship crimes'.²⁰⁴

Also the member states national strategies or action plans targeting domestic violence are unfortunately not far-reaching enough, since femicides remain largely overlooked.²⁰⁵ The scarceness of specific femicide measures is particularly disappointing seeing that femicides are often the escalation of other forms of violence the victims previously suffered, which requires also the investigation of the history of violence against the victim prior to their death.²⁰⁶ Additionally, also in cases of domestic violence preventive measures are mostly dependant on the victim filing an official complaint with the police and these are only effective if they are followed by immediate action before the victim is killed – which is often not the case.²⁰⁷

EIGE's report also indicated that in none of the for the study selected Member States existed practical tools to guide investigations and prosecutions of femicide cases regarding the collection of forensic evidence and data of the personal history before the killing.²⁰⁸ In addition only 18 member state's laws include emergency protections or barring orders allowing the police to prevent an potential perpetrator from getting close to the victim's apartment.²⁰⁹

²⁰³ Different kinds of shortcomings in most member states: GREVIO, supra note 152, at 59f.

²⁰⁴ See e.g. Cecilia Knodt, "Weder 'Beziehungstat' noch 'Ehedrama'," *tagesschau*, February 19, 2022, <https://www.tagesschau.de/inland/gesellschaft/femizide-studie-101.html>; Jane Monckton-Smith, *Murder, Gender and the Media, Narratives of Dangerous Love* (London: Palgrave MacMillan, 2012), 18ff.

²⁰⁵ EIGE, supra note 73, at 20.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, 21.

²⁰⁸ The Report refers to UN Women and OHCHR, supra note 64, at 57-68; EIGE, supra note 73, at 23f.

²⁰⁹ European Commission, *Impact Assessment Report, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence*, SWD(2022) 62 final, March 8, 2022, 14, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022SC0062>; see also GREVIO, supra note 152, at 134ff.

4. The EU legal framework regarding gender-based violence

Violence against women as a form of gender discrimination and oppression concerns several of the EU's most fundamental values such as human dignity and the respect for human rights.²¹⁰ The EU has made it its objective to fight discrimination and promote equality between women and men as can be seen in Articles 2 and 3 (3) (2) TEU²¹¹ and Articles 8, 10 and 19 TFEU. Gender equality is also enshrined in Article 23 in the EU Charter of Fundamental Rights with Article 21 prohibiting discrimination. Moreover, the EU has frequently reaffirmed its political commitment to tackling gender-based violence.²¹²

Even before 2023, some legal instruments dealt with gender-based violence, although often indirectly and never explicitly regarding femicides. However, these instruments play an important role in understanding the overall protection framework for women against gender-based violence. The most relevant ones are also mentioned in the Commission's proposal for the new Directive and include the following instruments that can be applied to individual femicide cases: the Directive 2012/29/EU (Victims' Rights Directive) sets minimum standards for the rights, support, and protection of victims, emphasizing the protection of victims of gender-based violence: EU Member States are therefore required to ensure access to information, support services, and justice-related services of victims.²¹³ The Directive 2011/99/EU on the European Protection Order allows for the recognition and enforcing of protection measures in a member state even if they were issued in another.²¹⁴ It specifically helps victims of gender-based violence and other crimes to obtain cross-border protection within the EU. The so-called "Compensation Directive" (Council Directive 2004/80/EC) allows for state compensation for victims of violent intentional crime.²¹⁵ Directive 2011/36/EU on combating trafficking in human beings and protecting victims focuses on the prevention and combating of human trafficking, including sexual exploitation, and provides specific measures

²¹⁰ Dilken Çelebi et al., "Germany Blocks Europe-Wide Protection of Women Against Violence," *Verfassungsblog*, January 17, 2024, <https://verfassungsblog.de/germany-blocks-europe-wide-protection-of-women-against-violence/>.

²¹¹ *Treaty on European Union*, Consolidated Version, O.J. C 326/15, October 26, 2012.

²¹² E.g. *Declaration annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon*, 2007 O.J. (C 309) 02, A.19. ("in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence (...)").

²¹³ *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA*, O.J. L 315/57, November 14, 2012.

²¹⁴ *Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order*, O.J. L 338/2, December 21, 2011.

²¹⁵ *Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims*, O.J. L 261/15, August 6, 2004.

to protect victims, particularly women and children.²¹⁶ Relevant provisions for violence against women were therefore fractured across multiple instruments so far, making coherent norms and targeted protection measures difficult to achieve as the Commission's proposal for the new directive stated: "*The existing provisions at Union and national levels have proven to be insufficient to effectively combat and prevent violence against women and domestic violence*".²¹⁷

In 2020, the Gender Equality Strategy 2020-2025 was adopted by the European Commission, which was based on president von der Leyen's coined term "*Union of Equality*", which focused on combating gender-based violence through prevention and victim protection measures, but also increased prosecution for perpetrators.²¹⁸

In the following the two main new developments at the EU-level regarding gender-based violence and the legal changes they introduce will be examined: the EU's accession to the Istanbul Convention (a.) and the adoption of the new Directive 2024/1385 on combating violence against women and domestic violence (b.). Subsequently, the shortcomings of these measures at this point in time in terms of comprehensively tackling gender-based violence in the EU are presented (c.).

a. The EU's accession to the Istanbul Convention and legal implications

Since its adoption by the Council of Europe in 2011, the Istanbul Convention has been signed by 45 states and ratified by 34.²¹⁹ All EU member states have signed, but only 22 have actually ratified the Convention: In Bulgaria, Czechia, Hungary, Lithuania and Slovakia the Convention has not yet entered into force.²²⁰ As previously established, also in the countries that have ratified the Convention, significant gaps in its implementation still exist.²²¹

²¹⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, O.J. L 101/1, April 15, 2011.

²¹⁷ European Commission, *Proposal*, 21.

²¹⁸ European Commission, *A Union of Equality: Gender Equality Strategy 2020-2025*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 152 final, March 5, 2020, 4, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0152>.

²¹⁹ Council of Europe, *Chart of signatures and ratifications of Treaty 210*, 2011, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures?p_auth=j0WpqY2.

²²⁰ Ibid.

²²¹ See e.g. GREVIO, supra note 152.

The EU had already signed the convention in 2017. The reasons for the delay in ratification were legal uncertainties and the Council's hesitance without unanimous member state agreement.²²² Only when the 2020-2025 Gender Equality Strategy stated the ratification as a pending priority²²³ and in it, the European Commission brought the idea of new legislation to address violence against women at EU level to the table,²²⁴ the process was sped up. Following the adoption of an interim report by the Civil Liberties (LIBE) and Women's Rights (FEMM) Committees on February 14, 2023 that was stressing the importance of the EU's broad accession to the Convention and also called on the immediate ratification by those member states that have not yet done so, the European Parliament gave its consent to the EU accession to the convention in May 2023.²²⁵ Even in 2021, the ECJ had already established, following an Inquiry by the European Parliament, that the appropriate legal basis for the ratification of the Convention was Articles 78(2), 82(2), 84 and 336 TFEU.²²⁶ Therefore only a qualified majority was needed for the adoption, which allowed for a quick ratification process without the need to wait until all member states agreed.²²⁷ This subsequently also means that some member states did not share the EU's political will to commit to the Convention's provisions: The Bulgarian Constitutional Court declared in 2018 that the convention was not compatible with the Bulgarian constitution.²²⁸ In the Czech Republic political concerns and debates over the definition of the term "gender" have delayed ratification.²²⁹ The Hungarian government under Viktor Orbán refused to ratify the convention in 2020 due to its "ideological approach" and the fear of it enabling easier immigration.²³⁰ The Slovakian parliament voted against ratification of the convention in 2019, with concerns about conformity with traditional family values and gender roles.²³¹

²²² European Parliament, *supra* note 134.

²²³ European Commission, *supra* note 218, 6f.

²²⁴ *Ibid.*, 3f.

²²⁵ European Parliament, *supra* note 134.

²²⁶ ECJ, Opinion 1/19, Opinion of the Court of 6 October 2021, *Istanbul Convention*, ECLI:EU:C:2021:198.

²²⁷ *Ibid.*

²²⁸ Radosveta Vassileva, "Bulgaria's Constitutional Troubles with the Istanbul Convention," *Verfassungsblog*, August 2, 2018, <https://verfassungsblog.de/bulgarias-constitutional-troubles-with-the-istanbul-convention/>.

²²⁹ "Czech Senate fails to ratify European treaty on violence against women," *Reuters*, January 25, 2024, <https://www.reuters.com/world/europe/czech-senate-fails-ratify-european-treaty-violence-against-women-2024-01-25/>.

²³⁰ "Hungary's parliament blocks domestic violence treaty," *The Guardian*, May 5, 2020, <https://www.theguardian.com/world/2020/may/05/hungarys-parliament-blocks-domestic-violence-treaty>.

²³¹ Zuzana Gabrizova, "Slovakia still opposes EU accession to Istanbul Convention preventing violence against women," *euractiv*, November 29, 2019, <https://www.euractiv.com/section/freedom-of-thought/news/slovakia-still-opposes-eu-accession-to-istanbul-convention-preventing-violence-against-women/>.

The process of the EU's accession to the Istanbul Convention was completed by the adoption of two decisions by the Council on June 1, 2023, joined by a Declaration on the EU competences in relation to the Convention's provisions.²³²

The Convention entered into force for the EU on October 1, 2023, unfolding binding legal effect for European institutions and member states in areas within the EU's competence.²³³ Since then EU institutions must ensure that their legislation and policies comply with the Treaty's obligations. The provisions of the convention within EU competences take the status of (secondary) EU law, therefore unfolding binding effects for member states.²³⁴ The rest of the Convention can also offer interpretative guidance for EU law since the ECJ often interprets EU law in light of the international agreements the EU is a party to.²³⁵

While the accession to the Istanbul Convention is seen as a step towards a unified legal framework to tackle violence against women,²³⁶ it is questionable to what extent the EU's accession can actually impact the member states' implementation of the convention in light of its competences. As the Council Decisions clearly state that the EU will accede to the Convention only as far as its exclusive competences allow, that is in the field of judicial cooperation, asylum and non-refoulement, and in matters relating to the Union's institutions and public administration,²³⁷ the EU did not accede to the Convention with its full scope: "*Any other matters covered by the convention remain within the competence of the Member States.*"²³⁸

A major step forward resulting from the EU's accession to the Istanbul Convention is that its provisions now affect EU law and can subsequently be applied by the ECJ. The first question was already taken up by the ECJ in its recent decision C-621/21²³⁹ in January 2024: The case concerning a woman from Turkey claiming she was forced into marriage by her family and divorced her husband who had been violent towards her and threatening her with her death.²⁴⁰

²³² European Parliament, *supra* note 134.

²³³ *Ibid.*

²³⁴ Article 216(2) TFEU; ECJ, Case 104/81, Judgement of 26 October 1982, *Hauptzollamt Mainz v C.A. Kupferberg*, ECLI:EU:C:1982:362, para. 13f.

²³⁵ Rafał Mańko and Carmen-Cristina Cîrlig, *European Court of Justice and international agreements*, European Parliament Briefing, 3, 2021, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696171/EPRS_BRI\(2021\)696171_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696171/EPRS_BRI(2021)696171_EN.pdf).

²³⁶ European Parliament, *supra* note 134.

²³⁷ *Ibid.*

²³⁸ "EU accession to the Istanbul Convention," EUR-Lex, accessed July 2, 2024, <https://eur-lex.europa.eu/EN/legal-content/summary/eu-accession-to-the-istanbul-convention.html>.

²³⁹ ECJ, Case C-621/21, Judgement of the Court of 16 January 2024, *WS v Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet*, ECLI:EU:C:2024:47.

²⁴⁰ *Ibid.*, 20.

After fleeing to Bulgaria, she explained her life would be at risk if she was to return to Turkey, where she feared a so-called “honour-killing” by the hands of her family.²⁴¹ The decision therefore focused on a potential femicide as grounds for international protection and the granting of a refugee status for women fleeing from gender-based violence. The Court clarified, that the Istanbul Convention, in this case Article 60 on Gender-based asylum claims, has direct impact on the obligations arising from EU law – also for those member states who are not state party to the Istanbul Convention themselves, such as Bulgaria.²⁴² According to the ruling, both the CEDAW and the Istanbul Convention constitute ‘relevant treaties’ in the sense of Article 78(1) TFEU and therefore the here relevant Directive 2011/95 (“Qualification Directive”) has to be interpreted in a gender-sensitive way in conformity with the obligations arising from these treaties, namely to eliminate discrimination and to combat gender-based violence against women.²⁴³ Following the ECJ’s ruling, a refugee status can be granted to “women” as a social group in the sense of Article 10(1)(d) of the Qualification Directive in cases where “*in their country of origin, they are, on account of their gender, exposed to physical or mental violence, including sexual violence and domestic violence*”²⁴⁴. Even if these conditions for granting refugee status were not fulfilled, women may also qualify for subsidiary protection status, if there is “*the real threat to the applicant of being killed or subjected to acts of violence inflicted by a member of his or her family or community due to the alleged transgression of cultural, religious or traditional norms.*”²⁴⁵ In other words: A refugee or subsidiary protection status can be granted to a woman that is of risk of becoming a victim of femicide in her country of origin.

This judgement goes to show how prioritising a gender-sensitive approach to EU law can impact individual cases. However, in regards to the Istanbul Conventions impacts – at least for the time being – this only applies to asylum cases: The ECJ emphasised specifically that the Istanbul Convention constitutes a relevant treaty in the sense of Article 78 (1) TFEU and therefore the EU’s measures on a common asylum policy (such as the Directive 2011/95 in question here) have to adhere by it, but only in so far as the Convention’s provisions fall within the scope of Article 78(2) TFEU, meaning those provisions relating to asylum and non-

²⁴¹ ECJ, Case C-621/21, 20.

²⁴² Ibid., 47.

²⁴³ Ibid., 44ff; see *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, O.J. L 337, December 20, 2011.

²⁴⁴ Ibid., 57.

²⁴⁵ Ibid., 80.

refoulement.²⁴⁶ This again shows the limited scope of obligations the accession to the Convention actually introduces for the EU due to competence boundaries.

The accession to the convention sends a strong political message for the EU's will to combat violence against women.²⁴⁷ However, for the proclaimed goal of making “*Europe the first continent in the world to end violence against women,*”²⁴⁸ instruments that go beyond political signalling are imperative.

b. The new EU Directive 2024/1385 on combating violence against women and domestic violence

The most important direct effect of the EU's accession to the Istanbul Convention was the drafting of the new Directive 2024/1385. Especially the process behind establishing this new directive on combating violence against women and domestic violence shows the divergences between the political will of European institutions on one and member states on the other side, as well as the limitations EU competences in criminal law pose.

i. OBJECTIVES OF THE PROPOSAL

The proposal for the new Directive was presented by the Commission on March 8, 2022 as the first legal instrument at EU level to explicitly target violence against women.²⁴⁹ It was preceded by a lengthy political process: The plan to create a legally binding instrument to combat violence against women in the EU to the same extent as the Istanbul Convention was already laid out in the Commission's Gender Equality Strategy in 2020.²⁵⁰

The proposal declared as part of its aims to follow international standards in closing the gaps in protection and access to justice for women in the EU,²⁵¹ referring to the Istanbul Convention as an “*important point of reference*”.²⁵² Its aim was therefore to complement “*the existing EU*

²⁴⁶ Ibid., 46f.

²⁴⁷ European Women's Lobby, *supra* note 19.

²⁴⁸ Frances Fitzgerald, Co-rapporteur from the Women's Rights and Gender Equality Committee on the new Directive 2024/1385, European Parliament, “Parliament approves first ever EU rules on combating violence against women,” Press release, <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20588/parliament-approves-first-ever-eu-rules-on-combating-violence-against-women>.

²⁴⁹ European Commission, *Proposal*.

²⁵⁰ European Commission, *supra* note 218, at 3.

²⁵¹ European Commission, *Proposal*, 10f.

²⁵² Ibid., 2.

acquis and Member States' national legislation in the areas covered by the Convention."²⁵³ It stated not only the explicit objective to fulfil the obligations arising from this agreement with the supplementary provisions of the directive, but also the need for action in member states that have not yet ratified the Istanbul Convention as well as those that have, due to the established persistence of gaps in the implementation of the Convention's provisions.²⁵⁴

Accordingly, the proposal for the new EU directive on combating violence against women and domestic violence also defines "violence against women" to be equivalent to "gender-based violence".²⁵⁵

For its political motivation the proposal itself provides the answer, stating a special need to combat the widespread of violence against women and domestic violence, especially after their increase during the COVID-19 pandemic in the form of "*targeted legislative action at EU level*"²⁵⁶ It explains the need for harmonisation, emphasising that while all member States address violence against women, they do so to different degrees. In accordance with the findings of this thesis so far, the European Commission finds this to create legal uncertainty and fragmentation.²⁵⁷

The choice of legal instrument as a directive derives directly from its legal basis in the competence regulations of Article 82(2) and Article 83(1) TFEU that only allow to regulate such matters in the form of directives. Since directives have to be implemented by the member states to unfold legal effect, this enables them to choose the means with which to achieve the objectives of the directive, allowing for a certain flexibility and a time period for transposing the directive into national law.²⁵⁸ Therefore member states are able to adapt the aims of the directive to their national laws, take cultural specificities into account and can also decide for a higher standard of protection than the minimum the directive stipulates.²⁵⁹

The proposed directive was adopted by the European Parliament on April 24, 2024, with 522 in favour, 27 against, and 72 abstentions.²⁶⁰ However, a number of changes were made to the

²⁵³ European Commission, *Proposal*, 3.

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*, Article 4a.

²⁵⁶ *Ibid.*, 9.

²⁵⁷ *Ibid.*

²⁵⁸ Art. 288 TFEU, Ruffert, *supra* note 125, para. 44.

²⁵⁹ "European Union directives," EUR-Lex, accessed July 2, 2014, <https://eur-lex.europa.eu/EN/legal-content/summary/european-union-directives.html>.

²⁶⁰ See: European Parliament, *Minutes of proceedings, Results of roll-call votes – Annex*, June 4, 2024, 76f, https://www.europarl.europa.eu/doceo/document/PV-9-2024-04-24-RCV_EN.pdf.

Commission's proposal before the final text was adopted.²⁶¹ The directive was subsequently adopted by the Council on May 7, and published in the Official Journal of the European Union on May 24, 2024.²⁶²

ii. CHANGES TO THE PROPOSAL: AGGRAVATING CIRCUMSTANCES

Article 13 of the proposed directive included two provisions directly relating to femicides: Article 13 (i) allowed for aggravating circumstances if the offence resulted in the death or suicide of the victim. Article 13 (k) entailed a provision of aggravating circumstances if the offence was committed against a former or current spouse or partner, which could be understood as relating to cases of intimate femicide.

Article 11 of the final version of the directive, after the Parliament's and Council's approvals, still includes these two aggravating circumstances, but provision (i) was changed to "*the conduct caused the death of the victim*" which presupposes a causal connection between the act of the perpetrator and the death of the victim and disregards the formerly included offense of causing the suicide of the victim. Acts such as ongoing coercive control and extreme violence that lead to the suicide of the victim, that in some countries are considered a form of femicide,²⁶³ are therefore excluded from the scope of the directive.

Still, such aggravating circumstances could in theory ensure that member states have to regard intimate partner violence as an aggravating circumstance in cases of the killings of women, directly impacting the sentencing of intimate femicides. However, since the criminal scope of the directive is very limited, these aggravating factors only concern the conducts regulated in Articles 3 to 8 of the directive. In the final version, these are female genital mutilation, forced marriage, non-consensual sharing of intimate or manipulated material, cyber stalking, cyber harassment and cyber incitement to violence or hatred. The only article that would thus regulate a form of femicide in conjunction with the provision in Article 11 (i) is therefore Article 3 on

²⁶¹ European Parliament, *Amendments by the European Parliament to the Commission proposal: Directive on combating violence against women and domestic violence*, Amendment 298, A9-0234/2023, April 16, 2024, https://www.europarl.europa.eu/doceo/document/A-9-2023-0234-AM-298-298_EN.pdf.

²⁶² European Parliament, *supra* note 134.

²⁶³ E.g. in Argentina cases of suicide as a consequence of gender-based violence are also reviewed by Femicide Observatories: UNODC Commission of Crime Prevention and Criminal Justice, *Background Paper on Femicide Review Committees*, E/CN.15/2023/CRP.6, May 10, 2023, 49, https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_32/CRPs/ECN152023_CRP6_e.pdf.

female genital mutilation. A death following this conduct which can be regarded as a harmful practice, would therefore constitute an indirect femicide.

Member states, particularly Germany, also expressed concerns about the provision of Article 13 (k) of the proposal: The German Bundesrat criticized that the commitment of the offence against a former or current spouse or partner would not necessarily constitute aggravated wrongdoing and that it was therefore inappropriate to link higher penalties to these aggravating circumstances.²⁶⁴ In the final directive the provisions that had been establishing higher penalties for aggravating circumstances (Article 12 of the proposal) are now missing in the revised Article (now Article 10). This is surprising seeing that the Istanbul Convention provides for the same provision of aggravating circumstances in regards to all forms of violence against women.²⁶⁵

iii. CHANGES TO THE PROPOSAL: CRIMINAL DEFINITION OF RAPE

The proposed directive sought to set a common standard of rules to “*ensure the rights of victims of violence against women and domestic violence and introduce minimum rules of definitions and penalties on conduct where gaps in criminalisation exist.*”²⁶⁶ However, there is two immediate limitations for this: Because of the legal provision for criminal law harmonisation that the proposal was based on, the directive can only establish minimum rules concerning the definition of criminal offences and penalties in the areas of sexual exploitation of women and children and computer crime, hence the areas listed in Article 83 (1) TFEU. Secondly, even some of the explicit criminal definitions that were included in the proposal were answered by political concerns across member states:

The most covered change to the proposed directive by the media and Women’s rights organisations²⁶⁷ was probably the dismissal of the planned Article 5, which contained a criminal provision for rape that went beyond the criminal law provisions in many member states: In this Article the proposal for the directive included a definition of rape as sex without consent²⁶⁸ rather than the criminal law provisions in 16 member states, in which rape per definition still

²⁶⁴ Federal Republic of Germany, Bundesrat, *Beschluss des Bundesrates, Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates zur Bekämpfung von Gewalt gegen Frauen und häuslicher Gewalt COM(2022) 105 final*; Ratsdok. 7042/22, Drucksache 131/22, July 8, 2022.

²⁶⁵ *Istanbul Convention*, Article 46 (a).

²⁶⁶ European Commission, *Proposal*, 9.

²⁶⁷ See Galindo, *supra* note 24; Amnesty Europe, *supra* note 24; European Women’s Lobby, *supra* note 24.

²⁶⁸ As required by the *Istanbul Convention*, Article 36.

presupposes coercion, force or threats.²⁶⁹ Feminists have called for a reform of such rape definitions for a long time, stressing the necessity to localise it within the area of gender-based crimes and the rethinking of how society perceives consent as the absence of resistance instead of an actual ‘yes’, to better reflect the lived reality of women.²⁷⁰ However, several member states, in particular Germany and France, opposed this Article.²⁷¹ The German Federal Ministry of Justice spoke of “considerable doubts” concerning the legal basis, arguing rape was not one of the crimes within the scope of Article 83 (1) TFEU, in so far concurring with the opinion of the Council's legal service.^{272, 273} Despite the fact there are several legal scholars arguing the opposite,²⁷⁴ these doubts of several member states²⁷⁵ have not allowed a qualified majority to be reached which led to the revision of the directive.²⁷⁶ In the final version, the regulation of rape is now completely missing in a directive that was supposed to be a milestone in the fight against **all** forms of violence against women.

iv. MULTICAUSAL APPROACH OF THE DIRECTIVE

In criminal law terms, the directive only includes few regulations that can be related to only a small proportion of femicide cases. However, as established earlier, indirect measures in other fields can also have an impact on the ecological risk factors that form the societal basis for such crimes. In the Commission’s remarks on proportionality, a multicausal approach for this instrument was explicitly stated:

²⁶⁹ European Commission, *supra* note 209, at 16.

²⁷⁰ See e.g. Carole Pateman, “Women and Consent,” *Political Theory* 8, no. 2 (May 1980): 149-168; Catherine MacKinnon, “Rape Redefined,” 432-477 (MacKinnon is holding arguably one of the more extreme opinions on the matter, arguing that consent can never fully exist within unequal relationships and therefore definitions must be reformed to reflect existing inequalities).

²⁷¹ Bauer-Babef, *supra* note 23.

²⁷² Council of the European Union, *Opinion of the Legal Service*, 14277/22, October 31, 2022, <https://data.consilium.europa.eu/doc/document/ST-14277-2022-INIT/en/pdf>.

²⁷³ Çelebi et al., *supra* note 210; see also Nina Monecke, “Buschmanns Nein gilt in der EU mehr als das einer Frau,” *Zeit Online*, February 7, 2024, <https://www.zeit.de/gesellschaft/2024-02/eu-richtlinie-vergewaltigungen-gewalt-gegen-frauen-blockade>.

²⁷⁴ e.g. German lawyers arguing the provision of ‘sexual exploitation’ in Art. 83 (1) (2) TFEU does in fact cover the crime of rape: Çelebi et al., *supra* note 210.

²⁷⁵ France, Germany, Austria, the Netherlands, Poland, Hungary, Malta, the Czech Republic, Estonia, Bulgaria and Slovakia, see Bauer-Babef, *supra* note 23.

²⁷⁶ European Parliament, “First ever EU rules on combating violence against women: deal reached,” Press release, February 6, 2024, <https://www.europarl.europa.eu/news/en/press-room/20240205IPR17412/first-ever-eu-rules-on-combating-violence-against-women-deal-reached>.

*“Numerous studies (...) show that only a comprehensive approach, targeting all components of the problem in a single EU act imposing minimum rules on the Member States can effectively contribute to the elimination of violence against women and domestic violence and to ensuring more effective, targeted support and protection responding to the specific needs of victims of this type of violence.”*²⁷⁷

Although the Directive does not include **all** components of the problem of violence against women, there are various aspects reflected in the text that, from a socio-ecological perspective, can still address the underlying issues of femicide and lead to greater protection for victims. Such aspects are mostly located at the community level such as ensuring support services for survivors of violence like shelters and victim protection centres (e.g. Article 25), promoting community-based prevention programs (Article 34) and implementing specialised training for law enforcement officers (Article 36).

Additionally, as established, the prevention and thorough prosecution of domestic violence can lead to a decrease of risk factors for femicides. Especially objectives of the Directive such as the improvement of easy and confidential reporting possibilities for acts of domestic violence²⁷⁸ and their prompt processing²⁷⁹ can have a positive impact on femicide prevention on the individual and interpersonal level. However, without expressive data, it is difficult to provide evidence of how many cases this could potentially affect and if not more specific measures tailored to different types of femicides would be more effective. Such data collection would again presuppose a distinct femicide definition to enable comparable and EU-wide statistics.²⁸⁰

While the directive acknowledges the structural nature of violence against women and its basis in *“socially constructed roles, behaviour, activities and attributes that a given society considers appropriate for women and men,”*²⁸¹ risk factors on the societal level, that would require an unambiguous position towards and definition of femicide, are still overlooked. After establishing how deeply engrained patriarchal structures are in European societies, it is crucial that this level is no longer disregarded in policy making. The European Commission, in its Impact Assessment Report, which is enclosed with the proposal for the new Directive, acknowledges the issue, which gives hope that future legislative acts of the EU can build on these findings and regulate femicides explicitly:

²⁷⁷ European Commission, *Proposal*, 10.

²⁷⁸ *Directive (EU) 2024/1385*, para. 33.

²⁷⁹ *Ibid.*, para. 36.

²⁸⁰ See UN GA, *supra* note 56, at 26.

²⁸¹ *Ibid.*, 2, para. 10.

“Societal norms affect perpetrators’ and bystanders’ behaviours. Perpetrators may not consider their act of violence as morally reproachable. Gender roles and stress over masculine gender roles have been found to strengthen tolerance toward violence against women, which may, in turn, be caused by factors such as negative stereotypes towards women. Tolerant attitudes towards violence against women may be further encouraged by the social environment, leading to a circle of violence.”²⁸²

c. Shortcomings

While the proposal for the new directive asked the right questions in its approach and recognised gaps in the national legislation of the member states regarding the implementation of the Istanbul Convention and the protection of women from gender-based violence, it ultimately fell short of its potential. Due to competence-based limitations and concerns from member states, violence against women and its forms that constitute criminal conduct could not be addressed in their entirety. The first comprehensive instrument on tackling violence against women on an EU level therefore only regulates certain forms of criminal conduct that constitutes violence against women.

On a positive note however, the new directive mentions femicide in its provisions:

*“Lastly, certain criminal offences under national law fall under the definition of violence against women. They include offences such as **femicide**, rape, sexual harassment, sexual abuse, (...).”²⁸³*

Given that this is the first time, a binding international legal instrument has mentioned the term femicide in Europe, the choice of wording over more gender-neutral terms can still be regarded as an important political signal to achieve more visibility for gender-specific killings of women.

In general, the directive’s adoption process goes to show how much EU legislation depends on political will, both of EU institutions and the member states. For now, femicide remains an extremely underrepresented crime in EU law and the law of the member states. The protection of women from falling victim to femicide or many other forms of violence against women not yet harmonised on EU level, therefore continues to vary depending on the member state’s jurisdiction she lives in. With the Istanbul Convention entering into force over 10 years ago,

²⁸² European Commission, supra note 209, at 27f.

²⁸³ Directive (EU) 2024/1385, para. 9.

such a varying scope of protection and prosecution measures as a result of the EU's politics against gender-based violence, cumulating in the new directive, is sobering. To use the words of MEP Frances Fitzgerald: *“There can be no equality without eradication of violence against women; we must ensure that there can be no impunity for those who commit such crimes.”*²⁸⁴

²⁸⁴ Frances Fitzgerald, MEP and co-rapporteur from the Women's Rights and Gender Equality Committee: “Parliament approves first ever EU rules on combating violence against women,” European Parliament News, accessed July 2, 2024, <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20588/parliament-approves-first-ever-eu-rules-on-combating-violence-against-women>.

IV. POSSIBILITY OF A HARMONISED FEMICIDE DEFINITION IN THE EU

After establishing that the main reason for the EU's failure to commit to more comprehensive criminal prosecution of violence against women in the new Directive 2024/1385 were mainly competence related concerns, the last question to be asked is where these concerns stem from and what a possible outlook of the further development on the combating of gender-based violence, particularly femicides could be. The previous analysis has shown several gaps in the handling of femicide across the EU, particularly in the investigating and judging of criminal cases and a lack of comparable data available for enabling targeted prevention measures. This final chapter will therefore address two possible solutions to the shortcomings in EU and member state legislation established so far: Firstly, the possibility of including a criminal minimal definition of femicide in EU harmonisation measures (1.) and secondly, the possibility of including a harmonised femicide definition for EU-wide data collection of femicide cases as an alternative approach outside criminal law but within EU competence regulations (2.).

1. Inclusion of a Femicide Definition in EU Criminal Law

Regarding the first solution, the inclusion of a femicide in EU law in the form of criminal law harmonisation by setting minimal standards, it has to be examined, to what extent such a harmonisation is possible and what requirements it entails. The following paragraphs will therefore discuss the need for such a criminal definition in EU law (a.), and the objectives and limitations of EU criminal harmonisation measures (b.).

a. The Need for a criminal Definition of Femicide

The majority of international documents, including the new EU Directive 2024/1385 merely mention femicide as one form of the broader issue of violence against women rather than a specific offense or human rights violation. For instance, the 2012 Report of the Special Rapporteur on violence against women, its causes and consequences stated: *“Rather than a new form of violence, gender-related killings are the extreme manifestation of existing forms of violence against women. Such killings are not isolated incidents that arise suddenly and unexpectedly, but are rather the ultimate act of violence which is experienced in a continuum*

of violence.”.²⁸⁵ This raises the question of why a distinct definition of femicide is needed, should it already be encompassed within gender-based violence provisions.

As seen in this analysis, as opposed to femicides, other crimes in the area of gender-based violence against women - such as sexualised crimes and domestic violence - are regularly addressed in legal measures as separate phenomena affecting women in particular. Although femicides are in many cases the cumulation of other forms of gender-based violence, there are several reasons for not considering the terms to be congruent: Provisions regarding gender-based violence depict social structures broadly, but as the ecological model showcases, femicides can only be tackled if the specific underlying risk factors in a society are investigated and translated into legal and policy measures. Especially when it comes to the criminal prosecution in specific cases, definitions and provisions tailored to the respective offense are required. As this analysis has shown, general provisions about gender-based violence only manage to prevent femicides to a certain extent. For example, preventing acts of domestic violence and prosecuting perpetrators consistently can target risk factors on the interpersonal level— at least regarding intimate and familiar femicides. However, such indirect measures can never encompass the issue of femicide as a whole, combating all of its forms and all underlying risks. Especially risk factors on the societal level, such as perceived impunity of perpetrators, are rarely tackled in the member states through specific criminal provisions. As analysed, this can lead to legal uncertainties and the misjudgement of femicides, thus further reinforcing social biases. This thesis argues therefore, that the causes of femicides must be highlighted in particular and require specific regulations, next to other forms of gender-based violence.

Some argue against such an approach, estimating gender-neutral provisions to be more suitable to cover violent crimes against women and other genders.²⁸⁶ This approach argues that not all women’s struggles should be summarised in the same category²⁸⁷ and fears a specific definition of femicide might not always do justice to individual circumstances and motives, and such a categorisation may overlook complex personal and situational factors.²⁸⁸ According to this, the specific categorisation of femicides as a distinct homicide is to be considered a social issue that does not fall within the remit of the law. However, femicide is characterized in several aspects

²⁸⁵ UN GA, *supra* note 56, at 4.

²⁸⁶ E.g. Julie Goldscheid, “Gender Neutrality and the ‘Violence Against Women’ Frame,” *University of Miami Race & Social Justice Law Review* 5, no. 2 (2015): 307-324.

²⁸⁷ *Ibid*, 315f.

²⁸⁸ Zinah Issa, “Why Femicide is a Dubious concept,” *Medium*, January 27, 2024, <https://zinahissa.medium.com/why-femicide-is-a-dubious-concept-da3097c66666>.

as a qualified form of murder or homicide and needs to be prosecuted accordingly.²⁸⁹ Gender-neutral provisions also pose the risk of disregarding motives resulting from patriarchal social structures such as misogyny or possessiveness, as demonstrated in Germany’s case law.²⁹⁰ Without a criminal definition reflecting these specificities, there is a risk of femicides being misjudged as for example “crimes of passion”²⁹¹ or “marital tragedies”²⁹², leading to the invisibility of the structural discrimination and social biases that allow for these crimes to happen in the first place.

As former UN Special Rapporteur on Violence against Women, Rashida Manjoo, stated in her 2012 Report: *„the use of inexact categories for the classification of murders, such as the category “others”, results in misidentification, concealment and underreporting of femicides—in particular those that do not occur in a family situation”*.²⁹³ To solve this issue of underrepresentation and lack of visibility of a crime so common in European societies is to reflect the characteristics of these crimes in a distinct femicide definition and adapt criminal law to reflect them. Recognising femicide as a specific crime also *“enables the timely identification of the possibility for femicide to occur, a quick response to prevent femicide, effective investigation, processing and the adequate punishment of perpetrators.”*²⁹⁴ Therefore, it is important to enforce a classification that explicitly names the phenomenon,²⁹⁵ places it within a broader societal context of gender-based risks and allows to address the underlying causes rather than ignoring individual motives.

On the other hand, some professionals also express concern about focusing on reacting to crimes rather than preventing them.²⁹⁶ While the concern about adequate prevention measures cannot be dismissed, it was emphasised earlier that legislative measures, especially in criminal law, can play a major role in setting social norms that go beyond political signalling by enforcing and promoting moral standards.²⁹⁷ It is crucial to acknowledge and address the specific ways women experience violence within criminal legal systems.²⁹⁸ Although the

²⁸⁹ Kouta et al., supra note 56, at 10; WHO, supra note 95, at 1.

²⁹⁰ E.g. German Federal Court of Justice, Judgement of 21 February 2018, 1 StR 351/17, para. 10, <https://www.hrr-strafrecht.de/hrr/1/17/1-351-17.php>; German Federal Court of Justice, decision of 24 October 2018, 1 StR 422/18, para. 20, <https://www.hrr-strafrecht.de/hrr/1/18/1-422-18.php>.

²⁹¹ UN GA, supra note 56, at 106.

²⁹² Knodt, supra note 202.

²⁹³ UN GA, supra note 56.

²⁹⁴ “Take five: ‘Femicide should be recognized as a specific criminal offense’,” UN Women – Europe and Central Asia, accessed July 1, 2024, <https://eca.unwomen.org/en/news/stories/2020/5/take-five-femicide-should-be-recognized-as-a-specific-criminal-offense>; EIGE, supra note 73, at 30.

²⁹⁵ Also: Dawson et al., supra note 89.

²⁹⁶ E.g. in Germany, France, Portugal and Romania: EIGE, supra note 73, at 50.

²⁹⁷ MacKinnon, supra note 49; Terwiel supra note 45, at 423f.

²⁹⁸ Gelsthorpe, supra note 41.

causes for femicide can only be eliminated through sustained social changes, these must also involve reforming criminal law.

Regarding some criminal offences such as the killings of women, it is necessary to approach them using a gendered lens, since their victims are predominantly of that gender or the motivation to commit that offence is heavily reliant on the gender of the victim.²⁹⁹ Additionally, these crimes are - as shown earlier - a result of systemic discriminatory structures that can be better assessed and studied by using a distinct category.³⁰⁰ That is why a comprehensive approach to addressing gender-related killings of women must consider judicial measures and prosecution. Central to this is the establishment of a legally binding definition as a necessary basis for legally dealing with the various manifestations of femicide.

The societal complexities underlying the causes of femicide evidently make it difficult to create a universally valid definition of femicide. The prosecution of criminal acts requires that social backgrounds be related to individual perpetrators, risking that various factors forming the state's and society's responsibility such as patriarchal and misogynistic structures become invisible.³⁰¹ Therefore a comprehensive approach to femicide has to go beyond a criminal definition. However, after the analysis of the current shortcomings of the EU's legal framework, this thesis argues that this approach must encompass a criminal definition to judge femicides accordingly, because it is an inherent part of acknowledging the ongoing suppression of women or in other words "*because it is recognised that those who impose the law must acknowledge the seriousness of violence before society can effectively respond.*"³⁰²

²⁹⁹ Monckton-Smith, *supra* note 204, at 13f.

³⁰⁰ Madhumita Pandey, "Femicide: why a specific crime is needed," *Social Europe*, May 15, 2024, <https://www.socialeurope.eu/femicide-why-a-specific-crime-is-needed>.

³⁰¹ Gerry Johnstone and Tony Ward, *Law & Crime* (London: Sage Publications, 2009), 16.

³⁰² Myrna Dawson and Saide Mobayed Vega, "Femicide and Feminicide: A Growing Global Human Rights Movement", in *The Routledge International Handbook on Femicide and Feminicide*, ed. M. Dawson and S. Mobayed Vega, (London: Routledge, 2023), 12, <https://doi.org/10.4324/9781003202332>.

b. Objectives and Implications of EU Criminal Law Competences

First, however, it is questionable whether EU law would allow the possibility of a criminal femicide definition and where the competence-related concerns in the area of harmonising criminal law stem from.

The word “harmonisation” is a rather unspecific term that can refer to different kinds of processes in different contexts.³⁰³ In legal terms “harmonisation” is understood as the progress of adaptation of laws towards the abolishment of differences between them.³⁰⁴ While there are some cases where unification is the goal of harmonisation measures, in the context of European integration, it would be more precise to describe this process as bringing two legal systems closer to each other, as “approximation”.³⁰⁵

With the adoption of the Lisbon Treaty in 2007 there came an expansion of EU competences including those in criminal law: It introduced a new possibility for the EU to create criminal legislative measures, strongly limited to a few areas,³⁰⁶ but also expanded the competence for harmonising criminal law of the member states within the framework of “Judicial Cooperation in Criminal Matters”, regulated in Article 82f TFEU, which is part of the “Area of Freedom, Security and Justice”³⁰⁷.³⁰⁸

With regard to femicides, the only form of criminal law competence that could be considered is that of harmonisation. In comparison to the harmonisation of other legal fields, the harmonisation of criminal law is subject to some specificities as it not only serves the alignment of legal differences between member states: It is closely connected to the values and objectives of the EU found in Article 2 and 3 (2) TEU and therefore an expression of the EU’s shared values.³⁰⁹ Therefore policy objectives also play a major role in the harmonisation of criminal law provisions, often described as achieving an “European common good”³¹⁰.

³⁰³ Marcel Kau, *Rechtsharmonisierung, Jus Publicum, Beiträge zum öffentlichen Recht, Bd. 252* (Tübingen: Mohr Siebeck, 2016), 2f.

³⁰⁴ Felicitas M. Tadic, “How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law,” in *Harmonisation and harmonising measures in criminal law*, ed. André Klip and Harmen van der Wilt (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 2002), 8f.

³⁰⁵ *Ibid.*, 9.

³⁰⁶ Art. 325 TFEU; Frank Zimmermann, „Die Auslegung künftiger EU-Strafrechtskompetenzen nach dem Lissabon-Urteil des Bundesverfassungsgerichts,“ *JURA* 31, no. 11 (November 2009): 844.

³⁰⁷ Art. 67ff TFEU.

³⁰⁸ Werner Schröder, “Limits to European Harmonisation of Criminal Law,” *eu crim* 2, no. 2 (April 2020): 144.

³⁰⁹ *Ibid.*

³¹⁰ ECJ, Case 11/70, Judgement of the Court of 17 December 1970, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114, para. 16.

When talking about a harmonisation of a femicide definition in criminal law in the EU, one has to consider the problems EU criminal law competences pose. As seen during the legislative process of the new directive, even different interpretations of whether or not the regulation of a crime could fall under EU competences can lead to some member states regarding the impact on their national laws high enough to block the ratification process. In principle, criminal law regulations are currently primarily the responsibility of the member states.³¹¹ According to the principle of conferral, the EU is only allowed to act within the competence limits that have been conferred upon it by the Member States through the EU treaties.³¹²

Historically, member states have always been hesitant to give up competences, especially in the area of criminal law.³¹³ Competences in criminal law are generally divided into three levels: the creation of norms, the application of norms, and the execution of decisions and judgments.³¹⁴ Since in EU legislation, introducing measures often necessitates the combination of these levels, the cooperation of member states is crucial.³¹⁵ A typical example of this is directives that have to be implemented by the member states.

Therefore, to answer the question of whether a harmonised criminal definition of femicides could be implemented in EU law, this chapter is going to first look at the EU criminal law competences in question (i.), then the scope of relevant competence provision in Article 83 (1) TFEU (ii.), subsequently the limitations the principle of subsidiarity provides (iii.) and lastly, the debate on further expanding EU criminal law competences (iv.).

i. THE EU CRIMINAL LAW COMPETENCE REGULATIONS

It is to be distinguished between areas where the EU has exclusive competence (Article 3 TFEU) and areas of shared competence (Article 4 TFEU), where both the EU and member states can legislate and adopt legally binding acts. However, according to Article 2 (2) TFEU, member states can exercise their competence in these latter areas only to the extent that the EU has not exercised its competence. When it comes to the area of substantive criminal law, according to the EU strategy on criminal justice,³¹⁶ the competence of the EU is limited to

³¹¹ “EU strategy on criminal justice,” *European Commission*, accessed June 21, 2024, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/criminal-justice/eu-strategy-criminal-justice_en.

³¹² Article 5 (2) TEU.

³¹³ Petter Asp, “The Substantive Criminal Law Competence of the EU,” *Skifter utgivna av juridiska fakulteten vid Stockholms universitet* no 79 (December 2012): 13-39.

³¹⁴ *Ibid.*, 40f.

³¹⁵ *Ibid.*

³¹⁶ “EU strategy on criminal justice,” *European Commission*, accessed July 2, 2024, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/criminal-justice/eu-strategy-criminal-justice_en.

establishing “*minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension*” (Article 82 TFEU). On top of that Article 82(2) concerns judicial cooperation in criminal matters, particularly the approximation of laws and regulations of the member states:

“To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.”

These EU-crimes have been specifically listed in Article 83(1) TFEU:

“The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.”

Article 83 (2) TFEU includes the competence for ensuring effective implementation of previously enacted EU harmonisation measures.

Specific Articles of the TFEU relevant to combatting violence against women can be in particular, additionally to Article 82 (2), Article 78 (2) that relates to the EU's policies on asylum, refugees, and displaced persons, Article 84 that addresses the EU's role in crime prevention and Article 336 that provides the legal basis for establishing measures concerning the administrative implementation of policies, which can include coordination and reporting mechanisms related to the Istanbul Convention.³¹⁷

³¹⁷ ECJ, Opinion 1/19, Opinion of the Court of 6 October 2021, *Istanbul Convention*, ECLI:EU:C:2021:198.

ii. THE SCOPE OF ARTICLE 83 (1) TFEU

There have repeatedly been calls, particularly from MEPs of the European Parliament, to include gender-based violence in the catalogue of Article 83 (1) TFEU.³¹⁸ This could - in theory - enable a legal instrument including a criminal definition of femicides.

This provision of Article 83 (1) TFEU, which is of great importance for the harmonisation of criminal definitions in the area of gender-based violence, includes criteria for the kind of criminal conduct that can be harmonised by establishing “*minimum rules concerning the definition of criminal offences and sanctions*” in the form of EU directives. These criteria however are abstract and not easily accessible to interpretation.³¹⁹ According to the ECJ, for the interpretation of EU provisions their wording, legislative history, the context and the objectives pursued must be taken into account.³²⁰ When implementing Article 83 (1) (2) TFEU especially the European legal history of instruments of harmonisation must be considered.³²¹

Article 83 (1) 1 TFEU stipulates that such harmonisation is only possible if the offences in question are classified as particularly serious crimes and have a “cross-border dimension”. The requirements must be met cumulatively.³²² This is followed by an exhaustive list of crimes that meet these requirements in subparagraph 2.³²³ However, subparagraph 3 allows for expansion of this catalogue. Any such expansion has to fulfil the requirements of both criteria in subparagraph 1 and requires the unanimous decision of the Council. The introduction of any form of gender-based violence into this catalogue of crimes would therefore first and foremost imply close cooperation and the consent of all member states.

It is not entirely evident how crimes are to be classified as “particularly serious” or having a “cross-border dimension”. To be considered as a particularly serious crime, the conduct must be comparable to the catalogue in paragraph 2 in terms of extent and social harm.³²⁴

³¹⁸ European Parliament, “Make gender-based violence a crime under EU law, MEPs say,” Press release, September 16, 2021, <https://www.europarl.europa.eu/news/en/press-room/20210910IPR11927/make-gender-based-violence-a-crime-under-eu-law-meps-say>.

³¹⁹ Helmut Satzger, „Art. 83 AEUV,“ in *EUV, AEUV, Becksche Kurz-Kommentare Bd. 57*, ed. Rudolf Streinz (Munich: Verlag C.H. Beck, 2018), para.7.

³²⁰ Key principles in: ECJ, Case 283/81, Judgement of the Court of 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, ECLI:EU:C:1982:335.

³²¹ Joachim Vogel and Jörg Eisele, „AEUV Art. 83,“ in *Das Recht der Europäischen Union*, ed. Martin Nettesheim (München: Verlag C.H. Beck, 2016), para. 52; Çelebi et al., supra note 210.

³²² Satzger, supra note 319.

³²³ Ibid.

³²⁴ Ibid., para. 11.

The “Cross-border dimension” does not simply refer to geographical aspects of a criminal offence.³²⁵ Article 83 (1) TFEU classifies that the “*special need to combat them on a common basis*”, alongside the nature and impacts of crimes, can indicate such a cross-border dimension. Some stated concern that this characteristic might undermine the criterion of subparagraph 1 that is supposed to pose a limit for the EU’s competence: For example, Germany’s Federal Constitutional Court stated in its “Lisbon-decision”³²⁶ that this must not be understood as blind authorization for harmonisation based on merely a common expression of political will.³²⁷ Therefore assuming such a special need to combat an offence on a common basis on EU level must be well founded.

However, Article 83 TFEU is historically intended as a mechanism allowing the EU to take action against crimes directed against its fundamental values.³²⁸ Some legal scholars³²⁹ even assume the derivation of a duty to harmonize historical grown differences in national laws with reference to the protective dimension inherent in the fundamental rights of the Union if the national legal systems do not adequately counteract conduct covered by the competence of Article 83 TFEU.³³⁰ The aim to combat femicides as one of the most extreme forms of violence against women, can, in light of the EU’s fundamental values, not be reduced to merely political will.

On top of that Article 83 TEU includes a dynamic annex competence to harmonise criminal law in policy areas that have already been harmonised by Union law. However, Article 82 (3) and Article 83 (3) TFEU regulate the right of each member state, to object a measure of harmonisation, in cases where it may affect “*fundamental aspects of its criminal justice system*”.³³¹ Therefore, every act of criminal law harmonisation is heavily dependent on the member states’ political will, as evident with the outcome of the new Directive.

³²⁵ ECJ, Case C-784/19, Judgement of the Court of 3 June 2021, „*TEAM POWER EUROPE*“ *EOOD v Direktor na Teritorialna direksia na Natsionalna agentsia za prihodite – Varna*, ECLI:EU:C:2021:427; Çelebi et al., supra note 210.

³²⁶ German Federal Constitutional Court, Judgment of the Second Senate of 30 June 2009 - 2 BvE 2/08 -, ECLI:DE:BVerfG:2009:es20090630.2bve000208,

³²⁷ Ibid., para. 359 (“*Eine solche besondere Notwendigkeit liegt nicht bereits dann vor, wenn die Organe einen entsprechenden politischen Willen gebildet haben*”).

³²⁸ Joachim Vogel and Jörg Eisele, „AEUV Art. 83,“ in *Das Recht der Europäischen Union*, ed. Martin Nettesheim (München: Verlag C.H. Beck, 2016), para. 43; Çelebi et al., supra note 210.

³²⁹ Such as Anna Maria Maugeri, “Fundamental Rights in the European Legal Order, Both as a Limit on Punitive Power and as a Source of Positive Obligations to Criminalise,” *New Journal of European Criminal Law* 4, no. 4 (December 2013): 374; Frank Zimmermann, *Strafgewaltkonflikte in der Europäischen Union, Schriften zum Internationalen und Europäischen Strafrecht Bd. 14* (Baden-Baden: Nomos, 2015), 219-221; Satzger, supra note 319, at para. 3.

³³⁰ Satzger, supra note 319, at para. 3.

³³¹ Schröder, supra note 308, at 146.

iii. THE PRINCIPLE OF SUBSIDIARITY

Apart from meeting the criteria of Article 83 (1) TFEU, harmonisation measures must especially consider the limitations given by the principle of subsidiarity in respect to Article 5 (1) 1, (3) TEU and the principle of proportionality regulated in Article 5 (4) TFEU, as prescribed by the “necessity criterion” in Article 67 (3) TFEU. Because of the severity of criminal sanctions, this criterion points to criminal law having to be regarded as a last resort.³³²

Fulfilling these criteria plays a particularly important role in the question of whether femicide or – more generally speaking - gender-based violence as criminal offences can fulfil the requirements of Article 83 (1) TFEU. This is because, according to the principle of subsidiarity, an area may only be harmonised “*only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*”³³³ This provision entails two subsidiarity tests: The so-called national insufficiency test and the comparative efficiency test.³³⁴ In the first test, the EU is allowed to act where the objectives cannot possibly be sufficiently achieved by the member states.³³⁵ In the case of a criminal definition regarding femicides, this must be rejected: Each member state could in theory implement their own femicide regulations and while this could lead to even more divergences between the states, it cannot be ruled out that such national regulations could be sufficient. According to the second test, the EU is allowed to act in areas where it is better able to achieve the objective.³³⁶ In the context of defining femicide, there is certainly room for debate: The Commission’s proposal for the new directive explained a special need to combat violence against women on a common basis at EU level, emphasising the fragmentation due to different approaches in the member states, the connected legal uncertainty and the need for targeted legislative action at EU level.³³⁷ As analysed before, the same fragmentation and lack of targeted measures exist in the legal and non-legal approaches towards femicides on national levels.

³³² Satzger, *supra* note 319.

³³³ Article 5 (2) TEU.

³³⁴ Robert Schütze, “EU Competences: Existence and Exercise,” In *The Oxford Handbook of European Union Law*, ed. Anthony Arnall and Damian Chalmers (Oxford: Oxford University Press, 2015), 90.

³³⁵ James R. Maxeiner, “Subsidiarity Principle,” In *Encyclopedia of Global Justice*, ed. Deen K. Chatterjee (Heidelberg: Springer Dordrecht, 2011), 1040.

³³⁶ *Ibid.*

³³⁷ European Commission, *Proposal*, 9.

iv. OUTLOOK ON FURTHER HARMONISATION OF CRIMINAL LAW AREAS

The Commission's Proposal for the new Directive noted in its Explanatory Memorandum: "*Given the way in which violence against women and domestic violence have evolved in the past decades, these types of crimes are unlikely to significantly decrease without additional EU action.*" Following this approach, the further harmonisation of minimum definitions for criminal offences in the area of violence against women, that go beyond the definitions included in Directive 2024/1385, seems necessary to tackle violent crimes against women. With the adoption of the directive it was decided the Commission should report every 5 years on the need of revising its provisions (Article 45) – this might open up possibilities to include more extensive criminal regulations in further legislative measures. However, there are arguments for both sides of the discussion on the expansion of the EU's criminal law competences:

On one side, critics of the further harmonisation argue that criminal law is a core aspect of national sovereignty that must be protected, especially regarding the ability of member states to legislate according to their own legal traditions and societal values.³³⁸ This emphasis is reflected in Article 82 (2) TFEU that demands to take "*legal systems and traditions of the Member States*" into account. As seen in the political discourse surrounding the adaptation of the new Directive, there is often political resistance to transferring competences for further areas to the EU level, particularly in sensitive areas like criminal law. This resistance therefore stems not only from nationalistic sentiments or conservative family and gender views, but also legal concerns over ceding control to supranational institutions, making it difficult to achieve consensus among all member states.

On top of that, the Implementation of harmonised criminal laws can require significant resources, including training for legal professionals or the setting up of support systems. Not all member states may have the capacity to effectively implement these changes, leading to inconsistencies in application.³³⁹

³³⁸ E.g. Harmen van der Wilt, "Some critical reflections on the process of harmonisation of criminal law within the European Union," in *Harmonisation and harmonising measures in criminal law*, ed. André Klip and Harmen van der Wilt (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 2002), 77; See also Schröder, *supra* note 308, at 146f.

³³⁹ Felicitas M. Tadic, "How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law," in *Harmonisation and harmonising measures in criminal law*, ed. André Klip and Harmen van der Wilt (Amsterdam: Royal Netherlands Academy of Arts and Sciences, 2002), 20.

In the past, critics also argued with the importance to protect the democratic legitimacy of criminal law, arguing with democratic deficits on EU level.³⁴⁰ This concern over the democratic legitimacy of an area of such sensitivity in relation to fundamental individual rights as criminal law is as important today as it has ever been and must be taken into account when considering the expansion of criminal law competencies.

Conversely, the harmonisation of criminal law provisions represents a crucial instrument to promote security, legal certainty and coherent interpretation across member states.³⁴¹ Legal disparities in areas of the criminalisation of acts against fundamental rights can impact the free movement of goods, services, capital, and people within the EU. This is evidenced by the Council's Legal Service's opinion, which argues that such a special need to combat offences on a common basis should be affirmed, "*for instance in view of their particular seriousness and the need to ensure an equivalent level of protection to persons enjoying the right of free movement within the EU*".³⁴² Measures harmonising criminal laws ensure that provisions are applied uniformly, providing equal protection to all EU citizens and facilitating judicial collaboration, making criminal investigations and prosecutions more efficient.³⁴³ Harmonisation can ensure that minimum standards of human rights protection are upheld across all member states, therefore reflecting a commitment to shared values and solidarity among member states.³⁴⁴

While both sides of this debate have valid arguments, fundamental EU principles like the principle of Subsidiarity in Article 5 (3) TEU and the principle of Proportionality in Article 5 (4) TEU ensure for the necessity of harmonisation measures as well as their scope: If a criminal law regulation imposes extensive effects on national laws these principles also oblige that it must be of special importance for achieving the EU's objectives and values.³⁴⁵ Especially in the area of the most fundamental EU values and the EU's commitment to upholding human rights, there are good reasons to assume an extension of criminal competences in this field could be seen as justified in the future.

³⁴⁰ Harmen van der Wilt, *supra* note 338, at 81.

³⁴¹ Schröder, *supra* note 308, at 144ff.

³⁴² Council of the European Union, *supra* note 272, at 23.

³⁴³ Jenia I. Turner, „The Expressive Dimension of EU Criminal Law,” *The American Journal of Comparative Law* 60, No. 2 (Spring 2012): 555.

³⁴⁴ *Ibid.*, 557.

³⁴⁵ Schröder, *supra* note 308, at 147.

2. Data Collection as an Alternative Measure to Combatting Femicides in the EU

As the analysis of legal provisions dealing with femicides directly or indirectly has shown, criminal law is not the only legal field in which measures against femicides can be taken. Femicides can only be effectively tackled if all societal levels are reflected and addressed.³⁴⁶ A legal approach to combat femicide can therefore only be impactful if it considers the various factors influencing a society that allow for that extent of violence against women to happen.³⁴⁷

One of the most important measures to understand the extent and causes of femicides in the EU and develop effective prevention and protection initiatives is data collection across the EU member states. A distinct femicide definition is also necessary for harmonised statistical data collection, since *“the different frameworks, definitions and classifications used in the conceptualization of femicide often complicate the collection of data from different sources and could lead to documentation that may not be comparable across communities or regions.”*³⁴⁸

There are two ways of such data collection: Administrative data collection through the reporting of gender-based crime to the police or through monitoring cases by courts and also healthcare and social support services on the one hand³⁴⁹ and population surveys on the other.

There is a lack of administrative documentation of gender-based violence against women in EU member states. This was also emphasised by GREVIO in several of its country reports in 2021.³⁵⁰ Specifically for femicides, it is difficult to find reliable figures at all, as even the European member states that do collect statistics work with different definitions and, for example, only record intimate femicides.³⁵¹

In some of GREVIO’s baseline evaluation reports not only the general lack of data on gender-based violence but also the lack of retrospective reviews of femicide cases was criticised for several member states. Here GREVIO emphasised the importance of such reviews to conduct risk assessments and evaluate the efficiency of existing protection mechanisms.³⁵²

³⁴⁶ UN Women and OHCHR, *supra* note 64; Kouta et al., *supra* note 56, at 54.

³⁴⁷ Kouta et al., *supra* note 56.

³⁴⁸ UN GA, *supra* note 56, at 26.

³⁴⁹ EIGE, *Understanding intimate partner femicide in the European Union: The essential need for administrative data collection*, publication, 2023, https://eige.europa.eu/sites/default/files/documents/20223656_pdf_mh0922324enn_002.pdf.

³⁵⁰ GREVIO, *supra* note 152, at 41ff.

³⁵¹ See e.g. Spain: Marceline Naudi et al., *supra* note 51, at 31.

³⁵² GREVIO, *supra* note 152, at 133.

Another issue is that even the data on violent crimes that is collected is usually not gender-specific, both regarding the perpetrator and the victim and also factors like the perpetrator-victim relationship or previous acts of violence preceding the offence are overlooked.³⁵³ On top of that, in multiple member states the data collection is not harmonised between public institutions.³⁵⁴ In order to evaluate which measures are effective, assess numbers of criminal investigations, convictions and repeat offenders as well as identify patterns preceding crimes, unified definitions to enable the comparability of data, are necessary.³⁵⁵ On top of that, also to assess the development and extent of gender-based violence against women over time, the harmonisation of data collection is crucial.³⁵⁶

Additionally, only relying on police statistics and the monitoring of specific cases is not sufficient regarding the Introduction of effective prevention mechanisms to intervene before a femicide occurs: While the Gender Equality Directive and Victim's Rights Directive aim to protect victims from intimidation and repeated victimisation and thus enable more and earlier reporting crimes, only one third of victims of gender-based violence are estimated to actually report the crimes.³⁵⁷ Due to this only enabling a limited database even if member states were to comprehensively review the reported cases, the European Commission calls for improved and EU-wide population surveys to additionally rely on.³⁵⁸

Between 2020 and 2023, Eurostat conducted a survey on gender-based violence against women as defined in the Istanbul Convention and other forms of inter-personal violence involving 18 member states that agreed to participate.³⁵⁹ For the other member states, the according data was collected jointly by EIGE and FRA.³⁶⁰ Available to the public are to this moment only first results of the survey published in November 2022.³⁶¹ The areas of violence covered by the study are however not connected to data on femicide cases yet so that assessing the risk factors leading up to the death of a woman is still a hurdle.

³⁵³ European Commission, *supra* note 209, at 19, Annex 8.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*, 235.

³⁵⁷ *Ibid.*, 20f.

³⁵⁸ *Ibid.*

³⁵⁹ "EU survey on gender-based violence," eurostat, accessed July 3, 2024, <https://ec.europa.eu/eurostat/web/microdata/gender-based-violence>.

³⁶⁰ *Ibid.*

³⁶¹ Eurostat, *EU survey on gender-based violence against women and other forms of inter-personal violence (EU-GBV) - first results*, report, 2022, <https://ec.europa.eu/eurostat/documents/7870049/15323622/KS-FT-22-005-EN-N.pdf>.

The predecessor of this study was an EU-wide survey on violence against women by FRA, however already nearly 10 years old.³⁶²

Data Collection across all member states is one of the areas where the EU has very clear-cut competences.³⁶³ At the same time, it is one of the areas where improvements could have extremely high chances of providing concrete information to better assess the social factors that pose risks for a femicide to happen and the patterns of previous acts of violence against women that must alarm officials about this particular risk.

Accordingly, the new Directive 2024/1385 includes in Article 44 on *Data collection and research* the provision: “Member States shall have a system in place for the collection, development, production and dissemination of statistics on violence against women or domestic violence,” and names in paragraph 2 (b) “the number of victims who have been killed due to violence against women or domestic violence.” This could be understood as an indirect femicide definition – if not criminal, then at least in regards to data collection.

The provision in paragraph 5 adds: „*The European Institute for Gender Equality shall support Member States in the data-gathering referred to in paragraph 2, including by establishing common standards taking into account the requirements set out in that paragraph.*” At the moment, EIGE’s definition for statistical use is restricted to “*the killing of a woman by an intimate partner and the death of a woman as a result of a practice that is harmful to women.*”³⁶⁴ This provision of the new Directive could be a gateway for EIGE to find a common methodology for all forms of femicides for the collection of data that could prove helpful in the future for the implementation of specific rules for the prevention of femicides and the protection of potential victims.

³⁶² European Commission, supra note 209, at 20; FRA, *Violence against women: an EU-wide survey, Main results*, 2015, https://fra.europa.eu/sites/default/files/fra_uploads/fra-2014-vaw-survey-main-results-apr14_en.pdf.

³⁶³ Article 338 TFEU and *Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics*, O.J. L 87, March 31, 2009.

³⁶⁴ EIGE, supra note 349, at 1.

In its past publications on the classification of femicides, EIGE has already referred to conceptual mappings involving different societal norms and contexts, putting an emphasis on considering risk factors on all social levels, individual, relational, cultural and societal.³⁶⁵ Therefore, it is to be hoped that the Directive's provisions on developing a harmonised approach to collecting data on violence against women can lead to a more extensive and differentiated definition of femicides for statistical purposes, covering all forms of femicides and assessing all the identified risk levels.

³⁶⁵ EIGE, *supra* note 100, at 8f.

V. CONCLUSION

The recent developments in EU law regarding gender-based violence can be seen as an important political step showcasing the fight against gender-based violence as a common goal of EU institutions and member states. However, in legal terms, the reform falls short of its promises so far. There are still significant gaps in the current legal frameworks addressing gender-based violence at the EU level. Despite the EU's progressive stance on gender equality and its accession to the Istanbul Convention, the challenge remains to translate these commitments into effective, harmonised actions across member states.

One of the most pressing issues identified is the fragmented legal framework within the EU regarding femicides. While some member states include femicide definitions in their legal criminal laws, other member states lag in providing specific legal recognition and adequate measures. This fragmentation results in inconsistent protection standards depending on the jurisdiction a woman lives under in the EU. Harmonising definitions and legal responses in regard to femicides could be one way to ensure uniform protection for all women across the EU.

Next to this fragmentation, the lack of concrete measures regarding femicide is manifesting on different levels in society. This analysis focused on the societal level, which shows a lack of unified criminal legislation and the presence of patriarchal structures in case law, politics and social narratives. Accurate and comprehensive data collection on femicides also remains a critical gap. The discrepancies and underreporting of femicide-related statistics hinder the ability to develop targeted policies and measure progress. Establishing standardised data collection protocols across the EU and promoting transparency in reporting can significantly enhance the understanding and visibility of femicides.

The adoption process of the new EU directive on violence against women has shown how the introduction of harmonised criminal law, even in an area so inherently necessary for the upholding of fundamental and human rights, still faces challenges due to the political resistance of some member states and limitations of EU competences in criminal law that are presenting a significant barrier to creating a cohesive legal approach to femicides in the EU. Consequently, addressing this issue requires a nuanced balance between respecting national sovereignty and strengthening EU-wide commitments to combat femicides effectively.

This is why, the perspective of this study for a (criminal) definition of femicide has its limits. The employed lens of the ecological model shows the ramifications of the causes of femicides in all societal levels, based on prevailing patriarchal structures in society as a whole. This is why, in addition to calling on policy makers to initiate measures for social changes, it is crucial to recognise the potential initiatives by civil society organisations, advocacy groups and international programmes. The EU is regularly supporting or creating initiatives in cooperation with different stakeholders, for example when it comes to the political participation of women.³⁶⁶ Non-governmental initiatives combating femicides in Europe are for example the WAVE network³⁶⁷ or the European Observatory on Femicide³⁶⁸. While this is no substitute for a legal examination of the offences and their causes, the strengthening, supporting and cooperation with such networks, women’s rights NGOs and initiatives can be great steps on EU level to tackle femicides more comprehensively. The perpetration of these heinous crimes and the pervasive understanding of gender and power relations in our society necessitate a unified effort from all sectors of society to effectively address them.

However, given the political climate following the recent European elections, there is good reason to be concerned about the further development of this area of regulation.: The 2024 elections for the European Parliament resulted in a notable increase in representation from Eurosceptic parties: 141 of 720 seats in the European Parliament are now being held by the two far right wing parties *Identity and Democracy* and the *European Conservatives and Reformists*.³⁶⁹ Politicians of these two parties made up nearly half of the rejecting votes and more than 70% of abstentions regarding the adoption of the new Directive on Combating violence against women and domestic violence.³⁷⁰ Among the several right wing nationalist and populist parties that have gained a significant number of seats in this year’s election are for example the *FdI* from Italy, the *AfD* from Germany and the *Rassemblement National* from

³⁶⁶ See European Commission, “EU and partners launch WYDE – Women’s Leadership Initiative,” News announcement, March 14, 2024, https://international-partnerships.ec.europa.eu/news-and-events/news/eu-and-partners-launch-wyde-womens-leadership-initiative-2024-03-14_en.

³⁶⁷ A network of over 170 European women’s NGOs, financially supported by the EU’s Rights, Equality and Citizenship Programme: “Women Against Violence Europe,” WAVE, accessed July 6, 2024, <https://wave-network.org/>.

³⁶⁸ A research and advocacy initiative, coordinated by European Universities: “European Observatory on Femicide (EOF),” EOF, accessed July 6, 2024, <https://eof.cut.ac.cy/?repeat=w3tc>.

³⁶⁹ “2024 European election results,” European Parliament, accessed June 30, 2024, <https://results.elections.europa.eu/en/index.html>.

³⁷⁰ European Parliament, *supra* note 260, at 76f.

France³⁷¹ – next to parties like the Hungarian *Fidesz*³⁷² that have all stressed their opposition towards international treaties like the Istanbul Convention and the so called “gender ideology” in the past.³⁷³ This significant presence of Eurosceptic and far-right parties therefore poses a huge challenge for the further implementation of unified legal standards and harmonised prosecution mechanisms in the area of gender-based violence or could shift the focus to a xenophobic understanding of gender-based violence³⁷⁴ without taking the inherent patriarchal problems of European societies into account.

Categorising femicides distinctly as a crime, is necessary for acknowledging the systemic nature of the ongoing oppression of women. Femicides are gender-based crimes not only because the term encompasses distinct forms of murders mostly committed against women and their motivations, but because societal gender norms form the basis for why these crimes happen and how they are treated.³⁷⁵ Concluding, without tackling femicides on a broader, societal level, measures remain limited addressing only the surface of this deep-seated issue of gender inequality. This tackling must include ensuring that crimes against women can no longer be diminished because their characteristics are invisible in law.

The fight against gender-based violence through legislation at EU-level has only just begun. While significant progress in some areas has been made, there remain substantial gaps. Implementing a harmonised legal definition of femicides could be one way to address the identified gaps in the EU and move closer to ensuring justice and protection for all women, thereby upholding its commitment to gender equality and human rights.

³⁷¹ With most of them even being the strongest party in their respective countries: European Parliament, *supra* note 369.

³⁷² That while losing two seats compared to last election is still the strongest political party of Hungary with 44,8 percent of votes: “2024 European election results - Hungary,” European Parliament, accessed June 30, 2024, <https://results.elections.europa.eu/en/hungary/>.

³⁷³ “Perché al Parlamento Europeo la destra italiana si è astenuta sulla Convenzione di Istanbul,” *Il Post*, March 11, 2023, <https://www.ilpost.it/2023/05/11/lega-fratelli-italia-astensione-voto-convenzione-istanbul/>; “EU sollte Istanbul-Konvention nicht anerkennen!,” AfD Kompakt, accessed July 6, 2024, <https://afdKompakt.de/2023/02/14/eu-sollte-istanbul-konvention-nicht-ankennen/>; Annika Bruna, “Droits des femmes et des LGBT, quels sont les vrais objectifs de la commission européenne?,” *Rassemblement National*, November 27, 2020, <https://rassemblementnational.fr/communiqués/droits-des-femmes-et-des-lgbt-quels-sont-les-vrais-objectifs-de-la-commission-europeenne>; *The Guardian*, *supra* note 230.

³⁷⁴ See e.g. German AfD: *AfD Kompakt*, “EU sollte Istanbul-Konvention nicht anerkennen!;” („*Because the Istanbul Convention promotes gender ideology and at the same time turns a blind eye to imported violence against women, it is harmful,*“ original: “*Weil die Istanbul-Konvention die Genderideologie vorantreibt und zugleich die Augen vor importierter Gewalt gegen Frauen verschließt, ist sie schädlich,*“); French *Rassemblement National*: Bruna, “Droits des femmes et des LGBT“.

³⁷⁵ Also: Jane Monckton-Smith, *supra* note 204, at 13f.

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