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**Conditions for plausibility of Women's Conventions:
Internalising the paradigm shift in the Inter-
American System of Human Rights.**

Analysing a comparable experience for the Istanbul Convention

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To Ema

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Abstract

Women's Conventions, endorsing and approach based on the recognition of structural discriminatory social patterns and cultural practices, have been adopted in the Universal System, with limited national impact, and in the Regional ones. Such systems present different structures, conditions and resources, which contribute to determine the *conditions for plausibility* of the rights enshrined.

The Inter-American System adopted the Belém do Pará Convention (BdPC) back in 1994, nevertheless, it largely failed to attract attention in legal scholarship, particularly in Western countries. We argue that, given its high degree of comparability with the European System, the analysis of such experience provides valuable informative material to shape a European response.

Our first objective is, hence, to analyse the process of internalisation of the BdPC in the Inter-American System. Analysing Inter-American Institution's case law on VAW since 1994 and the evolution of relevant national legislation in the region, we find evidence of the role of a coalition of civil society organisations and scholars' in compensating Inter-American Institutions' lack of previous experience with gendered analyses, enabling an incremental learning process and triggering BdPC full justiciability, initially unclear due to BdPC ambiguous wording. At the same time, the availability of authoritative precedents to hold before national governments in a relatively culturally homogeneous context enhanced national implementation of regionally constructed principles and standards, harmonised with those of the Universal System. The IACrTHR plays a crucial interpretive function, clarifying the implications of an inherently incomplete instrument in concrete cases. On the basis of the identification of early setbacks, we suggest a reform of the IACommHR filtering function, which should be limited to the evaluation of petitions' admissibility and to coordinate the availability of crucial contextual information. This function should be performed with the support of Inter-American Commission of Women's expertise. Such procedural reform would improve analyses of complex cases emerging from intersectionality and cultural diversity, still unsatisfactorily developed.

Our second, and consequent, objective is to use our findings to identify a generalizable method to ensure women's rights plausibility. We argue that both

ECrTHR's case law and CoE Member States' legislations on VAW are still at an early stage. However, the Istanbul Convention does not grant the ECrTHR competence on the protection mechanism established. On the basis of our findings, we argue the need to reconsider ECrTHR role with respect to the Istanbul Convention and present a concrete proposal to guarantee the feasibility of its contentious jurisdiction, avoiding further clogging-up, valorising the recently introduced Pilot Judgment Procedure and the specific expertise provided by GREVIO.

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List of Acronyms and Abbreviations

ACHR	American Convention on Human Rights
ADHR	American Declaration on Human Rights
BdPC	Belém do Pará Convention
CEDAW	Convention to Eliminate all forms of Discrimination Against Women
CEJIL	Centre for Justice and international Law
CLADEM	Latin American and Caribbean Committee for the Defence of Women's Rights
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECommHR	European Commission of Human Rights
ECrTHR	European Court of Human Rights
EU	European Union
FGM	Female Genital Mutilation
HRC	Human Rights Committee
IACommHR	Inter-American Commission of Human Rights
IACommW	Inter-American Commission of Women
IACrTHR	Inter-American Court of Human Rights
ICCPR	Inter-American Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IIHR	Inter-American Institute of Human Rights
ILO	International Labour Organization
NAFTA	North American Free Trade Agreement
OAS	Organization of American States
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNAM	National Autonomous University of Mexico
UNGA	United Nations general Assembly
VAW	Violence Against Women
VCLT	Vienna Convention on the Law of the Treaties

General Introduction

Background and motivation

During my previous academic studies, I had to come to terms with the fact that while, for historical reasons, Latin American regional initiatives frequently drew on similar European consolidated experiences for inspiration and guidance, at times arguably resorting to actual “transplants,”¹ they generally failed to attract European attention as comparable external sources of useful information. Indeed, the generalised tendency is that of a unidirectional dialogue, or monologue (De Vergottini, 2011), through which long successful European regional experiences are used as sources of authoritative solutions to similar problems in Latin America, whereas the European counterpart largely perceives itself as a path-breaker. The context has recently changed for what concerns the interaction between the Inter-American System of Human Rights, which counts on a long successful history in the Latin American region, and the European System of Human Rights,² increasingly interested in the doctrinal evolutions emerging from the activities of an homologous system with comparable legitimacy and *auctoritas*³ (Garlicki, 2012).

Building on the evidence gathered in my previous research experiences in

¹ Examples of political and economic integration are UNASUR and MERCOSUR, emerging from previous integration experiments in Latin America and inspired by the process that from the European Economic Community led to the European Union. The focus of this research, the Inter-American System of Human Rights, established by the Organisation of American States in 1969, is an example of regional integration in the field of human rights protection that, in its early phases, drew on the experience of the European Convention of Human Rights within the Council of Europe.

² For an extensive study on the historical interaction between the two regional Human Rights Courts refer to: García Roca et al. 2012.

³ Evidence of an emerging bi-directional dialogue is, for instance, the adoption by the European Court of Human Rights of the Inter-American doctrinal elaborations on the issue of the *desaparecidos*, with the Inter-American Court recognising State’s responsibility on the basis of the continuous nature of the violation to guarantee effective legal proceedings; see Massolo, 2012.

Latin America,⁴ I embarked on my doctoral studies with the objective of contributing to provide bases for a stronger bi-directional dialogue. Given the evolutionary jurisprudence produced by the Inter-American Court of Human Rights (IACrTHR) on cultural rights, in particular for what concerns indigenous communities, harmonising regional solutions with the international normative framework provided by, *inter alia*, Convention 169 on the Rights of Indigenous and Tribal Peoples of the International Labour Organisation (ILO), I initially focused on the issue of legal and cultural pluralism in the Inter-American System, as a potentially useful comparable experience to address new questions arising in the increasingly multi-cultural European context. During this early phase, I recognised that my interdisciplinary academic background enabled me to count on suitable tools of analysis to appropriately understand the complexities arising from the socio-legal approach endorsed by recent international human rights instruments, which overcomes the shortcomings of the positivist approach and the limits of the traditional understanding of universality and objectivity.

While I began my studies, the European region was confronting the challenges emerging from the need to guarantee effectiveness to the rights enshrined in the 1979 United Nation Convention on the Eradication of Violence Against Women (CEDAW) and in CEDAW Committee's 1992 General Recommendation 19, recognising gender-based violence⁵ as a form of discrimination and a violation of women's fundamental rights. While the issue of violence against women (VAW) gained momentum with the adoption of CEDAW Optional Protocol in 2000, granting CEDAW Committee the competence to receive and consider petitions from individuals or groups from within the jurisdiction of ratifying States, and a plethora of recommendations, declarations, guidelines and awareness raising campaigns in the Universal System, European Union (EU) and in the Council of Europe (CoE), the latter was coming to terms with the need to adopt a specific convention on women's rights to promote national implementation. The ECrTHR was developing its doctrine to harmonise its

⁴ The research for my Master's final dissertation on the problems and perspectives of Latin American regional integration initiatives was developed during my stay at the National Autonomous University of Mexico (2007-2008).

⁵ Although the wording *gender-based violence* is currently, and correctly, starting to be used to refer to a violence emerging from a wider variety of sexual identities, we are going to use it as a synonym for violence against women, considering their interchangeable use in current international instruments on women's rights, the object of this research.

decisions with the paradigm shift on the interpretation of VAW, however, the specific features of the Women Conventions required the actualisation of the traditional tools of analysis. The national inquiries of United National Special Rapporteurs on Violence Against Women signalled that social and cultural patterns, reproducing discrimination against women and creating conducive contexts for VAW, were not, in Sepper's words, a problem exclusive to "less democratic of less-developed countries". On the contrary, while Western States had generally achieved legal equality, culture remained an obstacle to substantive equality⁶ (Sepper, 2008). In this sense, Article 5(a) CEDAW posed the greater challenges, requiring States to modify the social and cultural patterns of conduct of men and women, which are based on, and reproduce, unequal relations of power between the sexes.

My research interests, nationality and, certainly, my gender, created the conditions for an active participation in the debate in Italy on a legal response to VAW,⁷ triggered by CEDAW Committee's considerations on national periodic reports, that confronted Italy with the gravity of the phenomenon. The objective was preparing a draft legislative text that would reflect the normative framework provided by CEDAW and General Recommendation 19, adopting a holistic approach to the problem.⁸ The evolution of my research focus emerged naturally when, searching for comparative material to inform our activities, I realized that, to the overall absence in the CoE of examples of national

⁶ On the transition from the traditional, formal, understanding of equality to the concept of *substantive equality* refer, amongst the many, to Roth, 2002.

⁷ CEDAW Special Rapporteurs underlined the magnitude of the problem in Italy, signalling that fragmentation of the legal framework, inadequate punishments and lack of effective redress for women victims of VAW, contribute to the invisibility of the phenomenon and its consequences, and inadequately address its causes. For specific reference see the 2011 CEDAW Committee's observations on Italy and the 2012 Report of the Special Rapporteur on VAW, who stated that: *"Violence against women remains a significant problem in Italy. As the most pervasive form of violence, domestic violence continues to affect women across the country. The increasing number of victims of femicide by partners, spouses or former partners reflects the continuum in domestic violence. Most manifestations of violence are underreported in the context of a patriarchal society where domestic violence is not always perceived as a crime; where victims are largely economically dependent on the perpetrators of violence; and perceptions persist that the state responses will not be appropriate or helpful"* (Manjoo, 2012, p. 17).

⁸ This participatory process resulted in the presentation of the Draft Law 3390 *Norme per la promozione della soggettività femminile e per il contrasto al femminicidio* (Norms to promote women's subjectivity and contrast feminicide), presented by Sen. Serafini to the Senate at the end of 2012, under Monti presidency, currently waiting to be re-submitted for consideration to the parliament elected in 2013. A more limited Decree Law, mainly focused on punitive measures, has been presented to the Chamber of Deputies in August 2013. Its conversion into law is currently pending, and should be finalized by the end of October 2013.

legislations reflecting the paradigm shift on VAW,⁹ corresponded a completely different context in the Latin American region, where recently adopted laws generally presented the features required by the new understanding on VAW¹⁰. Struck by the sharp difference, I immediately realized that I had run over a perfect case to conclusively pursue the objective of my doctoral studies.

As opposed to the CoE, as early as in 1994, its American counterpart, the Organisation of American States (OAS), had adopted a specific regional convention on VAW, just a couple of years after the path-breaking General Recommendation 19: the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará, from now on BdPC). Not only this instrument reflected and actualised the normative framework provided by CEDAW, including its transformative Article 5(a) (Article 8, BdPC), but it also provided for a stronger protection mechanism, granting the competence to receive and consider individual petitions to the Inter-American Commission and the Court (respectively, IACommHR and IACrTHR), several years before the adoption of the Optional Protocol to CEDAW.

Considering that both Inter-American and CoE Member States had ratified CEDAW, most of them in the years after its adoption in 1979, my direct intuition was that the BdPC was probably the cause of such different outcomes in the two regional systems. Indeed, there is a wide consensus in the literature on the limited influence exercised by CEDAW on guaranteeing States' compliance (Evatt, 2002; Merry, 2003, 2006). Refocusing my research I realized that, for what concerned legal literature, there was an impressive lack of systematic studies on the evolution and features of the process through which the Inter-American System had adapted.

Through an extensive review of the English, Spanish, Portuguese, French and

⁹ There are only two exceptions amongst the 47 Council of Europe Member States, Spain, with Law 1/2004 *Against gender-based violence*, and Sweden, with the 1998 Government Bill for the Violence Against Women Act. For extensive analysis of the content of national legislations on VAW in the Council of Europe, refer to the studies of the Gender Equality and Anti-Trafficking Division (currently Gender Equality Division): Hagemann-White and Bohn, 2007; Hagemann-White, 2008; Hagemann-White, 2010.

¹⁰ Some preliminary considerations on Latin American legislations on VAW have been published in Galanti, Borzacchiello, 2013.

Italian human rights literature, I could find: brief articles on the IACrHR's doctrinal elaborations in cases of VAW (Arango and Henao, 2011); studies focused broadly on the principles of equality and non-discrimination of women in Inter-American jurisprudence (Dulitzky, 2007; Osuna, 2008; Friedman, 2009; Valencias 2011) and its influence on regional domestic systems (Heranandez-Truyol, 2001; Oré-Aguilar, 1998; Badilla and Torres García, 2004); accounts of the antecedents and drafting process of the BdPC (Meyer, 1999); case studies on national implementation and impact of Inter-American standards on VAW, e.g. prevention and eradication of femicide in Guatemala (Trujillo, 2009), Brazil (Macaulay, 2000), Mexico (Acosta López, 2012; Calzolaio, 2012); critiques focused on specific features of the new regional normative framework on women's rights, e. e. persistent male-bias (Arroyo Vargas, 2011), or more general studies on the jurisprudential evolutions of Inter-American standards of protection (Burgorgue-Larsen, 2008; Schönsteiner, 2011; Stubbs, 1999; Rescia and Seitles, 2000). Several studies focused on how, in general. Treaty ratification influences structural changes to adapt to new emerging understandings (Meyer et al. 1997; Bradley and Ramirez, 1996; Frank et al. 2000; Hualde and Ramirez, 2001; Meyer et al. 2010), on the role of national and international institutions, and other social institutions, in guaranteeing national compliance (Suarez and Ramirez, 2007, Koo and Ramirez, 2009), or on the synergic interaction between international instruments and institutions in adapting existing principles to the specific needs of the protection of women's rights and eradication of VAW, creating gender-specific standards and procedures (Stadelman, 2006, Bernard, 1996, Jacobs et al. 2000). The overall tendency of the literature was to underline the contemporary contributions of the frameworks set by CEDAW and the BdPC in shaping the international response for women's rights protection, while some studies focused on the limitations of the universal system in guaranteeing the effectiveness of the elaborated specific standards (Holtmaat, 2006, Merry, 2003, Shin, 2004; Goodale and Merry, 2007). There seemed to be virtually no systematic study focusing on the process of internalisation of the new paradigm set by the BdPC in Inter-American Institutions activities, besides the emphasis on their reception and further elaboration of the new international standards and principles on the subject. Notable exceptions were two studies authored by Zuloaga, where from a feminist perspective, the author addressed some controversial issue in the Inter-American experience with the BdPC, with a particular focus on the "early neglect" of the instrument by Inter-American

Institutions (Zuloaga, 2004, 2008).

At the time of my background research, the Inter-American System counted on a rather developed regional case law on VAW, which was producing pioneering doctrinal developments on women's rights, while there also seemed to be a generalised tendency of national legislations on VAW to converge on common principle and standards on VAW. On the other hand, the limited impact of CEDAW in guaranteeing effectiveness to women's rights and promote national implementation had been long criticized (e.g. Charlesworth et al. in 1991; Chinkin, 1995; Byrnes and Connors, 1996; Holtmaat, 2004, Byrnes and Freeman, 2012), CEDAW Committee's case law under the Optional Protocol was still at an early stage,¹¹ and the initial enthusiasm for the establishment of the new protection mechanism had been disappointed by its overall underutilization (Connors, 2010).

At this point it was clear to me that, to provide a valuable contribution and fulfil my objectives, my research focus had to be a systematic analysis of the Inter-American experience with the BdPC, in order to determine the *conditions for plausibility*¹² of the paradigm shift on VAW enshrined in the Women Conventions and single out the structural, institutional and procedural features that a human rights system needed to guarantee their effectiveness at regional and national level. In other words, there was a need to evaluate the processes through which the Inter-American System regionalised the shifted paradigm, its features, successes and setbacks. Therefore, I would not focus on the general state of women's rights in the region, but rather assess the appropriateness of this regional system for pursuing the structural change required by the BdPC to reach its overall objectives.

In this sense, this research provides a double contribution to the international debate on women's rights: on the one hand, providing a systematic evaluation

¹¹ By 2010, CEDAW Committee had only decided on six cases of VAW, involving four countries (Austria, Hungary, United Kingdom and Philippines). The number doubled in the following two years, with five additional cases decided in the period 2011-2012, involving three countries (Belarus, Bulgaria and Canada).

¹² In focusing on the *conditions for plausibility* of women's rights, we followed the suggestion of Prof. Madsen, in the introduction to Madsen, Verschraegen (ed), 2013. In the spring of 2012, the author of this research, was allowed the opportunity to conduct part of her research at iCourts, Centre of Excellence for International Courts of the University of Copenhagen, co-directed by Prof. Madsen.

of the dynamic process through which the BdPC has influenced a reshaping of the Inter-American System, it allows to identify its crucial elements and suggest directions for improvement; on the other hand, the processes that will emerge with the entry into force of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), could count on that systematic evaluation of a consolidated experience in a comparable system, to avoid repetition of experienced errors and setbacks.

Overview of contents

The First Section of this research is composed of two parts. In the first part we briefly recall the historical evolution of the international instruments on women's rights in the second half of the past century, describing the development through stages that led to the paradigm shift endorsed by Women's Conventions. Considering its legacy with the international feminist movement, to explain its origins and implications and set our research framework, we present a comparative analysis of CEDAW, BdPC and Istanbul Convention (i.e. the Women's Conventions) using the conceptual tools elaborated by feminist legal scholars, in particular for what concerns the critique of human rights norms neutrality, the challenge to the traditional public/private divide of international law and the concept of intersectionality. A special attention is dedicated to the evolution of the understanding of gender-based violence as originating in discrimination and reproducing unequal power relations between the sexes. The second part thoroughly describes our approach and research methodology. First of all, we identify the minimum preconditions that, building on our previous conclusions, a human rights system should present in order to coherently pursue the scope of the Women's Conventions, i.e. those features that suit the basic requirements emerged from the debate on women's rights, and make their effectiveness plausible. In analysing their dimensions, we argue that the availability of such preconditions allows to draw some preliminary conclusions for what concerns the expectations to place on such instruments, regardless of the system in which they are adopted being universal or regional. We next focus on the additional favourable conditions that regional systems provide, with particular

reference to their multi-level structure and to the specificities of the socio-legal approach reflected in the Women's Conventions.

Building on our considerations, in the second part of this Section we draw some conclusions on the structural causes of CEDAW limited impact in guaranteeing the effectiveness of the rights enshrined, and address the issue of the relative underutilization of the new protection mechanism provided by its Optional Protocol. We then continue presenting the primary objective of our analysis and our consequent secondary objective. The primary objective has two dimensions: a) analyse the dynamic process through which the Inter-American System consolidated its experience with the BdPC, in order to assess to what extent the minimum preconditions previously determined influenced it and identify other specific elements that might had a positive or negative impact on the process, and b) use our findings to propose future improvements. The ultimate scope is to determine whether our analysis allows us to identify the features of a successful method to respond to the challenges of the paradigm shift endorsed by the Women's Conventions. Our secondary objective, which will be more extensively addressed in our future developments of this research, is to assess whether such method can be generalised to another regional system, providing useful informative material to shape appropriate preconditions of plausibility for the Istanbul Convention in the Council of Europe. In the last sub-section we describe the structure of this research, based on Inter-American case law on VAW and on Latin American countries' national legislations on VAW, and present the methodology used for the analysis.

The Second Section starts with a brief overview of the Inter-American System structure. We then present a thorough descriptive analysis of Inter-American case law on VAW and of the content of national legislations on VAW since the adoption of the BdPC in 1994. We decided to put this Section before our analytical study, however, it is up to the reader to decide whether to go through it "chronologically," or rather use it as reference while reading the following Section.

In the Third Section we develop our analysis of the Inter-American experience with the BdPC, using the conceptual tools presented in the First Section and on the basis of the approach and methodology described in the Second Section of

this research. We begin focusing on the type of enforcement mechanism provided by the BdPC, and analyse the issues concerning the contentious jurisdiction of the IACrTHR, which had to be officially clarified by the Court in 2006 due to an arguably technical obstacle. We then continue with an analysis of the reviewed case law focusing on the process through which Inter-American Institutions gradually internalised a gender perspective in their interpretation of VAW, the complexities emerging from intersectionality and the overcoming of the traditional public/private divide in international law, which had long prevented States from acknowledging their positive obligations in eradicating VAW. In the third sub-section we analyse the evolution of national legislations on VAW, considering both the hierarchical status of international instruments of human rights in domestic legal systems and the contemporary evolution of regional jurisprudence on VAW previously analysed. We identify a first and second generation of legislations, with distinctive features, and we recognise a clear turning point in IACrTHR's 2006 first ruling on a petition invoking the BdPC (*Castro-Castro* case). Although a direct causal link can be difficult to establish conclusively, for what concerns VAW we are able to provide significant evidence of a direct influence of the Inter-American System structure and suitable preconditions on national implementation of the relevant BdPC provisions. Favourable rules of procedure of Inter-American Institutions, allowed the contribution of a multi-level coalition of civil society actors and organisations, that facilitated the adoption of a gender perspective that such institutions had not yet internalised in their long experience in the region, directly influencing the process of internalisation of the new paradigm in their understanding of gender-related violations and even providing the IACrTHR with a favourable occasion to clarify its contentious jurisdiction on the BdPC. At the same time, this interaction triggered a mutual alimentation process that, providing regional actors with authoritative precedents, created favourable conditions to enhance the likelihood of a regional convergence of national legislations on VAW. In this perspective, the IACrTHR represents a crucial engine to fill the inherent incompleteness of a convention with the specificities of the BdPC, given that its full meaning can only be determined on the basis of contextual and subjective concrete conditions.

The final Fourth Section is dedicated to an extensive discussion on the conclusions we can draw from our findings. On the basis of our research, we

describe the crucial features of the method developed by the Inter-American System to respond to the challenges of the paradigm shift endorsed by the BdPC, and propose some guidelines to use the favourable elements identified to further improve the process and overcome some persisting shortcomings. In particular, we suggest a reform of the IACommHR's role in the protection mechanism, removing its filtering function of the cases to be referred to the IACrTHR, and extending and better organizing its Rapporteurships. This role better suits the currently mature regional context and provides the means for responding to the increased need for contextual and thematic analyses, required to guarantee consistency in decisions and coherence with an increasingly complex socio-legal approach to human rights. In this perspective, we dedicated the last part of this section to present our proposal for an analytical method that consistently, and conclusively, holds together the challenges emerging from clashes of fundamental rights. Such clashes arise from intersectionality and cultural diversity, characterizing current multicultural societies, and represent a difficult problem to solve coherently when abiding to the paradigm shift endorsed by Women's Conventions, in particular for what concerns the effectiveness of what established by Article 5(a) CEDAW and 8 BdPC. To develop and justify our proposal we use the facts of a case decided by the IACommHR in 2001, *Ana, Beatriz, and Celia González Pérez v Mexico*, providing an explanatory example of how our proposed method can be concretely used to achieve a coherent solution.

In the second part of this last Section we follow up to our secondary objective, developing a brief *a priori* assessment of the perspectives of the Istanbul Convention (not yet come into force) in the European System, on the basis of the high degree of similarity between the two regional systems. We describe a workable outline for our future research focus, in which we will evaluate to what extent the conclusions drawn from the Inter-American experience are "exportable," whether and how they can be adapted to a different context, and we single out specific preconditions of the European System that might provide further tools to enhance the effectiveness of the recent Istanbul Convention. For the limited scope of this final task, based on CoE analytical studies on Member States' national legislations on VAW, we provide evidence of the overall shortcomings of the European context compared to Inter-American context. We then turn to a brief analysis of how, in absence of a specific convention in the CoE, the ECrTHR addressed cases of domestic violence,

highlighting the tools of interpretations used and the frequent reference to the Women's Conventions. Through our analysis we recognise that the ECtHR rarely refers to discrimination when analysing the facts, while it usually recognised breaches to the Right to a private life (Article 8 ECHR), and an extensive use of the doctrine of the margin of appreciation. Drawing some preliminary conclusions, we argue that both ECtHR's case law and CoE Member States legislations on VAW appear to be still at an early stage in the process of internalisation of the international paradigm shift on VAW, compared to the Latin American region. Based on the findings of our research on the Inter-American experience with the BdPC, which provide evidence of the crucial element constituted by IACrHR's contentious jurisdiction on the instrument, we focus on one significant element of difference between the BdPC and the Istanbul Convention, that, in our view might imply the latter's limited prospective influence in the region, i.e. its lack of a strong enforcement mechanism and, in particular, the missed opportunity to grant the ECtHR the competence on the new instrument. Given the high degree of comparability between the two systems, and in the light of our previous considerations with respect to ECtHR's case law and overall unsatisfactory development of national legislations on VAW, we develop our arguments on the need to reconsider ECtHR's role with respect to the Istanbul Convention. We argue that the likely negative impact on national implementation of its exclusion from the protection mechanism *and* the unacceptable consequences with respect to the implicit marginalization of the long marginalized women's rights, do not allow to justify such choice on the need to encourage ratifications (which are, anyway, coming at a very slow pace). After presenting the substantial reasons, implied in the *jus cogens* nature of the principles of equality and non-discrimination, based on which the choice not to grant the ECtHR with the contentious jurisdiction on the instrument is to be considered as contravening to the emerged international consensus on women's rights, we adopt a problem-solving approach to suggest a solution that holds together the need to avoid Court's overload and to guarantee Istanbul Convention's full justiciability. One of the features of our proposal is to turn the Group of Experts on VAW (GREVIO), currently the only body established by the Convention to monitor States' compliance, into an intermediate body with specific (needed) expertise, considering and informing the cases before they are submitted to the Court. In this way, GREVIO would be able to reject ill-founded cases before they reach the Court and facilitate its work once a case is submitted to its

consideration. We then provide additional reasons to argue the feasibility of ECtHR's competence on the Istanbul Convention explaining, for instance, how the recently introduced pilot-judgement procedure, specifically designed to address systemic dysfunction generating related cases, could be successfully pre-organized by GREVIO in cases of VAW.

Section I - The path to the paradigm shift on women's rights

Introduction: A brief review of the historical evolution of women's rights international protection

"A revolution has taken place in the last decade. Women's rights have been catapulted onto the agenda with a speed and determination that has rarely been matched in international law... women's rights discourse [had] a special trajectory, facilitating its emergence as a major innovation of human rights policy within the framework of international law; a process of 'international norm creation' "

(Coomaswamy, 1997)¹³

The historical evolution of the international protection of women's rights (or, if preferred, human rights of women), particularly for what concerns the understanding of the issue of violence against women, constitutes an informative example of the dynamic potential of international instruments of human rights protection.

In this Section we present a chronological review of the evolution of international instruments of protection of women's rights and the incremental process leading to recognise VAW as a human rights violation, which manifests discriminatory social structures nullifying women's substantive equality.

Cook presents the process of protection and promotion of women's legal rights in international law as a progress through stages (Cook, 1995). The first,

¹³ United Nations Special Rapporteur on Violence Against Women in the period 1994-2003.

focused on specific rights and specialized conventions, such as the Employment of Women During the Night Convention (1919); in the second, discrimination on grounds of sex was prohibited, e.g. the 1948 Universal Declaration of Human Rights, in regional instruments and constitutions; the third phase addresses the structural nature of violation of women's rights, starting with CEDAW in 1979. The related evolving jurisprudence extended the original vision addressing chronologically four generations of rights: political and civil; economic, social and cultural; group rights (indigenous); women's rights, and challenging the public/private boundary (Coomaswamy, 1997).

Article 2 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) explicitly referred to the need to address the public as well the private sphere: "*State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end, undertake – among others – to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise*". Although CEDAW obtained a success in terms of ratifications, a high number of signatories expressed reservations, which included substantial provisions and outnumbered the reservations expressed for any other international human rights treaty¹⁴ (Cook, 1990). The nature of the problem led CEDAW Committee to issue General Recommendation 4 in 1987, to prompt signatories to withdraw their reservations.

The discussion about enforcement mechanisms included the consideration of the possibility of individual complaints. However, the final text adopted only provided for a monitoring procedure, led by the CEDAW Committee (Ilic and Corti, 1997).

The issue of VAW, not included in CEDAW, was explicitly addressed a few years later. The 1984 Resolution 1984/14 of the U.N. Economic and Social Council and the 1985 Resolution 40/36 of the U.N. General Assembly, invite States to prevent and respond to cases of domestic violence. The issue was then addressed by the CEDAW Committee with 1989 General Recommendation 12,

¹⁴ As we will see further on in this research, some of these reservations have been expressed on substantial provisions, such as Article 5.a, and their abidance to what established by the Vienna Convention on the Law of Treaties (VCLT) is controversial.

that required States to submit period reports specifically on VAW. In 1990, the UN General Assembly passed Resolution 45/114, addressing the public and, if necessary, criminal response to domestic violence and the 1992 CEDAW Committee General Recommendation 19 marked a shift in the understanding of the nature and the impact of VAW (Vojdik, 2007), defining it as violence that is directed against a woman because she is a woman or that affects women disproportionately, explicitly referring to gender-based violence, in all forms (Art. 1), as a violation of the principle of gender equality and CEDAW, and requiring CEDAW signatories to take positive measures to eliminate all forms of violence against women.

The direct follow up to this new understanding was the preparation of a Manual for Practitioners by the Canadian Department of Justice, the Helsinki Institute for Crime Prevention and Control and the Crime Prevention and criminal Justice Branch of the UN Secretariat in 1993.

The Manual stressed the importance of cooperation and the integration of a criminal justice approach with other measures and public policies. The Manual highlighted two crucial features of VAW, referring to its nature of hidden phenomenon since *“communities deny the problem, fearing that admission of its existence is an assault on the integrity of the family. Few official statistics are kept. (...) Victims are often reluctant to report abuse because they feel ashamed of being assaulted by their husbands; they may be afraid; they may have a sense of family loyalty”*, and tackling its structural nature¹⁵ and implicit acceptability (Yilo and Bogard, 1988), *“Violence in the home has its origins in an entire social context. Wife battery is a reflection of the broad structures of sexual and economic inequality in society. Studies show that rather than representing an aberration, violence in the home is widely accepted and tolerated. It is an extension of the role society expects men to play in their domestic sphere. In this analysis, the abuse of women can be seen as a display of men power, the outcome of social relations in which women are kept in a position of inferiority to men”* (Manual for Practitioners, Introduction).

¹⁵ Previous tendencies focused on theories of causation more centred on the individual, linking violence against women and domestic violence to personal characteristics of the perpetrator or victims' actions (Smith, 1989). For general reference on these theories of causation refer, *inter alia*, to: Holtzworth-Munroe et al. 1997; Rosenbaum, Hoge, 1989; Magdol et al. 1997; Cicchetti ,Tucker, 1994.

1993 is also the year of the establishment by the UN Security Council of the International Tribunal for prosecution of offences committed in the territory of the former Yugoslavia. The jurisdiction of the Tribunal included rape and acts of sexual violence against women, and spelled out that systematic rape may constitute a crime against humanity.

The 1994 UNGA Declaration on the Elimination of Violence Against Women interpreted VAW as “*a manifestation of historically unequal power relations between men and women*” (Preamble, para. 6), contributing to reproducing women’s subjugation. Explicitly referring to VAW as a human rights violation, the Declaration indicated the *due diligence* principle as the applicable standard for the prevention and protection (Article 4.c), requiring States to abide to it whether those acts were perpetrated by the State or by private persons.

In 1994, the United Nations Commission on Human Rights appointed a Special Rapporteur on violence against women, who, in her Preliminary Report, referred to the issue as one of most pervasive of human rights violations, denying women equality, security, dignity, and the right to enjoy fundamental freedoms, requiring States’ participation in eradicating the problem. She stressed the historically unequal power relations among men and women, the social acceptance of using sexuality to control women, cultural ideology and government inaction.

In the same year, the General Assembly of the Organisation of American States adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Pará Convention, BdPC), which set out States’ duties relating to the eradication of gender-based violence. The BdPC was drafted by the Inter-American Commission on Women, an intergovernmental institution established in 1928 to ensure women’s civil and political rights that, since its inception, had been the leading body in the regional evolution of women’s rights instruments.¹⁶ The BdPC adopted the concept of violence against women as an issue of gender equality. Its Preamble

¹⁶ The Inter-American Commission of Women was the promoter of the first regional instruments on women’s rights: the Inter-American Conventions on the Nationality of Women (Montevideo, Uruguay 1933), the Granting of Political Rights to Women (Bogotá, Colombia 1948), and the Granting of Civil Rights to Women (Bogotá, Colombia 1948).

states that violence against women is *"a manifestation of the historically unequal power relations between women and men"* (Preamble, para. 3). VAW is defined broadly, including physical, sexual and psychological violence. At Article 3 the Convention establishes the need to guarantee to women *"to be free from violence in both the public and private spheres"*, requiring States to take affirmative steps to prevent and eradicate VAW. States must *"pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence"* (Article 7). Specifically, it requires States *"to apply due diligence to prevent, investigate and impose penalties for violence against women"* (Article 7.b).

In 1995, the Beijing Fourth World Conference on Women included VAW amongst the priority areas for action to achieve gender equality *"Violence against women is an obstacle to the achievement of the objectives of equality, development and peace. Violence against women both violates and impairs or nullifies the enjoyment by women of their human rights and fundamental freedoms. The long-standing failure to protect and promote those rights and freedoms in the case of violence women is a matter of concern to all States and should be addressed"* (Final Declaration, Section D, para. 112).

In 2000 the Human Rights Committee General Comment 28 on Equality of Rights Between Men and Women interpreted Article 3 of the International Covenant on Civil and Political Rights¹⁷ as requiring proactive conduct by States, to ensure to men and women equally the enjoyment of all rights provided for in the Covenant in both the public and the private sectors and, in order to assess compliance with Articles 7 (Right to Humane Treatment) and 24 (Rights of the Child) of the Covenant, requested States parties to provide information on national laws and practices with regard to domestic and other types of violence against women.¹⁸

In the same year, with the adoption of the Optional Protocol, came to conclusion the long debate on the need to provide CEDAW with a more

¹⁷ Article 3 ICCPR: *The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.*

¹⁸ This Comment explicitly refers to domestic violence as a breach to the right to humane treatment (Article 7 ICCPR). Several Concluding Observations of the Committee stress this view, see, *inter alia*: those directed to: Russian Federation, 2010 (para. 10) and Denmark, 2008 (para. 8).

effective enforcement mechanism, started in 1991. Notably, this further treaty prohibited reservations.

In 2003, a Protocol on the Rights of Women was added to the African Charter on Human and People's Rights (Banjul Charter), including new structural or economic forms of violence against women, such as unequal rights in marriage, polygamy, negative media campaigns, and traditional and religious practices which treat women as second-class citizens.¹⁹

In 2005 the Committee on Economic, Social and Cultural Rights issued General Comment no. 16 on the Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, stating that gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights, on a basis of equality, and that States Party must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors, as well as provide victims of domestic violence, primarily women, with access to safe housing, remedies and redress for physical, mental and emotional damage.

In her 2006 Third Report, the Special Rapporteur on violence against women Yakin Ertürk argued that there is a rule of customary international law that *"obliges States to prevent and respond to acts of violence against women with due diligence"* (para. 29). Addressing the problem of the effectiveness of the principle in eradicating the causes of gender-based violence, she emphasised the lack of effort in prevention.

In 2008 the Council of the European Union adopted the EU guidelines on violence against women and girls and combating all forms of discrimination against them, and in 2010, the Special Rapporteur on VAW Rashida Manjoo

¹⁹ The African Charter on Human and Peoples' Rights was established in 1981 by the Organisation of African Unity (now African Union) and came into force in 1986. To date, 53 States of the African Union have ratified the Charter. This regional human rights protection mechanism, mirrors those of the Inter-American and European system. The African Commission on Human and Peoples' Rights monitors States' compliance with the Charter. The 1998 Protocol establishing an African Court on Human and Peoples' Rights came into force in 2005, and the Court admitted the first application in 2008. Although this regional system will not be further analysed in this research, it is in our research development plans to thoroughly address this case.

considered that the obligation to provide adequate reparations to the victims involves ensuring the rights of women to access to both criminal and civil remedies and the establishment of effective protection, support and rehabilitation services for survivors of violence.²⁰

Finally, in 2011 the Committee of Ministers of the Council of Europe, adopted the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), currently open for ratifications.

The current approach to women's rights emerged in a process through which several features of the traditional approach in international human rights law were challenged, on the basis of their shortcomings in promoting substantial equality and non-discrimination between men and women. The new paradigm internalised the view that women's human rights cannot be ensured without generating a process of social transformation, embedding them in societies and creating the conditions for their effectiveness. CEDAW, BdPC and the Istanbul convention reflect an understanding that emerged primarily from the need to respond to the critiques coming from feminist legal scholarship and feminist movements.

²⁰ This position reflects the evolved international consensus, in the framework of a wide range of international instruments, such as: CEDAW General Recommendation 28 and 19; UNGA Declaration on the Elimination of Violence Against Women (Article 4.g); Beijing Platform for Action (para. 125); 2006 Report of CEDAW Special Rapporteur on VAW (see Ertürk, 2006, para. 83); the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Article 7.f and 7.g); the Additional Protocol to the African Charter on Human and People's Rights on the Rights of Women (Article 4.2.f); EU guidelines on violence against women and girls (para. 3.2.7.1); Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, (Articles 20 and 23).

Literature review

The main feature of the Women's Conventions is their emphasis on social transformation, considered crucial to guarantee the achievement of that substantive equality and non-discrimination that the traditional approach has not satisfactorily ensured. We argue that their legacy with critical (feminist) legal scholarship and the feminist movements²¹ suggests to adopt the same perspective to identify the minimum conditions that the systems in which they've been adopted should present to make their effectiveness plausible.

In order to define the framework of our research and elaborate on the adopted approach, it is crucial to trace the origins and implications of the current paradigm, focusing on the contributions provided by critical (feminist) legal scholarship. Admittedly, this is a selective choice, but we can argue our reasons. In the early phase of this research, when reviewing the available literature on women's rights in international human rights law, we could not but notice that that the main efforts were directed to arguing, proving and justifying the criticisms raised towards the traditional approach to equality and non-discrimination. Indeed, the current international consensus on the new paradigm is a fairly recent novelty and, as we will see, there is still reluctance in completely internalising it, beyond the plethora of declarations, recommendations and awareness raising campaigns.²²

With our study we wish to overcome the "legitimacy building" phase, we do not aim to ground or justify the paradigm shift of the conventions, which we can now consider uncontroversial, but to contribute guaranteeing its *conditions for plausibility*. In other words, we wish to move from arguing its legitimacy to using it to determine which features human rights systems need to present in order for their efforts to be conclusive. To do so, we will elaborate on the conceptual tools provided by critical (feminist) legal scholarship, to identify favourable conditions to make the new understanding feasible in the practice.

²¹ For studies focused on the influence of feminist legal scholarship and feminist movements on the process that led to the adoption of the Women's Conventions refer to: True, Mintrom, 2001; Bunch, 1990; Kelly, 2005; Merry, 2006.

²² As we will see in the Fourth Section of this research, the ECtHR has not been granted contentious jurisdiction, or other competences, on the Istanbul Convention. States' compliance is monitored by a specific body, GREVIO.

Paraphrasing Garlicki, the systems in which Women's Conventions have been adopted have different structures and operate in different conditions, with different resources, which contribute to determine the possibility to reach the objectives set in the conventions (Garlicki, 2012). For this reason, we decided to develop our literature review of critical (feminist) legal scholarship combining it with a comparative presentation of the most significant features of the Women's Conventions, underlining how they responded to the raised "categories of challenge" (Chinkin, Charlesworth, 2000) and signalling their implications for what concerns preconditions for the current paradigm effectiveness.

Questioning objectivity and neutrality

Arguably, the major contribution of feminist legal critique to the advancement of women's rights, in international human rights law, has been the challenge to the idea of objectivity (Charlesworth, 1999) and the introduction of gender as a category of analysis. While the emphasis on objectivity grounded the legitimacy of human rights law in the early phases, and several authors stressed its centrality (Simma, Paulus, 1999; Dunoff, Trachtman, 1999), feminist scholars were sceptical about the assumed neutrality and impartiality of a system that did not include women's voices (Charlesworth et al. 1991; Koskemmeini, 1995). Their critique of liberal rights stressed their inherent *androcentric nature* (MacKinnon, 1987; Smart, 1989).

Feminist legal scholarship focuses on the fact that, since its foundation in 1948, women held few positions of power and influence in the UN System (Charlesworth et al. 1991; Zuloaga, 2008). In this view, the *de facto* exclusion of women influenced the agenda of the United Nations, resulting in a pervasive gender bias within the content and definition of human rights law (Johnstone, 2006). They pointed at the invisibility of the gendered dimensions of women's rights, focusing on the fact that women face problems and forms of discrimination that men do not experience, such as domestic violence, and sexual degradation (Zuloaga, 2008; MacKinnon, 1987).

The original gender bias of human rights law is individuated in the predominance of civil and political rights at the expense of economic and social

rights, considering the latter crucial to promote women's rights. Johnstone maintains that the focus on civil and political rights suggests both a male and Western liberal bias, which diminished the relevance of the immediate needs of anyone who was not Western, white, adult, and male (Johnstone, 2006). In this sense, gender-bias not only disregards women, but implies the definition of a content of human rights structured and worded in a way that might allow for their use to deny women self-determination, e.g. the right to culture, religion, and private family life, possibly invoked at the expense of women's rights to education, healthcare, employment, and freedom to marry (Hemndez-Truyol, 1997; Coomaraswamy, 2001). Feminist scholars consider civil and political rights, referred to spheres in which women, given the structural discrimination they experience, fail to enter or are significantly underrepresented, as vested in an objectivity not allowed to economic, social and cultural rights. In this perspective, they stress international human rights law bias for what concerns the lack of enforcement mechanisms for those economic, social and cultural rights, crucial to achieve women's substantial equality (Fellmeth, 2000). Zuloaga notes how, in this sense, the traditional assumption that justifies the division of human rights into two groups as necessary in the context of the Cold War cannot be considered legitimate (Steiner and Alston, 2000; Zuloaga, 2008).

Some scholars recognise gender-bias in all dimensions of international human rights protection, considering human rights law structurally male-gendered both conceptually, substantially but also procedurally. As mentioned, conceptually because of the absence of women from decision-making processes, and substantively, since conceived in a way that cannot but ignore women's experiences (Charlesworth et al., 1991; Coomaraswamy, 1997, Fineman, 2011) given women's underrepresentation in international institutions and at national level (Zuloaga, 2004, 2008). Procedurally, because inherently patriarchal States choose their own representatives in international organisations, preventing the empowerment of women. In other words, had women obtained equal representation in diplomatic posts, human rights law (and other branches of international law) would include women's view points. However, the underrepresentation-critique has been, itself, challenged as mainly descriptive, not necessarily implying that the international legal order contributes to male dominance *per se*, and lacking the possibility to be backed

by a counterfactual, providing evidence that equal representation would have resulted in the inclusion of a gender perspective (Fellmeth, 2000).²³

Asking the “woman question,” feminist movements and scholars raised the problem of how norms and practices affect women’s lives (Fellmeth, 2000), arguing for a contextual methodology (Bartlett, 1990). As we will see in the following Sections of this research, on the basis of the evidence provided that the traditional “neutral” approach implied that gender-specific variants of violations had been missed or not adequately responded to (Byrnes, 1992), Women’s Conventions were drafted to respond to these criticisms. The new instruments internalise the problem, both for what concerns addressing the issue of women’s underrepresentation in national and international institutions, with the underlying *gender mainstreaming* strategy promoting women’s participation to political life, and integrating sex and gender as crucial elements in the analysis of social structures and human rights violations.

Sameness, difference or dominance

The principles of equality and non-discrimination have traditionally constituted reference points, constructive elements and interpretive tools to determine the content of human rights norms.²⁴ They are of *jus cogens* nature

²³ Fellmeth argues: “(...) *The Westphalian system was not gender driven per se; there is no strong evidence that women would have done things differently. Not every head of state during the formative years of international law was male. Most powerful states were, during the most formative years of international law, ruled at least partly by women at one time or another: from Queens Victoria and Elizabeth in England to Mary Stuart, Queen of Scots; from Queen Maria Theresa of Hungary and Bohemia to Catherine the Great of Russia; from Queen Isabella of Spain to the Empress Dowager Cixi of China.*”⁷⁷ *The purpose of the Peace of Westphalia was to protect elite power, not male power per se, although the protection of male power was necessarily the result of protecting elite power. Thus, there followed a considerable neglect of women’s concerns prior to the Second World War*” (Fellmeth, 2000, p. 703).

²⁴ Besides the Women’s Conventions, all human rights instruments include explicit references to these principles. See, *inter alia*: Universal Declaration of Human Rights (Article 2); Covenant on Civil and Political Rights, (Articles 2.1 and 26); Covenant on Economic, Social and Cultural Rights (Article 2); European Convention of Human Rights (Article 14); American Convention on Human Rights (Article 1.1); African Charter on Human and Peoples Rights, (Article 2); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Articles 1.1 and 7); Convention on the Elimination of All Forms of Racial Discrimination; ILO Convention on Discrimination in Matter of Employment and Occupation; UNESCO Convention against Discrimination in Education; Declaration of the United Nations on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Beliefs (1981).

and imply obligations *erga omnes*; hence, the prohibition of discrimination encompasses all rights at substantive level, as well as the conditions of their exercise, at procedural level.

There is a wide consensus in feminist literature on considering the traditional approach to non-discrimination (at least) ineffective. Johnstone argues that the emphasis on equality and non-discrimination, since the Universal Declaration in 1948, failed to achieve the objective (Johnstone, 2006). In Crenshaw's view, the crucial problem of the non-discrimination doctrine is its focus on intentionality, which distinguishes unlawful from lawful discrimination (Crenshaw, 1989). MacKinnon blames the "sameness" discourse of requiring women to adopt masculine qualities to achieve equality, and of being unable to provide solutions to problems affecting predominantly women, given the male-bias of the standard norm. She argues that sex equality law has been ineffective in providing women with what they are socially prevented to achieve on the basis of a condition at birth (MacKinnon, 1998).

While some scholars adopted an approach focused on differences between the sexes,²⁵ sometimes arguing the existence of a difference in ethics,²⁶ others rejected it. The latter maintain that, whilst it reacted to the traditional equality, the difference approach still failed to consider differences in social status, assuming neutrality of social institutions, e.g. the family, and overlooking the context in which women live (Littleton, 1987). In this perspective the difference paradigm presents two contradictions: on the one hand it dismisses differences *between* women (Villamoare, 1991), assuming a universal women-hood and replacing a stereotype for another one, on the other hand, it inherently legitimated unequal treatment between men and women, reproducing the *status quo*, although with a positive aura (Scott, 1989). Some maintained that difference should be taken into account for contextual (Hawkesworth, 1989), or situated (Brigham, 1987) interpretations, not as an assumption for shaping policies and rules. Building on this perspective, post-modernists scholars in particular, emphasized the specificities of women's experiences (Probyn, 1990) and refused to privilege any particular difference (Di Stefano, 1990). According to them, feminist

²⁵ See, *inter alia*: Freedman, 1983; Olsen, 1983; Williams, 1982; Scales, 1986; Boyd, Sheehy, 1986; Littleton, 1987; Menkel-Meadow, 1989.

²⁶ For an overview refer to: Tong, 1993 and Grimshaw, 1991.

scholarship had to “*become more localized, issue-oriented, and explicitly fallibilistic*” (Fraser and Nicholson, 1990). However, on the other hand, post-modernists were criticized for inherently disabling the construction of an approach useful to provide generalizable solutions to the problem (Handler, 1992), hence reproducing the *status quo*.

To overcome the shortcomings of the traditional equality doctrine, the contradictions of the difference paradigm and the limited usefulness of post-modernists’ approach for promoting women’s rights on a large scale, some scholars argued for an alternative form of analysis, based on the observation of diversified realities, but directed towards challenging them (MacKinnon, 1987, 1989). Some focused on disadvantages in social relations (Rhode, 1990), others articulated an approach built on the notions of dominance and powerlessness (MacKinnon, 1987, 1989), focusing on social structures relegating women in a position of subjugation. According to MacKinnon “*[f]or women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness*” (MacKinnon, 1987).

CEDAW was the first instrument on women’s rights to integrate the critiques of the traditional notion of equality and non-discrimination, adopting that of *substantive* equality.

Indeed, Article 4 CEDAW explicitly refers to differentiated measures to achieve equal opportunities: “*1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. 2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory*”.

Article 5(a), acknowledging the existence of social structures in which social and cultural patterns of conduct of men and women reproduce and idea of the inferiority of women based on stereotyped roles, provides evidence of CEDAW endorsement of an approach based on social relations. The content of this article is further clarified by Point 11 of General Recommendation 19:

“Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion [...] the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities”.

The case-law of the organs of international supervision of human rights evolved into considering discriminatory any distinction which does not have a legitimate purpose, or an objective and reasonable justification, and which does not keep a relation of proportionality between its purpose and the means employed. In 1989 General Comment 18, the UN Human Rights Committee interpreted Article 26 of the Covenant on Civil and Political Rights of the United Nations, which sets forth the basic principle of equality and non-discrimination, as constituting an actual *right to equality*²⁷ (Morawa, 2002), besides being an interpretive tool for all human rights norms (General Comment 18, para. 12). The 1995 Fourth World Conference on Women in Beijing, recognised *de facto* as well as *de jure* barriers to women’s enjoyment of human rights, moving beyond the traditional notion of sex-equality, and conceptualising human rights as rights to outcomes, not just equal opportunities, as already elaborated for what concerned racial discrimination.

Violence against women and discriminatory social structures

The 1993 UN Declaration on the Elimination of Violence Against Women explicitly endorsed the dominance approach. In its Preamble, the Declaration recognises *“that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men”.*

²⁷ Early evidence of jurisprudence adopting this perspective can be found in ECtHR, *Gaygusuz v. Austria* (1996).

The BdPC, drafted in the same years and adopted in 1994, adopted the same approach: *“violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men”* (Preamble).

This is also the case for the Preamble of the Istanbul Convention: *“recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women”*.

Considering VAW both an evidence of discrimination and a concurrent cause of its reproduction, all Women’s Conventions define it as a human rights violation, adopting the understanding promoted by feminist legal scholarship (Coomaraswamy, 2001).

CEDAW General Recommendation 19 states: *“Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1²⁸ of the Convention [...]”* (Point 7, General Comments).

Similarly, the BdPC states: *“Violence against women constitutes a violation of their human rights and fundamental freedoms, and impairs or nullifies the observance, enjoyment and exercise of such rights and freedoms [...]”* (Preamble).

Finally, in the Istanbul Convention: *“‘violence against women’ is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence²⁹ that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women [...]”* (Art. 3.1).

²⁸ Article 1 CEDAW: *For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

²⁹ At Article 3.d, the Istanbul Convention defines gender-based violence as violence that is directed against a woman because she is a woman or that affects women disproportionately.

VAW is, hence, a structural problem, both a manifestation of the power imbalance between sexes and a social mechanism that forces women into subordination. The Preamble of the Istanbul Convention explicitly recognises this feature, referring to *“the structural nature of violence against women as gender-based violence”*.

The reference to gender, or women, in Women’s Conventions emphasises the specificity of the problem. The right to be free from violence is not an adaptation of a right built upon male experience, and, therefore, it is not grounded on the notion of equality between the sexes. This is a significant advancement from the traditional understanding of discrimination, which responds to the criticism to the traditional conceptualisation of equality and non-discrimination doctrine.

However, the term "gender," rather than sex, better internalises the reference to the social construction of the ideas of "femininity" and "masculinity" and the role of men and women in society. In Charlesworth words, the term gender allows to refer to *“the excess cultural baggage associated with biological sex”* (Charlesworth, 1999, p. 379). The introduction of the term in international law is, itself, historically and culturally determined, signalling the consolidation of the paradigm shift on women’s rights.

Whereas 1979 CEDAW never uses it, both 1992 General Recommendation 19 (throughout the whole text) and 1994 BdPC (once) use the term gender when referring to VAW:

General Recommendation 19 (e.g. Point 6, General Comments)

“The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately”.

BdPC (Article 1)

“For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or

psychological harm or suffering to women, whether in the public or the private sphere”.

Whilst none of them explicitly defines it, its interpretation as a social construct can be derived by other provisions, referring to women’s (subordinated) role in society as based on *“stereotyped patterns of behaviour and social and cultural practices”* (BdPC, Art. 6.b) or on *“traditional attitudes”, “stereotyped roles”* and *“prejudices and practices”* (General Recommendation 19, Point 11, commenting on Articles 2.f, 5 and 10.c CEDAW).

On the other hand, the more recent Istanbul Convention dedicates Article 3 to define the concept, stating that: *“‘gender’ shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men”* (Art. 3.c).

Norms and social transformation

“The critical feature of the CEDAW process is its cultural and educational role: its capacity to coalesce and express a particular cultural understanding of gender.

Like more conventional legal processes, its significance lies in its capacity to shape cultural understandings and to articulate and expand a vision of rights”

(Merry, 2003, p. 973)

The Women’s Conventions set social transformation as a necessary process for achieving substantive equality and, specifically, to eradicate VAW. Social change is understood as promoted by the cooperation of international law, transnational advocacy networks, national legislation and public policies, all considered crucial. In this sense, international law responded to the traditional critique in critical (and feminist) legal scholarship towards the excessive emphasis on “text drafting” as opposed to an overarching commitment to social and cultural processes of regulation (Merry, 1995).

CEDAW states: *“States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices*

which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (Art. 5.a). Further clarified, in relation to VAW by General Recommendation 19.³⁰

Similarly, with the BdPC: *“The States Parties agree to undertake progressively specific measures, including programs: b. to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women”* (Article 8.b).

On the same line, according to the Istanbul Convention: *“Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men”* (Art. 12.1).

Focusing on CEDAW, Holtmaat and Supper note that Article 5.a did not attract much attention in the literature (Holtmaat, 2004; Sepper, 2008). The same is true with regards with the other two conventions, which is surprising, given the innovative nature of the transformative approach. Its origins can be found in the long debate about the role of law in society, and the international endorsement of an understanding of institutional preconditions and cultural embeddedness as crucial elements to address structural problems, diverting from a strictly legalistic perspective (Banakar, 2004; Fredman, 2001)

This socio-legal approach, endorsed by Women’s Conventions, implies the

³⁰ *“Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities”* (Point 11, General Comments).

interpretation of law as a social construct, historically and culturally determined and, hence, dynamic. Madsen refers to individual rights as “*constructed in and by society*” (Madsen, 2013), Rhul considers law a context for society and society a context for law (Rhul, 1996). Norms, and the policies they imply, contribute to the production and shaping of social relations, and should not be restrictively considered as a reaction to problems, while they give shape and name to problems, making them visible (Bacchi, Eveline, 2010). Culture is considered adaptive, in a state of constant change, evolving through internal conflicts and inconsistencies. Raday argues that, when an adaptive culture opens to a human right instance, there will be a process of interactive development rather than of confrontation (Raday, 2003).

Like many colleagues in critical legal studies and, previously, Marxist legal literature, feminist scholars are cautious towards the role of law (both national and international) to trigger social change (Johnstone, 2006; Chinkin et al. 1991). Whilst some preferred to focus on the role of advocacy and campaigning (Smart, 1989), others were concerned about the excessive emphasis on uniformity required by a legal approach (Bartlett, 1990). However there is a wide consensus on considering norms as complementary instruments of transformation, valorising their social impact (Fellmeth, 2000), “special resonance” (Rhode, 1990) and symbolic power in articulating new meanings, social alternatives (Villmoare, 1985) and political mobilization (Milner, 1989). Merry argues that norms contribute to processes of cultural redefinition, through which subjugation can be resisted and challenged by means of law (Merry, 2003). Others expressed similar views, claiming that rights can operate as a defence, although they not necessarily lead to liberation (Williams, 1988; Matsuda, 1989; Crenshaw, 1988) or welcomed international human rights law as providing partial protection from subjectivity (Koskenniemi, 1995). Hunt emphasises that such strategy of social transformation can only work if rights articulate into social practices, producing and produced by an emergent common sense (Hunt, 1990). On the same line, other scholars maintain that people generally conform to laws because they are part of a taken-for-granted context (Ewick, Silbey, 1998). Post-modernists partially share this view of norms as situated in particular socio-economic and cultural experiences of women (Bartlett 1990; Sarat, 1993, Ewick, Silbey 1998), although preferring to refer to *rights*. In this perspective, rights are practices articulating expectations between and amongst women and men (Minow, 1988). This issues address the

critical importance of the *legitimacy* of norms and of the institutions emanating from them (Madsen, 2011).

Negating the contemporarily conservative and dynamic nature of norms would prove controversial, vis-à-vis their historical evolution. Notably, it would imply creating the conditions of a self-fulfilling prophecy, protecting the legal discourse from the challenges emerging from evolving understandings, thus contributing to the crystallization of its content. Moreover, it would deprive such new understandings of a powerful, if not merely symbolic, tool for concretization. In this sense, a critical stand should not tend to take social transformation out of the legal agenda, but participate in the construction of norms to promote the incorporation of alternative understandings (Kinoy, 2004). Processes of social change are complex and the construction of norms valorising *“an idea, ideal or practice, only comes about when a specific sociological context and a specific configuration of historical contingencies coexist”* (Madsen, 2013).

As for law in general, the sociological approach to human rights law typically focuses on its limitation in influencing social change (Freeman, 2002). Some critical scholars express disappointment in the capacity of a legal system to achieve the desired goals of a social movement, and go as far as negating its transformative power and affirming its inherent legitimization of the *status quo*, functioning as a system of beliefs that makes it appear natural and unchangeable (Gordon, 1982), thus protecting the existing social order (Luhmann, 1993). According to some scholars, human rights law reinforces existing institutions and ideologies and neutralizes the instances of social reform groups, narrowing their causes and de-radicalizing or absorbing their agenda (Lobel, 2007). Foucault directed attention to the institutional mechanisms that allow some *knowledge*s to become dominant in the struggle for control of discourses. In this view, some issues fail to gain credibility because they confront the rules of relevance (Foucault, 1991).

Human rights norms have been addressed with a special focus in the debate on the role of norms in promoting the advancement of women's rights. Notwithstanding an overall scepticism on the role of norms in general in promoting social transformation, there is currently a widespread consensus in feminist legal scholarship in considering human rights norms as contributing

to the legitimization of feminists' claims, providing the basis of a discourse in a powerful language (Sen, 2003) and a useful tool for communicating with States (Johnstone, 2006). Merry argues that human rights provided a unifying framework for transnational feminism, enabling it to challenge the "naturalness" of gender discrimination (Merry, 2006). Transnational advocacy networks and international conferences are considered powerful channels to share and disseminate ideas (Keck, Sikkink 1998; Sanjeev, Riker; Sikkink 2002), as well as to construct new understandings (Merry 2006; Riles 2001). Merry emphasise the impact of human rights discourse on women's perceptions themselves, and its suitability to construct claims simultaneously universally and locally rooted (Merry, 2006).

On the other hand, while recognising the usefulness of articulating women's claims in the language of human rights, Kelly raises a concern about the possible risk of "neutralization" of the feminist agenda: *"One is left to ponder on whether the language of human rights both provided something and took something away. Through its vocabulary and machinery feminists created a, perhaps unprecedented, way to transcend differences and achieve agreed goals: they not only spoke a 'common language' with each other, but one that could be heard within the UN and international law. It is unlikely that the more challenging language of domination and oppression could have performed these functions. At the same time, it remains an open question whether rights-based claims can be extended to encompass the feminist (and UN) aspiration to end violence against women through the deeper social transformation of gender orders and gender relations"* (Kelly, 2004, p. 5).

Women's Conventions consider norms as one of the elements of social transformation. The question is, hence, to promote their effectiveness while, at the same time, strengthening an understanding of their culturally productive role, i.e. determining the ways in which legal processes contribute to the construction (and reproduction) of social and cultural life and how law and society interact (Rhul, 1996).

At a meeting in the United Nations in 2003, the Special Rapporteur on VAW Coomaraswamy argued that implementation is the biggest challenge to the human rights approach to VAW. The same author had previously noted that, *"if norms do not permeate down into the realm of everyday life, then the foundation*

of feminist analysis and understanding will have been lost” (Coomaraswamy, 1997).

Universality, cultural relativism and intersectionality

In feminist scholarship, the critique to universality shares the same basis as that against objectivity and neutrality, recognising additional elements of bias of human rights norms and, somehow, creating a division in feminist claims themselves.

In the legal discourse, the concept of the universality of human rights has been long debated (Zucca, 2007; Brems, 2008), ranging from perspectives based on natural law, which understand it as a set of standards that apply by definition to all human beings, to positivistic views, which focus on the formal acceptance of certain rights by the majority of States. The socio-legal approach has been traditionally critical towards the concept of universal rights, which are seen as historically, geographically and culturally determined (Morris, 2006; Turner, 1993). In this perspective, hence, the content and meaning of rights cannot be considered universal (Stenner, 2013). The dynamic evolution of human rights, both for what concerns the understanding of their content and their implementation (Garlicki, 2012), suggests that a sociologically informed approach to human rights might, indeed, prove to be a better suited tool for their conceptualisation.

Since its adoption in 1948, the UDHR has become the norm of reference for all human rights instruments (Möller, De Zayas, 2010). However, interculturalism, cultural relativism and legal pluralism made more complex the debate on the legitimacy of transformative objectives of human rights instruments and of their universalistic claims, at times creating the conditions for clashes between fundamental rights (Fellmeth, 2000; Merry, 2006; Bribosia and Rorive, 2010). The doctrine strives to compose tensions arising when the universalistic aspirations of inherently abstract concepts, or their *constitutional substance* (Cassese, 2006), need to be applied to concrete societal contexts (Zumbansen, 2005), acquiring specific meanings. Cultural relativists, for instance, see with suspicion the forceful transplant of exogenous systems of values in different

cultural contexts.³¹ There is a need to come to terms with the abstractness and ambiguities inherent in the concept of human rights (Madsen, 2010), recognising the tensions they arise both because of the historical dynamic evolution of the understanding of their content and because of the complexity of contemporary multicultural societies. As Madsen argues “*There is nothing natural, let alone inevitable, about ordering societies around the idea of universally equal and inalienable human rights*” (Madsen, Verschraegen, 2013).

Some of the critiques from feminist scholars do not address the concept of universality *per se*, rather they challenge the legitimacy of universal claims based on norms constructed around a white-male subjectivity, culturally, economically and socially determined (Crenshaw, 1988). Indeed, this view does not prevent some feminist scholars to assume the universality of patriarchal structures, which put women in a position of inferiority across all societies regardless of their perception of them (Merry, 1995). Those sharing this standpoint do not overlook cultural diversity, but accommodate it through a balancing process that does not reject the universality of a set of minimum standards. In this view, self-perception of subjugation has to be enabled by a framework that provides the instruments to challenge it. Merry stresses that, in Western societies themselves, battered women did not talk about it as a crime until recently. It took the political activities of feminists, the creation of a shelter and the support of the judiciary and the police to generate the massive increase in the number of women asking the courts for help. In this sense law, national and international, culturally redefined and re-constructed gender identities, bringing to the understanding of VAW as illegitimate and undeserved.

This is a critical issue for cultural relativist scholars, particularly in the case of feminist post-modernist and post-colonial views (Nicholson, 1990; Ashe, 1988). Some interpret international human rights law as a product of Western thinking (Chow, 1991), inherently incapable to account for cultural diversity, and stress that rights have different meaning in different contexts (Villamoare, 1991; Morse, Sayeh, 1995), which affect people’s expectations (Minow, 1987). In this perspective, the international discourse on women’s rights does not

³¹ The problems arising from cultural diversity will be addressed in the Third and Fourth Sections of this research. For perspectives focused on the Western-bias of universal rights refer to, *inter alia*: Pannikar, 1982; Ibhawoh, 2001; Sjørselev, 2001.

integrate, for instance, the claims of deeply religious women or women belonging to minority cultures (Reitman, 1997).

Some scholars, whether feminist or not, point at the inherent essentialism of cultural relativism, which depicts culture (and social practices) as monolithic and unchangeable (Mayer, 1996; Sepper, 2008), incapable of dynamic adaptations to changing circumstances and understandings, interpreted as illegitimate alterations. They maintain that this reluctance to consider progressive reforms maintains the *status quo*, preventing any change in social relations (Reitman, 1997). On the other hand, others consider cultural defence unproblematic and enriching, up until the point in which it demands the preservation of structures infringing human rights (Nussbaum, 1999). A criticism to these last positions might be that they assume, eventually, a convergence towards “reasonable understandings” (Gunning, 1992).

As mentioned, the new international human rights approach to women’s rights largely endorses an understanding of women’s conditions worldwide as a product of social structures reproducing male-dominance. They explicitly refer to the necessity of a social transformation, encompassing culture, custom, religion and traditions. Legitimate intervention largely overcomes national and individual self-determination, challenging the limitations of “*assuming an autonomous individual whose self- realization consists of protecting his or her freedom of choice and action*” (Garlicki, 2012), and identifying the existence of contextual constraints on agency (Chinkin, Charlesworth, 2000; Coomaraswamy, 1997). This perspective assumes that no real self-determination can be exercised in social institutions (e.g. State, family) where power relations amongst individuals are unequal.

Social and cultural transformation is, therefore, an instrument to achieve the recently shaped standards for women’s rights protection and promotion, and cultural differences cannot be invoked to justify their rejection. In this framework, social, religious and traditional practices are not entitled to deference merely because they are culturally specific traditions (Binion, 1995). The effort should, hence, be put in identifying and modifying particularly conducive contexts for VAW, considered illegitimate and unjustifiable (Coomaraswamy, 1997).

The critical point to reduce this tension is to provide for a method that enables different cultures to articulate their own interpretation (Gunning, 1992), while providing those who perceive a violation with an instrument of defence. This issue calls for a focus on an inclusive dialogue to construct a global consensus on human rights understandings, a challenge that the international field faces not only for what concerns women's rights. As we will see in the Third Section of this research, the approach based on unequal power relations provides tools to accommodate these tensions.

Following up on the precious considerations, if acceptable solutions might be found for what concerns accommodating cultural diversity on single issues, reaching a *"temporary political consensus on a specific issue"* (Braidotti, 1992), the problem of intersectionality complicates the framework. As we will see, the difficulties in promoting women's rights, particularly in the legal sphere, required a certain degree of simplification, which discouraged the integration of additional elements of complexity.

Some feminist scholars challenge the adoption of an approach based on unequal positions of power focused solely on gender (e.g. Crenshaw, 1988). In this perspective, a single-factor analysis makes invisible other forms of subjugation. In their view suffering and oppression derive, in some cases, from an intersection of several factors (Haraway, 1991), demanding more complex analyses.

Those focusing on intersectionality understand women's identities as constructed by a diverse set of social relations, which might even be contradictory (Flax, 1990). Mohanty argues, *"Women are constituted as women through the complex interaction between class, culture, religion and other ideological institutions and frameworks. They are not 'women' - a coherent group - solely on the basis of a particular economic system or policy"* (Mohanty, 1988). In this view, although a strategic political alliance is needed to promote women's rights, it should not be confused with homogeneity. These claims can be internalised extending the analysis based on unequal power relations between sexes to all forms of social dominance, without restricting them to those exercised by men over women in patriarchal societies.

This views originated in the Black Women movement, which pointed at the

shortcomings of a feminist theory consolidated creating a consciousness of (white) women in opposition to (white) man (Crenshaw, 1988; Thornhill, 1985). Western feminism, hence, overlooks other social structures, such as race, which constitute women's identities. Crenshaw argues that for black women, belonging to a community defined by race, a challenge of patriarchal structures created in opposition to black man and through an alliance with white (privileged) women, was not a viable solution (Crenshaw, 1988). Similar claims have been raised by post-colonialist feminists and, recently, by Muslim women scholars. Johnstone argues for the consideration of intersectional issues, such as race and gender, disability and gender, and age and gender, which have historically fallen through the gaps (Johnstone, 2006).

Intersectionality and cultural diversity, constant elements of the reality of women's experiences (Hooks, 1984), demand for more complex analyses and theories.

The Women's Conventions provide some elements that can be used to address complex cases of intersection, moreover, with their emphasis on the role of the State, they provide for mechanisms of localized interventions, more appropriate for context-based analyses.

CEDAW Preamble, setting the framework of the Convention, recognises a multiplicity of factors affecting people's possibility to enjoy their fundamental rights, referring to *"the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States [as] essential to the full enjoyment of the rights of men and women"*. Article 14 refers to the particular problems faced by rural women. It should be pointed out that, however, only Article 14 explicitly requires an analysis that takes into account the intersection between multiple factors, namely gender and other factors determining the particular conditions faced by a specific group of women.

The BdPC, although only with reference to VAW, provides a better suited wording far what concerns intersectionality. Article 9 states: *"With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of among others, their race or ethnic background or their status as migrants, refugees or displaced*

persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socio-economically disadvantaged, affected by armed conflict or deprived of their freedom.” The language of Article 9 could easily be used as the starting point of an analysis encompassing the interplay of several factors creating the conditions for unequal power relations.

The more recent Istanbul Convention provides the most articulated wording. Article 12.3 establishes: *“Any measures taken pursuant to this chapter shall take into account and address the specific needs of persons made vulnerable by particular circumstances and shall place the human rights of all victims at their centre”*. The crucial significance of this provision is its reference to vulnerability, an important element for a complex analysis of the causes of subjugations. Article 44 (Jurisdiction) contains other elements worth to be signalled. Point 2 states: *“Parties shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this Convention where the offence is committed against one of their nationals or a person who has her or his habitual residence in their territory”*, and at Point 5 we read: *“Parties shall take the necessary legislative or other measures to establish jurisdiction over the offences established in accordance with this Convention, in cases where an alleged perpetrator is present on their territory and they do not extradite her or him to another Party, solely on the basis of her or his nationality”*. The use of the male and female pronouns, both referring to the victim (Point 2) and the perpetrator (Point 3), suggests the possibility to use the Istanbul Convention in complex cases, where the victim is not necessarily a women and the perpetrator is not necessarily a man. Such a broad application is conceivable if addressing cases applying an analysis encompassing a wide variety of factors creating vulnerability, e.g. homophobic societies, and resulting in discriminatory violence as a manifestation of unequal power relations.

Women’s Conventions provide the basis to respond to the issues posed by intersectionality and provide elements to address multi-dimensional analysis of contexts creating unequal power relations. On the other hand, it is inherent in the emphasis on specific situations and personal identities that a legal instrument, particularly an international one, cannot exhaustively cover all possibilities. The critical point is not to dismiss their usefulness on the basis of

their incompleteness, but to provide means to “complete” them in a way that responds to the concerns raised. In this sense, international and national law and institutions are required to adopt a self-critical posture, avoiding considering gendered analysis as sufficiently explanatory of increasingly complex situations, reproducing the errors made in the past, when gender was not considered a category of analysis. Let us recall that it took three decades to use the framework of analysis adopted in the 1963 Declaration Against all Forms of Racial Discrimination to understand the nature and consequences of VAW, with the 1993 Declaration on the Elimination of Violence Against Women. Most of the advancements made in the international response to VAW are not actual innovations, but adapted notions, concepts and principles, which existed but were not applied to issues that, for historical and cultural reasons, were not understood as human rights violations.

Domestic effectiveness and the public/private dilemma

The centrality of domestic implementation brings about the question of the traditional public/private divide in international law.

Traditionally, feminist legal scholars have been sceptical about the usefulness of international law to respond to acts of VAW. They pointed at their easy dismissal when committed by public agents, given that such acts are not part of their duties and, hence, not attributable to the State. For instance, the definition of torture, by focusing only on purposeful torture by public officials, excluded other “non-purposeful” violence perpetrated by State agents (MacKinnon, 1993). Moreover, failing to create a nexus between VAW and human rights, international law left unaddressed all the “private” social domains, in which women are most likely to suffer from oppression³² (Charlesworth, 1995;

³² As we will see in the following paragraphs, this understanding of the private and public domains has been criticized as emerging from a culturally defined context, incapable to describe societies in which such dichotomy does not exist, or presents different features. Crenshaw stressed that the separate-spheres literature assumes this feature as a universal element of the social construction of women's gender, while this might not be the case (Crenshaw, 1988). However, some objected that no judgement is made on the “private”, while its identification comes from observation and refusing it would deprive communication of a powerful tool (Fellmeth, 2000). Other scholars underline that, in some societies, the restriction on State's intervention in the private sphere actually protects women from unwanted public interference on their lives (Cook, 1995; Buss, 1997; Engle, 1994).

Johnstone, 2006; Rao, 1996; Buss, 1997). Hence, the public/private divide affected disproportionately women, actually constituting a significant limitation to States' possibility to intervene in spheres protected by the right to a private life. Under these conditions, the international field was considered unfit to protect and promote women's rights (Johnstone, 2006; MacKinnon, 1993).

With the recognition of the *jus cogens* nature of the principles of equality and non-discrimination, they came to imply obligations *erga omnes*, thereby encompassing all the addressees of the legal norms (*omnes*) in all domains. While *jus cogens* is a concept of material law, the obligations *erga omnes* refer to the structure of their performance, on the part of all the entities and all the individuals bound by them (Ragazzi, 1997; Byers, 1997; Annacker, 1994). Judge Cançado Trindade, describes an horizontal dimension, in which these principles bind all States Party to human rights treaties (obligations *erga omnes partes*), and all the States which compose the organized international community (obligations *erga omnes lato sensu*), and a vertical dimension, in which the obligations *erga omnes* of protection bind both the organs and agents of public power, and the individuals themselves (Cançado Trindade, 1999).

In this framework Women's Conventions cut through the problem, explicitly clarifying the need to address violations to women's rights regardless of the "type" of perpetrator and the ambit in which they occur. Chinkin recognised that CEDAW responded to the inadequacy of international law to address private abuses (Chinkin, 1995, 2000). Indeed, Article 2.e CEDAW requires States *"To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise."* However, the more recent instruments are more explicit.

General Recommendation 19 refers to the responsibility of the States in cases of acts perpetrated by private individuals at Point 9: *"[...] Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation"*. Then reiterates it in the Specific Recommendations at Point

24.a: *“States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act.”*

The BdPC establishes it in Article 1: *“For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere”.*

The Istanbul Convention clarifies its stand at Article 3, dedicated to defining concepts: *“violence against women’ is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.* It then reiterates it at Article 4.1: *“Parties shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere”.*

Hence, currently, mandatory non-intervention in private matters (or national-sovereignty) cannot be invoked to justify the failure of a State to protect women from violence, understood as a human rights violation and a manifestation of discrimination. Nevertheless, the active role of States encountered scepticism in feminist legal scholarship, which traditionally considered them patriarchal institutions³³ (e.g. MacKinnon, 1987; Littleton, 1989, Walby, 1990). Charlesworth emphasises that the concept of national-sovereignty limits the possibility of triggering a process directed to achieve equality (Charlesworth, 1995) and eradicate VAW. On the other hand, Cook recognised that, although national-sovereignty can still be an obstacle to effective enforcement, its invocation has significantly lost legitimacy (Cook, 1994). The form in which States should intervene has also been questioned. Gunning, for instance, argues for a particular emphasis on education, to avoid the confrontation with local resistance that a punitive approach might arise (Gunning, 1992).

³³ In this perspective, international law itself reproduces patriarchal structures, since it binds and is created by States (Charlesworth at al., 1991).

Being the State itself a social institution, historically and culturally determined, some scholars argue that its patriarchal structure should not be considered unchangeable, and that a radical position in this sense would contribute to the reproduction of the *status quo*, interpreting as suspicious any attempt to social change (Fellmeth, 2000; Buss, 1997). In this view, although States (and international law) cannot be considered as the only tools to improve women's conditions, their complementary role should not be overlooked.

Women's Conventions endorse a socio-legal approach with a focus on the role of institutions, which implies the recognition of States' positive responsibilities in promoting and protecting human rights (Holmes and Sunstein 1999; Galligan and Sandler 2004). In this view, human rights have inherently positive and negative dimensions (Landman, 2006), needing institutional preconditions for their enjoyment (Madsen, 2013). Positive obligations entail the obligation of protecting the life of individuals within States' jurisdiction in cases of imminent risk.³⁴ This interpretation has been elaborated to cover cases in which the State knows, or ought to know, that an individual (or a group) is subject to a risk involving the violation of her/his right to life. Hence, failure to adopt measures to prevent such breach would give rise to State's responsibility for omission.

CEDAW (and General Recommendation 19), BdPC and the Istanbul Convention elevate the promotion of human rights (of women) above cultural values and social patterns, explicitly imposing positive obligations to States, crucial actors in the process of social change. Not only signatories commit to eliminate and penalize all practices that result in discrimination against women in all social relations and institutions, but they also commit to promote cultural and social change to eliminate prejudices and stereotypes, in order to guarantee *substantive* equality between men and women.

For what concerns CEDAW, Article 2 establishes positive and negative obligations for the States, in relation to the adaptation of their legal systems to its provisions, stating that: "*States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without*

³⁴ Refer, for instance, to ECtHR elaboration in *Osman v. United Kingdom* (1998).

delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women”.

Article 3 CEDAW refers to their duties for what concerns the elaboration of public policies: *“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”.* Article 4 explicitly considers the possibility of adopting special measures to facilitate the process: *“1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved. 2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory”.*

In General Recommendation 19, CEDAW Committee raised a concern about the fact that *“not all the reports of States parties adequately reflected the close connection between discrimination against women, gender-based violence, and*

violations of human rights and fundamental freedoms. The full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women” (Point 4). Point 24 includes a comprehensive list of measures that States are required to enact, individuating reforms and integrations to be inserted in national legislations (including adaptation of Criminal law), trainings for public officials, data collection, involvement of the media, public education programmes, criteria for effective investigations, protective measures and support services for victims.

Similarly, Article 7 BdPC addresses the requirements to States with respect to their domestic legal systems: *“The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation; b. apply due diligence to prevent, investigate and impose penalties for violence against women; c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary; d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property; e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures; g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and h. adopt such legislative or other measures as may be necessary to give effect to this Convention”.*

Article 8 refers to obligations what concerns public policies: *“The States Parties agree to undertake progressively specific measures, including programs: a. to promote awareness and observance of the right of women to be free from violence, and the right of women to have their human rights respected and*

protected; b. to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women; c. to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women; d. to provide appropriate specialized services for women who have been subjected to violence, through public and private sector agencies, including shelters, counselling services for all family members where appropriate, and care and custody of the affected children; e. to promote and support governmental and private sector education designed to raise the awareness of the public with respect to the problems of and remedies for violence against women”.

Finally, Article 9 mirrors the intent of Article 4 CEDAW: *“With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socio economically disadvantaged, affected by armed conflict or deprived of their freedom”.*

The Istanbul Convention is even more precise, Article 5 summarizes States obligations stating that: *“1. Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation. 2. Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors”.* Article 6 calls for gender-sensitive policies: *“Parties shall undertake to include a gender perspective in the implementation and evaluation of the impact of the provisions of this Convention and to promote and effectively implement policies of equality between women and men and the empowerment of women”.* Article 4.4 reflects Article 9 BdPC and Article 4 CEDAW, clarifying

that: “*Special measures that are necessary to prevent and protect women from gender-based violence shall not be considered discrimination under the terms of this Convention*”.

In the following Chapters, the Istanbul Convention thoroughly addresses the crucial elements of the *holistic approach* required. Chapter II refers to integrated policies and data collection, requiring State wide comprehensive and coordinated policies (Article 7) and the allocation of appropriate financial resources for the implementation of integrated policies, included those carried out by NGOs and civil society (Article 8). Chapter III is dedicated to prevention (Arts. 12 and 16), awareness rising (Article 13), education and training (Arts. 14 and 15) and participation of the private sector and the media (Article 17). Chapter IV refers to protection and support for victims of violence (Arts. 18-28). Chapter V refers to the adaptation of national legal systems (Arts. 29-48), while Chapter VI presents a thorough interpretation of States’ obligations with respect to investigation, prosecution, procedural law and protective measures (Arts. 49-58). Finally, Chapter VIII establishes the criteria to enhance international co-operation on the issue.

States’ abidance to their positive obligations is evaluated on the grounds of the principle of *due diligence*. If State’s responsibility overarches negative (respect for human rights) and positive obligations (protecting and promoting) to reach substantive minimum standards (Byrnes and Connors, 1996; Macklem and Scott, 1992), In her 2006 Report, UN Special Rapporteur on VAW Yakin Ertürk referred to a rule of customary international law that “*obliges States to prevent and respond to acts of violence against women with due diligence*” (para. 29), explicitly including due diligence in relation to VAW into the realm of *jus cogens*.

Therefore, the failure of the State to promote and protect rights does not depend on the necessity to identify a particular perpetrator (Fredman, 2010) and its responsibility emerges from inadequate national structures to respond to VAW, including the failure to adequately investigate such acts. The challenge is then to effectively reform inadequate national structures, while contemporarily focusing on transforming the social and cultural patterns which generate VAW and conduct to impunity (even in cases in which national legislation provides appropriate frameworks for action and formal legal equality).

Both General Recommendation 19 and the Declaration on the Elimination of Violence Against Women explicitly refer to the principle of due diligence:

In General Recommendation 19 *“Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”* (Point 9, General Comments).

The UN 1993 Declaration includes it in Article 4.c: *“States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: [...] (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”*.

Similarly, at Article 7.b, the BdPC establishes that: *“The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: [...] b. apply due diligence to prevent, investigate and impose penalties for violence against women”*.

Article 5.2 of the Istanbul Convention states that: *“Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention [...]”*.

On these bases, attention should be paid to distinctions between States’ ability to adequately address VAW and their willingness to abide, in the light of the *principle of proportionality*, according to which States’ obligations cannot be interpreted in a way that imposes on them an impossible or disproportionate burden.³⁵ However, a written international instrument is not suitable to

³⁵ This perspective is clarified, for instance, in ECtHR *Osman v. United Kingdom* (1998), para. 116.

conclusively solve an that need to be evaluated referring to concrete cases, in order to determine whether, in a particular context, the State acted to the extent of its ability (Cook, 1995).

Through the notion of positive obligations, the (extended) principle of due diligence and the explicit reference to VAW as a human rights violation, Women Conventions have satisfactorily responded (“to the extent of their abilities”) to the early criticism of feminist legal scholars.

The critical issue is, therefore, guaranteeing effectiveness to their provisions at domestic level, having singled out the State as a crucial engine to eradicate VAW. This brings us to address the question of the establishment of enforcement and monitoring mechanism to promote States’ implementation of Women’s Conventions provisions, to guarantee compliance and promote their political will to abide (or overcome the lack of it).

The controversial choice of a specialized instrument

“One of the most telling ironies is that CEDAW was enacted, according to its preamble, because the state parties to the convention were concerned that, in spite of a significant number of UN treaties and conventions promoting equal opportunity and equal rights for women, ‘extensive discrimination against women continues to exist’. The parties apparently decided that the solution to the problem of real world violations of treaty-based rights was to create more treaty-based rights”
(Fellmeth, 2000, p. 721)

Feminist legal scholars are generally sceptical in their judgement of specialized international instruments on women’s rights. Some authors consider CEDAW a prove of the marginalization of women’s rights emphasising, *inter alia*, the fact that it was adopted by the Commission on the Status of Women instead of by

the Human Rights Commission³⁶, as in the case of other treaties (Chinkin, 2005; Johnstone, 2006).³⁷

Elaborating on what previously considered in relation to the recognised conceptual and structural gender-bias of the traditional approach, we do not find this negative attitude entirely coherent. Indeed, if arguing women's underrepresentation in international institutions as a crucial negative condition for the inclusion of a gender perspective in human rights law, we believe that a more coherent conclusion would be to consider positively the decision to entrust the elaboration of a specific instrument, "fixing" the shortcoming of existing ones, to a Commission with appropriate expertise. Given the persisting gender bias in UN institutions at the time of the adoption of CEDAW,³⁸ the preference on the Commission on the Status of Women appears to us more reasonable than waiting for gender-balanced Human Rights Commission, or expecting a male-biased composition to satisfactorily integrate gender as a tool of analysis and norm production. We agree with Fellmeth in the view that *"segmentation derives from historical formation, not formal taxonomy"* (Fellmeth, 2000, p. 702), with the resulting specialized instruments representing a "catching up" by international law of a new shared consensus.

On the technical side, it should not be overlooked that a reform of the old conventions, to avoid the drafting of a specific instrument, would require reopening the process of ratification by all signatories.³⁹ On the other hand, solely relying on advocating the integration of a gender perspective in the interpretation of existing (arguably male-biased) conventions would maintain undesirable arbitrariness and discretion. Indeed, if recognising gender-discrimination as a structural problem, judges and officers cannot be considered to be immune from the contextual influence of the social structures

³⁶ Replaced in 2006 by the Human Rights Council.

³⁷ Johnstone stresses that: *"CEDAW Committee was also geographically and structurally isolated; it was located in Vienna under the auspices of the Division for the Advancement of Women, while the other committees were in Geneva under the Office for the High Commissioner for Human Rights"* (Johnstone, 2006, p. 151).

³⁸ The need to achieve gender balance is still considered a priority, as stressed in the 2005 Report of the UN High Commissioner for Human Rights: *"it is essential that a gender balance be achieved in relation to the overall list of mandate holders"* (p. 67).

³⁹ We note that, if States' lack of political will is the problem, a CEDAW reform requiring a second round of ratifications cannot be a viable option.

they live in, not even those with the “high moral character”⁴⁰ sufficient to be nominated for human rights institutions. In other words, a specific instrument constitutes a useful tool for social transformation at all levels.

Being the understanding of the content of human rights norms historically, culturally and socially determined, we might argue that, until very recently, the rights currently enshrined in CEDAW and Women’s Conventions were not even conceivable, and that the previous generations of rights, namely, political and civil, have been propaedeutic to women’s emancipation and to the further articulation of their instances. If the new specific instruments do not seem to imply *per se* the reproduction of women’s rights marginalization, this criticism raises a useful concern and should not be superficially dismissed, as it promotes an increased attention towards the possible risks of their limited use. As we will see, marginalization can more probably derive from weak enforcement mechanisms.

Other arguments focus on the language of specific instruments and declarations. Charlesworth points out at the circumscribed idea of womanhood adopted in the Platform for Action of the Fourth World Conference on Women held in Beijing in 1995 (Charlesworth, 2000). She maintains that the debate about what might constitute “balanced and non-stereotyped” images of women, paradoxically resulted in a paragraph referring to women’s experiences as including the “*balancing [off] work and family responsibilities, as mothers, as professionals, as managers and as entrepreneurs*” (Beijing Declaration, para. 46) p. 73), thus, in fact, proving the difficulty in removing elements of stereotype. Otto noted that the traditional role of motherhood remains central, only enriched with the recognition of women’s role in the free market economy, leaving several aspects of women’s lives still unaddressed (Otto, 1996). However, one might argue this focus can be justified on the basis of its descriptive nature, which points at an observable situation, without judging (or defining) women’s role.

A similar critique can be moved to CEDAW Preamble, which states “*Bearing in mind the great contribution of women to the welfare of the family and to the*

⁴⁰ This is the usual wording used by international human rights instruments, see, for instance, Article 21 ECHR and Article 52 BdPC, both referring to the appointment of judges in respective regional Courts.

development of society, so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole". From a feminist perspective, the emphasis on the social significance of maternity, although tamed by the reference to the shared responsibility of parenthood, falls in a contradiction similar to that of the Beijing Platform for Action. The contradiction is reinforced in the following paragraph, which states: *"a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women"*. This aspiration is put in a place that makes it somehow ironical, having previously referred to the role of women exclusively in relation to reproduction, where the "particular function" of women is enforced by nature, i.e. their sex, not by the social construction of their gender.

On the same line, Charlesworth notes that Article 27 of the Fourth Geneva Convention provides protection from sexual crimes as attacks on women's honour or community identity⁴¹ rather than human rights violations (Charlesworth, 1999), perpetuating the view of women as cultural objects (Chappell, 2003). Notably, the First Additional Protocol replaced the reference to a woman's honour with the notion that women should *"be the object of special respect"*, although the general wording maintains the emphasis on their childbearing function.

In the following paragraphs, we will address some innovative features of Women's Conventions and the new approach of VAW as a human rights violation, which possibly overcome the scepticism on specialized instruments.

⁴¹ See also *Prosecutor v. Karadzic and Mladic*, which states that: *"The systematic rape of women (...) is in some cases intended to transmit a new ethnic identity to the child. In other cases humiliation and terror serve to dismember the group"*.

Guaranteeing national implementation of international principles and standards

While pointing at the limitations of a strictly legal approach based on the individualization of human rights (Fredman, 2008; Galligan and Sandler, 2004; Greer, 2013), human rights scholars lawyers and activists have long criticised weak enforcement mechanisms to ensure national implementation of conventional provisions (Merry, 2003). Teson argues that any liberal theory of international law, feminist or not, *"must . . . postulate an affirmative obligation in international law on the part of the state to have a reasonably effective legal system in which assaults against life, physical integrity, and property are not tolerated"* (Teson, 2001). Enforceable conventional norms, besides their formal legally binding nature for ratifying States, are more suitable to function as complementary instruments to promote domestic implementation and the transformation of the State as a social institution, in the same way as national legislation can influence societies. To move beyond reliance on the symbolic meaning of an international human rights instrument, providing feasible conditions for its effectiveness is crucial. Heyns and Viljoen maintain that the success of any international human rights system should be assessed on its impact on the domestic level, whether occurred in response to enforcement mechanisms or because treaty norms have been internalised in domestic legal systems or cultures (Heyns, Viljoen, 2001).

Analysing CEDAW, Charlesworth et al. point out that the 1979 convention does not provide any specific mandatory measures or predictable penalties for States that fail to take positive action to implement its provisions (Charlesworth et al. 2001). This omission has been interpreted as an evidence of the lack of political will to actually ensure observance (Keck, Sikkink, 1998). Although legally binding on ratifying states, not all States have acted consequentially (Merry, 2003).

Johnston points out at the high number of (substantive) reservations to CEDAW, compared to its "prototype", the Convention for the Elimination of Racial Discrimination (Johnstone, 2006), which she interprets as evidence of a wider tolerance for gender discrimination than racial discrimination. Chinkin observes that several States have made sure to clarify that CEDAW is a non-binding instrument insofar as its provisions conflict with the domestic legal

system (Chinkin, 1995). Based on extensive research, Merry provides a summary of the variety of States' (poor) responses to CEDAW implementation: *"Some opt out of key provisions when they sign the convention; some ratify it but regard it as non-self-executing, requiring further domestic legislation for implementation; and some ignore it altogether despite ratification. Some states fail to translate it into national languages, refuse to prepare and present period reports on their compliance, or simply fail to keep the sex-disaggregated statistics that make it possible to see if women are being treated equally to men in job opportunity, education, and political participation"* (Merry, 2003, see also Bayefsky 2001; Mayer 1996). Heyns and Vilijoen found limited impact of CEDAW on domestic systems and argued for strengthening its monitoring mechanisms, while supplementing them with "creative efforts" to internalise its norms in the domestic legal and cultural system (Heyns, Vilijoen, 2001).

The monitoring mechanism established by CEDAW includes a Reporting Procedure, according to which CEDAW Committee evaluates national reports on progresses and discusses further actions with government representatives,⁴² and an Inter-State Procedure, through which States can refer disputes about the interpretation and implementation of CEDAW to arbitration, if the dispute is not settled, it can be referred to the International Court of Justice. This procedure is subject to a large number of reservations and has never been used. The weakness of this mechanism has been identified as a reason for CEDAW being relegated to a "second-class instrument" (Meron, 1990). As mentioned, the problem was acknowledged and addressed through a 10 years long process,⁴³ which resulted in the adoption of an Optional Protocol, entered into force in 2000.

Ratifying the Optional Protocol States recognise the competence of the Committee to receive and consider communications (Article 1). Article 2 provides a Communication Procedure to submit individual (or collective) complaints invoking CEDAW provisions, which will be admitted by the Committee if all available domestic remedies have been exhausted and if the complaint is not, nor has been, under the examination of another international

⁴² Ilic and Corti present a overview of the protection mechanisms for women's rights in comparison with those established by other human rights treaties, see Ilic and Corti, 1997.

⁴³ A detailed chronology of the stages of the process can be found on the UN website at: <http://www.un.org/womenwatch/daw/cedaw/protocol/history.htm>

institution (Article 4). Before its final decision, when appropriate, the Committee can require the State to adopt precautionary measures to protect alleged victims from irreparable harm (Article 5). Articles 8 and 9 establish, respectively, an Inquiry and Follow-up Procedure, according to which the Committee can initiate a confidential investigation based on “*reliable information of grave and systematic violations*” and require States to provide reports on remedial efforts. While Article 10 provides an opting out clause,⁴⁴ by which signatories can avoid to submit to the procedures at Articles 8 and 9, Article 17 prohibits reservations to the Optional Protocol, which has currently been ratified by more than half of CEDAW States Party. The Committee addressed the first complaint in 2005 and, to date, has delivered 11 decisions.⁴⁵

The other two regional Women’s Conventions established their own mechanisms of protection. In the case of the BdPC, the question gave rise to several controversial issues. We give here a brief description of the procedure established, which will be thoroughly examined in the Third Section of this research.

Article 12 BdPC allows any person or group of persons, or any non-governmental entity, legally recognised in one or more OAS members, to lodge petitions with the Inter-American Commission on Human Rights, containing denunciations or complaints of violations of Article 7 BdPC by a State Party. The Commission shall consider such claims in accordance with the norms and procedures established by the American Convention of Human Rights (ACHR) and the Statutes and Regulations of the IACommHR. The BdPC was adopted in 1994, and by 1996 it had been ratified by most ACHR members, with no reservations.⁴⁶ In 1998 the Commission received its first petition invoking, *inter alia*, BdPC provisions (*Maria da Penha v. Brazil*). In 2004, for the first time, the Commission referred a case where the petitioners had invoked the BdPC, although excluding such provisions from its application to the Court. In

⁴⁴ Four countries have followed this option: Bangladesh, Belize, Colombia and Cuba.

⁴⁵ CEDAW Committee’s jurisprudence under the Optional Protocol is available at: <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Jurisprudence.aspx>.

⁴⁶ Bahamas is not a significant exception, since the country did not ratify the ACHR, while it ratified the BdPC in 1995 clarifying that: “*Article 7(g) of the Convention imports no obligation upon the Government of the Commonwealth of The Bahamas to provide any form of compensation from public funds to any woman who has been subjected to violence in circumstances in which liability would not normally have been incurred under existing Bahamian law*” (May 3, 1995.). Currently, only Canada and United States, amongst all OAS members, have not ratified the BdPC.

this occasion, as we will see, the IACrthR had to clarify its contentious jurisdiction on the instrument through a lengthy systematic and teleological interpretation (*Castro-Castro* case). Therefore, currently, the BdPC presents the same strong mechanism of enforcement as the ACHR.

Let us underline that these evolutions the Inter-American System happened at the same time as the UN, which includes Latin American countries, were addressing the problem of the weak mechanism of enforcement established by CEDAW. Notably, the first petition invoking the BdPC received by the IACommHR was submitted while the debate on the Optional Protocol to CEDAW was finally coming to an end, with the first line involvement of the Inter-American Institute of Human Rights, an autonomous academic international institution created in 1980 through an agreement signed between the Inter-American Court of Human Rights and the Republic of Costa Rica.⁴⁷ Analysing similar processes, Merry underlines the function of the circulation of ideas through institutions and networks in creating new (global) cultural understandings and articulating new normative standards produced through international consensus (Merry, 2003).

Interestingly, the more recent 2011 Istanbul Convention (IC), although counting on these two previous experiences and adopted in a context very similar to that of the Inter-American System, resorted to a monitoring mechanism similar to that of CEDAW before the Optional Protocol. Chapter IX of the Istanbul Convention is entirely dedicated to the monitoring mechanism.

The IC is not in force yet, and the ratification process seems to be taking long.⁴⁸ This instrument provides for a Group of Experts on Action Against Violence Against Women and Domestic Violence (GREVIO), which will assess the

⁴⁷ In 1997, experts of the Inter-American Institute for Human Rights (IHR) provided technical assistance to governments' delegations participating to the drafting process of the Optional Protocol. The IHR produced a document containing a summary of the debate, recommendations, and precedents under other international instruments for each one of the 24 articles discussed. In order to disseminate information on the Optional Protocol and strengthen Latin-American countries commitment to the new mechanism, the IHR triggered a regional debate involving representatives of ministries of foreign affairs, governmental agencies responsible for women's issues and the women's movement. For further information of IHR's contributions refer to the Institution's website at: <http://www.iidh.ed.cr/multic/DefaultIJDHEN.aspx>.

⁴⁸ As we will see in detail in the Fourth Section of this research, to date only five out of the 47 CoE Member States ratified the Istanbul Convention.

measures enacted by States Party to ensure its effectiveness, based on national responses to a questionnaire (Article 68). Additionally, GREVIO may draw on information from NGOs, national institutions for the protection of human rights, the Council of Europe Commissioner for Human Rights, the Parliamentary Assembly and other specialized bodies of the Council of Europe. National Parliaments are also invited to participate in the monitoring process (Art. 70). Should the information received be insufficient or should a particular issue require immediate attention, GREVIO may travel to the country in question for an inquiry. On the basis of the information at its disposal, GREVIO may adopt reports and conclusions aimed at helping the State Party to better implement the convention. It may also adopt general recommendations addressed to all States Party (Art. 69). In addition to GREVIO, a second entity composed of the representatives of States Parties will be set up: the Committee of the Parties (Art. 67). Its tasks will include, among others, electing GREVIO members and issuing recommendations to States Party concerning the measures to be taken in order to implement GREVIO conclusions. The choice of this mechanism is controversial, given that both the other two instruments found appropriate to establish (somehow “on the run”) stronger mechanisms of enforcement. The issue will be addressed in the Fourth Section of this research.

Having described how the three instruments provide for domestic implementation, we now introduce some additional elements to the debate about the role of international instruments and institutions in guaranteeing effectiveness to international conventions.

Cook argues that international institutions should not be allowed to adjudicate private allegations of human rights violations committed by non-state actors, since a flood of complaints would flood international adjudication systems, making them incapable of effective functioning and affecting their credibility (Cook, 1994). In this view, States should enforce international human rights obligations by requiring their own internal institutions to study and react to human rights violations. She maintains that a suitable, but ideal, compromise would be for States to hold each others accountable. However, it must be underlined, States rarely do so in absence of a compelling requirement. As Fellmeth pointed out *“these are very attractive recommendations, [however] how this accountability would play out would presumably be an entirely political*

choice by states, as it is now" (Fellmeth, 2000, p. 723). Notably, States' abidance also depends on the domestic status of conventional human rights norms, regardless of their content or specificity, although this could arguably be traced back to their *a priori* political will. Fellmeth maintains that Cook's position *"does not preclude at least the supplementary establishment of an independent international institution charged with investigating states that exhibit a consistent failure to enforce such rights, and with the further power to declare a state in violation of its treaty obligations if the evidence so warrants"* (Fellmeth, 2000, p. 723) and that this solution would better serve women's interests.

These issues will be thoroughly addressed in the Third and Fourth Sections of this research.

Drawing preliminary conclusions: expectations and conditions for plausibility

The current approach to women's rights emerged in a process through which, the traditional approach in international human rights law, was challenged on the basis of its shortcomings in promoting substantial equality and non-discrimination between men and women. As seen through our literature review, CEDAW, BdPC and the Istanbul convention reflect a paradigm shift shaped to respond to the critiques coming from feminist legal scholarship and feminist movements. The new paradigm internalises the view that women's human rights cannot be ensured without generating a process of social transformation, embedding them in societies and creating the conditions for their effectiveness. We presented the crucial conventional provisions reflecting the evolving understanding, in particular for what concerns the eradication of VAW as a product of discrimination that reproduces unequal relations of power between the sexes.

The increased international awareness and involvement of transnational advocacy networks, have substantially contributed to the dissemination and construction of a shared understanding. The new conventional texts addressed and responded to a wide variety of criticisms, triggering evolutions in the international understanding of the issue. The emphasis on neutrality and

objectivity has been replaced by the recognition of the need to include a gender perspective, both in the drafting of norms and in their interpretation in concrete cases. The new international understanding is based on considering the female actor as the starting point for an assessment, in the same way as the male actor is. Women's underrepresentation in national and international institutions has been, for the past three decades and especially since the '90s, a crucial issue on the international agenda and at national level. The early equality and anti-discrimination doctrines, proved ineffective to promote women's rights, have been replaced by the endorsement of an approach based on social structures and unequal relations of power, reproducing subjugation of women through a stereotypical representation of genders. International instruments on women's rights currently identify a variety of measures to eradicate VAW, overarching law and public policies, and the traditional limitations to States intervention in the private sphere is now counterbalanced by their positive obligations to protect and promote women's rights with due diligence. The issue of the limited impact of conventional norms, due to the lack of enforcement mechanisms, and their strong legally-binding nature has been addressed both by CEDAW Committee, with the Optional Protocol, and by Inter-American Institutions, where the IACrTHR is granted contentious jurisdiction on the BdPC.

Interestingly, the Council of Europe did not draw on such previous experiences, and the ECrTHR is not the competent body to hear cases involving the Istanbul Convention. Social transformation, i.e. the eradication of social and cultural patterns reproducing the idea of women's inferiority, including religious traditions and customary practices, is the core of the current strategy envisaged by international human rights law to promote and protect women's rights. This feature carries the inherent implication of a tension, identifying a challenge which a written text cannot solve, if not partially. Indeed, three issues emerge as still needing to be conclusively accommodated, namely: the universalistic aspiration of human rights norms, cultural relativism and intersectionality. As showed, these problems have not been discarded in the international debate, but the complexity of shaping acceptable solutions in concrete cases, as we will see, raises concerns.

Given the incremental process that shaped the understanding reflected in Women's Conventions, we assume a general international consensus on the

paradigm shift and a significant level of public legitimacy. Therefore, we shall take into account that possible shortcomings in their effectiveness might be a consequence of the complexity of the new paradigm and of contingent obstacles or structural deficiencies, as opposed to lack of international institutions' political will to reach the set objectives. Although such position might be challenged, we believe it provides us with the most appropriate framework to adopt a problem-solving attitude, since it rests on the recognition of the illegitimacy of any lack of political will for what concerns ensuring substantial equality and non-discrimination between men and women. On the other hand, political will (and lack of it) remains a problem when it comes to national implementation, given that States are not institutions established purposely to protect human rights, although they certainly constitute the first level in which such rights should be guaranteed.

While the Vienna Convention on the Law of the Treaties (VCLT) sets the normative standards to guarantee State's compliance to international law, regardless of the structure and type of the national system in which they are adopted, the normative framework it provides is not sufficient, *per se*, to ensure States' abidance. Women's Conventions set a normative framework requiring the development of a process in which all social actors (in the national, international, legal, political and private spheres) are necessary to achieve their effectiveness and to maintain internal and external coherence. While the process that shaped their content contributes to their legitimacy, in order to maintain it Women's Conventions need to prove effective in realizing their scope in a way that is consistent with their ambitious framework of analysis. As mentioned, they remain inherently incomplete instruments, which rely on the vertical and horizontal interaction of legal and social institutions, at national and international level, advocacy networks and civil society movements, requiring inclusive processes.

This analysis does not aim to ground or justify the goal that Women's Conventions pursue, which we derived from their content and assume as already constructed and legitimate, but rather focuses on the *conditions for plausibility* of this understanding, analysing the institutional and procedural preconditions for their effectiveness. As underlined by Garlicki, the systems in which such conventions have been adopted have different structures and operate with different resources in different conditions (Garlicki, 2012), which

contribute to determine the possibility to reach the objectives set in the conventions.

Reviewing feminist legal scholarship, we described the origins of the paradigm shift characterizing the new international approach to women's rights, and singled out crucial conventional provisions reflecting this change. Given the legacy of the emerged understanding with feminist claims, we adopt the same standpoint to determine the minimum conditions that a human rights system should present to coherently pursue the scope set by Women's Conventions, i.e. those features that suit the basic requirements emerged from the debate on women's rights, and make their effectiveness plausible

Some favourable preconditions for their effectiveness are common to all human rights instruments. They concern their legitimacy, accessibility, accountability, ability to interact with national institutions and legally binding nature. However, considering Women's Conventions and the contributions from feminist scholarship analysed, we can determine their specificities when it comes to ensure women's rights, and single out additional favourable preconditions required by the socio-legal approach endorsed. Favourable preconditions do not necessarily imply the positive impact of the conventions, however, they make it more likely.

Women's Conventions internalise the critique to objectivity and neutrality of human rights norms, constituting specific instruments that introduce gender as a category of analysis. However, this choice carries the risk of marginalizing women's rights in the human rights discourse. This possibility implies that a broad mandate of international institutions established to ensure the rights they enshrine, would be an additional element to consider in determining their expectations of effectiveness and coherence. This element encompasses the possibility to provide reparations for victims, as well as to address systemic failures in national contexts beyond the limits of the concrete cases, minimizing the risk of tackling women's rights as an isolated subject. Moreover, given that inequality in social relations of power hinders women's rights in the public and private domain, international Institutions' should be able to recognise international responsibility of States in the case of violations perpetrated both by public officials and by private individuals, counting on appropriate mechanisms of monitoring or enforcement of conventional provisions.

Additionally, the emphasis on prevention requires International Institutions to set principles and standards concerning both negative and positive obligations of a State.

Women's balanced representation in international institution's membership is an additional specific precondition. Besides ensuring the competence and integrity of their members, human rights institutions and bodies should guarantee balanced sex representation in their membership. This feature enhances the likelihood of counting on specific expertise to address complex questions, overarching multiple dimensions. In general, more diversified memberships, representing the actual composition of society, facilitate the task of integrating different perspectives in analyses. While this requirement cannot be fulfilled structuring them as sorts of parliaments, there is a generalised consensus in considering (at least) a balanced sex-representation in institutions as a necessary precondition for the plausibility of women's rights.

Given the objective of social transformation to give meaning to women's rights, we can identify other favourable conditions that a human rights system should guarantee to enhance its possibility to influence such process adopting a specific convention.

The nature of international institutions' function largely determines the extent of expectations that can be placed on their suitability to influence States' abidance and adaptation, promoting the development of national mechanisms suitable to address specific violations and the implement measures of prevention. International human rights systems intervene if a violation cannot be adequately addressed at national level, requiring the exhaustion of domestic remedies for their activation to activate international adjudication procedures, when provided. However, the possibility to extend the influence of their decisions beyond the single case, depends on other characteristics of their subsidiary role.

Generally speaking, the formal status of human rights instruments in national constitutional structures, influences their effectiveness in national legal systems and give a broader meaning to institution's subsidiarity. International human rights law have different hierarchical status in domestic orders, which varies from supra-constitutional, constitutional, supra-legislative or legislative.

At the same time, regardless of the domestic hierarchical status of international law, the higher the national deference to international institutions' decisions, the more effective the human rights system will be in ensuring States' compliance with international institutions' decisions. Besides monitoring national abundance, the establishment of a body with contentious jurisdiction on an international instrument, providing a mechanism of sanctions, improves the likelihood of States' compliance. Institutions' ability to appropriately address the causes of women's rights violations, providing systemic analyses beyond the limits of concrete cases depends on their familiarity with national social and legal contexts, on their interaction with civil society organisations and governmental institutions and on the possibility to launch investigations providing necessary additional information on specific contexts. Through their monitoring or adjudicating functions, international institutions can shape standards providing generalisable guidelines for all States Party.

These considerations allow us to draw some preliminary conclusions for what concerns the expectations to place on a human rights system's ability to effectively promoting Women's Conventions. Some of these conclusions are generalizable to any adopted instrument of human right protection, others, as we will see, address the specificities of the socio-legal approach identified in the reviewed literature.

The emergence of regional systems of human rights protection responds to the need to augment the effectiveness of human rights norms, compared to the structure of the universal system, counting on enhanced proximity between the supranational and national domains, greater bi-directional familiarity, cultural homogeneity and interdependence of State's Party to an international instrument.

Proximity and familiarity influence the accessibility of a regional human rights system, generally higher than that of the universal system. Although both systems share a subsidiary nature with respect to national legal systems, the fact that international institutions cannot intervene in cases submitted to other international procedures makes the options they provide mutually exclusive. In this sense, regional systems are more likely to become the "first choice" for victims of human rights violations (Garlicki, 2012). On the other hand, the parallel development of case law in the universal system, provides crucial

references and a source of legitimation for a regional institution that needs to address complex cases.

Regional systems provide multi-level mechanism of protections, based on the subsidiarity of regional institutions and legally-binding conventions, which improves their possibility to influence States' abidance and promote convergence to shared principles and standards beyond, and before, the activation of international adjudication mechanisms. States are assumed capable of adopting appropriate measures since, in principle, their direct connection to national societies enables them to better determine the content of conventional requirements in their national contexts.⁴⁹ Nevertheless, their discretionality is submitted to the control of supranational institutions.

While there is no need to exclude that a similar process might be triggered by decisions of a universal body, and it has often been the case, it seems more likely that non directly involved countries would refer to decisions delivered to a State that share with them a certain degree of homogeneity. In other words, Guatemala might find easier, and more appropriate, to adopt an approach suggested by the IACrTHR in a case involving Argentina, rather than that adopted by CEDAW Committee in a case involving, let us say, Philippines or Austria.

Triggering States' implementation is crucial, since the national level is the more suitable context to provide responses to the complexities of an understanding based on social transformation. While States' are required to provide locally shaped solutions to specific social and cultural contexts, the existence of a regional institution, particularly in the case of human rights Courts, provides the opportunity to externally evaluate the appropriateness of the measures implemented with the set scope, further guaranteeing a mechanism to address violations which national recourses might have left unattended. At the same time, reflecting the universal framework, regional systems perform a crucial role in guaranteeing the adoption of national solutions harmonised with both regional instruments and the universal understanding. Regional Courts, in particular, maintain a certain degree of control on States' discretionality, evaluating their due diligence for what concerns negative and positive

⁴⁹ This perspective is adopted, *inter alia*, ECrtHR *Handyside v. the UK* (1976, par. 48)

obligations, making sure that the scope of a convention is fulfilled. Garlicki stresses the significance of such function of regional human rights systems, with particular reference to the influence of a regional Court in maintaining “*a bi-focused perspective trying to harmonise national solutions on the one hand and, on the other, harmonising their case-law with concepts and solutions elaborated at universal level*” (Garlicki, 2012, p. 4).⁵⁰ Regional human rights Courts constitute crucial engines to enhance the effectiveness of a multilevel system⁵¹ of human rights protection and promote regional convergence on international standards, guaranteeing the conditions for what has been called an horizontal (or cross) jurisdictional dialogue between national and international judicial bodies (De Vergottini, 2011). To extend the influence of such favourable conditions to a newly adopted human rights instrument, hence, a regional Court should be granted contentious jurisdiction on it.

It might be somehow redundant to underline that, regional systems with authoritative Courts, provide more suitable conditions than the universal system for guaranteeing accessible mechanisms to protect human rights and promote national implementation. However, we argue that in the case of Women’s Conventions preference to regionalised solutions should be grounded on other specific elements, inherent to the complexity of the socio-legal approach they endorse, elaborated in the reviewed feminist literature.

Conventions endorsing a transformational approach, no matter how evolved, cannot provide a perfect and complete norm of reference to address all arising issues. As Judge Cançado Trindade argued “*The facts are richer than the formulations of precepts, they predate the latter, and they must constantly be reformulated in light of the core principles of the law of nations, to attain the realization of justice*” (*Mapiripán Massacre*, Cançado Trindade Concurring Opinion, par. 15). This argument applies to international human rights law in general, and grounds decisions to establish institution competent on developing the interpretation of conventional provisions, applying them to concrete cases. The dynamic nature of human rights norms and the crucial

⁵⁰ The influence of the *margin of appreciation* doctrine affects the extent and degree of regional convergence on shared solutions.

⁵¹ The structures of the Inter-American and European Systems can be defined as multilevel, polycentric or integrated, depending on the emphasis put on their different elements. For a general idea on the different perspectives refer to: Gambino, 2010; Pizzolo, 2013 and Morrone, 2011.

function of formative interpretation, require contextualised interpretations to guarantee the effectiveness of conventional provisions.

No written text can be complete if its content is required to reflect the changing shape and context – social, political, moral and cultural – of societies. In this sense, international institutions add and shape conventional meanings through decisions and jurisprudence, when critical information is revealed in concrete circumstances, allowing for a certain degree of flexibility and adaptation to an evolving social consensus and accounting for its fallibility (Fellmeth, 2000) in specific contingencies that were not (or could not be) foreseen. As we argued, regional systems provide more suitable structures to allow context-based interpretation and implementation, while guaranteeing that national discretionality and social specificities do not turn into mechanisms to maintain the *status quo*.

This brings forth an argument to respond to the controversial debate about the appropriateness of a specific instrument to promote women's rights. We believe that the risk of a marginalization of women's rights is diminished in the case of specific conventions belonging to a system created around a general convention, adjudicated by a common judicial institution. Indeed, the specific convention would be likely invoked in conjunction with the general convention, given that the specific rights are, by definition, included in general provisions. In this sense, a specific instrument will perform its function of providing additional elements for Courts' analyses, remaining integrated in the general framework. In this research, we discharge *a priori* rejections of specific instruments to internalise a gender-perspective in human rights norms, given that they result in the reproduction of the status quo, completely relying on the discretionality or experience-based sensitivity of judges the choice of adopting it in their reasoning.

It has been argued that a feminist approach requires situated judgements rather than Grand Theories (Rhode, 1990). We argue that it is on the basis of the challenges posed by pluralism, cultural diversity and intersectionality, as elaborated in feminist literature, that we can provide arguments to prefer regional to universal approaches international mechanism to promote women's rights

As seen, while objectivity and neutrality of human rights norms was being questioned against the need to integrate a gender perspective in human rights law, their universality was challenged as geographically and culturally determined (Morris, 2006; Turner, 1993). The universality of human rights norms has been put under question by scholars pointing at its inherent assumption of cultural and social homogeneity, which uncovered the Western-bias of the human rights discourse. Considering the paradigm shift on women's rights, which requires social and cultural transformation to meet standards of substantial equality, perceived legal-ethnocentrism (Bartlett, 1990, Merry, 2006) could negatively affect its legitimacy and hinder the possibility to reach set objectives in culturally diverse contexts. In this perspective, the adoption of a regional convention, reflecting the universal understanding while guaranteeing a certain degree of contextual adaptation of its content, provides a remarkable opportunity to challenge arguments pointing at the unacceptability of the enforcement of exogenous understandings in a culturally diverse international community.

Regional and national constructions of legal understandings on women's rights are consistent with the need to guarantee the right to cultural diversity, while the existence of a regional jurisdiction responding to the universal framework, allows to respect and adapt cultural differences without considering them as given and unchangeable, articulating regional standards in a way that is both nationally (and socially) acceptable and inserted in a broader regional and universal framework. The basic norms of reference remain universal, while their enforcement and interpretation are allocated to regional Courts. Regional adaptation, more sensitive to a culturally homogenous context, allows for incremental effectiveness of transformational norms that might be *prima facie* opposed if attributed to a universal institution, individuating acceptable solutions.

On the other hand, the very emphasis on the need to integrate a gender perspective in international human rights law, has been questioned as largely overshadowing the influence of other social structures, which diversify the causes of discrimination. Focusing on intersectionality, feminist scholars pointed at the multiple factors influencing women's identities, intersecting with their gender in conditioning their social position. Intersectionality and cultural diversity demand for more complex analyses and theories, since they

are a constant element of the reality of women's experiences (Hook, 1984). Written conventions cannot provide solutions to this problem, besides signalling its existence, while a consistent response to this challenge requires informed context-based analyses. In this perspective, a regional system, given its proximity and familiarity with national contexts and closer links with civil society organisations and governmental institutions, appears to be better suited to count with the additional information required to shape coherent decisions, accounting for intersectionality and diversity, while maintaining a close control over the measures adopted by member States and their due diligence.

Proximity, familiarity and closer links with national societies, make regional systems the preferable option to trigger a multi-level process, capable of constructing solutions that account for these challenges coherently and consistently.

The system provided by CEDAW had a limited impact on influencing States' compliance with conventional provisions (Evatt, 2002; Merry, 2003). On the one hand, the reason for such unsatisfactory impact can be found in that CEDAW only provided for a monitoring mechanism to ensure States' abidance, guaranteed by a specific Committee. On the other hand, the major challenge to the effectiveness of the rights enshrined, was the high number of reservations put on those provisions which characterized the paradigm shift adopted, such as Article 5(a) CEDAW, addressing the systemic nature of gender inequalities and requiring systemic solution and structural changes in national societies or communities. This feature arguably proves a generalised limited national commitment to endorse the emerged transformative approach, addressing those social and cultural patterns reproducing gender discrimination (Holtmaat, 2004; Merry, 2006, Evatt, 2001).

To address the problem of its limited impact on national systems, in 2000 CEDAW Committee adopted an Optional Protocol, which admits no reservations, allowing it to receive and consider individual and group petitions. However, this mechanism is available only for petitioners within the jurisdiction of countries that have ratified both treaties, and reservations to CEDAW persist constituting a significant limitation to the Committee's activity. The adoption of the Optional Protocol came after more than 10 years of debate

in the universal system, its entry into force was enthusiastically celebrated as a long due response to CEDAW shortcomings and 100 out of its 187 States Party to CEDAW ratified it by 2010.⁵² However, in the first ten years, only 25 petitions were submitted to the Committee. The pattern has recently changed, with the submission of 20 additional petitions in the two following years (Connors, 2012). Connors argues that the issue of the early under-utilization was not striking *per se*, given that the admission of petitions depends on the previous exhaustion of domestic remedies, a time consuming process (Connors, 2010). However, we shall underline that, although this argument seems *prima facie* convincing, it does not actually justify the impressive under-utilization of the new mechanism considering, on the one hand, the high number of ratifications and the poor women's rights standards guaranteed in several States Party and, on the other hand, the fact that the rule of prior exhaustion can be overcome when the national legal system is organized in such a way to constitute an obstacle to women's access to effective remedies.

In our view, a more telling element to understand such a disappointing early performance is the generalised lack of familiarity of national societies with the instrument provided and, in general, with the human rights discourse framed in the universal system. Connors emphasises the role of capacity building initiatives at national level and greater visibility gained by CEDAW Committee's first decisions and outreach activities (Connors, 2012). For what concerns VAW, originally not covered by CEDAW but included in 1992 with General Recommendation 19, to date CEDAW Committee ruled on 11 cases.⁵³ Only two of these cases concern countries not belonging to the Council of Europe, namely Philippines and Canada. The protection mechanism provided by the universal system seems to be more accessible for countries already belonging to a regional human rights system. This is unsurprising, given the crucial influence that, the habit to human rights discourse and supranational mechanisms of protection, exercises on the likelihood of individuals to conceive the possibility to refer to international systems, or even to conceive violations *themselves*. In other words, those societies were socio-cultural

⁵² After 2010 four additional countries have ratified the Optional Protocol.

⁵³ *A. T. v. Hungary* (2005), *A. S. v. Hungary* (2006), *Goekce v. Austria* (2007), *Yildirim v. Austria* (2007), *N. S. F. v. United Kingdom* (2007), *Vertido v. Philippines* (2010), *V. K. v. Bulgaria* (2011), *Abramova v. Belarus* (2011), *S.V.P. v. Bulgaria* (2012), *Jallow v. Bulgaria* (2012), *Kell v. Canada* (2012).

patterns are more likely to violate CEDAW provisions, are also those in which the likelihood of the actual use of CEDAW Optional Protocol is lower.

The Inter-American and European systems are the most articulated regional systems of human rights protection currently existing. Both of them are organized around general human rights conventions, respectively the ACHR and the ECHR, which present a similar catalogue of fundamental rights enforced and interpreted by the respective regional human rights courts. Both systems have introduced specific instruments for the protection of women's rights and the eradication of VAW, reflecting the framework set by CEDAW and General Recommendation 19. However, whereas the BdPC was adopted in 1994, and its development in the Inter-American System is contemporary to that of the universal system after General Recommendation 19 and the Optional Protocol, the Istanbul Convention is a recent innovation, not yet into force.

None of the cases decided by CEDAW Committee involves a State Party to the Inter-American System, whereas nine out of eleven of them concern a member of the Council of Europe. The first evident element of difference is that, as opposed to the Inter-American System, the Council of Europe cannot yet count on a specific convention on women's rights and VAW. With the availability of a new mechanism of protection under the Optional Protocol, in absence of a European women's convention, the high degree of familiarity of Council of Europe States' societies with international systems of human rights protection, and the increased international awareness on VAW, prompted victims of VAW to "distribute" their petitions between the more familiar, but under-equipped, ECtHR and the less familiar, but better-endowed, CEDAW Committee.

On the contrary, not only the Inter-American System had adopted the BdPC in 1994, but also, at the time of the entry into force of the Optional Protocol, the IACmHR had already received several petitions invoking the BdPC, including the crucial *Maria da Penha* case on domestic violence (2001), which had gained great resonance in the region. Moreover, by the time of the first CEDAW Committee's decisions, the *Castro-Castro* case had been submitted to the IACrHR, providing the occasion to clarify its contentious jurisdiction on the BdPC. These elements made the more familiar Inter-American Institutions a preferable option for victims of VAW, given their historical long-proven

effectiveness in providing remedies and compensation for victims (Abregú, Espinoza, 2006) and because of the multilevel level structure of the Inter-American System, better fit than the universal one to promote structural reforms at national level.

Although with the 2001 Optional Protocol CEDAW provided for an adjudicatory body to address the problem of national compliance, only States that ratified it are subject to the jurisdiction of the Committee, and the effectiveness of this mechanism is still challenged by the high number of substantive reservation to CEDAW that still persist, hindering its legally binding nature.

Despite the lively debate triggered by the drafting of the Istanbul Convention, the twenty years long experience of the Inter-American System with the BdPC has attracted surprisingly little attention, as an appropriate source of information on the use and development of Women's Conventions in regional systems. International literature on the BdPC is mainly concerned with assessing its impact on promoting equality and non-discrimination in the region. To our knowledge, as mentioned, there is virtually no literature focused on evaluating the process through which the Inter-American System regionalised the shifted paradigm, its features and setbacks, and attempts of comparative analysis of the two regional systems' performance on women's rights are not available.

Through this research we do not want to draw conclusions on the general state of women's rights in the Latin American region. Although this kind of assessments are crucial to evaluate the impact of the new conventions on achieving the set objectives, we recognise that the transformative approach endorsed might require a long period of adaptation to effectively realize social change. Some measures might improve women's conditions almost overnight. This is the case of, for instance, repealing norms reflecting unjustified unequal treatment on the basis of sex. In our research, we wish to identify which are the structural and procedural preconditions determining the plausibility of the procedural objectives set by Women's Conventions. Our conclusions will assess the appropriateness of a system such as that established by the ACHR for triggering the multi-level structural change required by the BdPC to reach its scope, signalling its strengths and shortcomings. Such conclusions will prove a

valuable contribution to the debate on the recent Istanbul Convention in the European System, singling out the features of a generalizable method to promote and protect women's rights in regional systems, exploiting the specific opportunities provided by regional systems' structures and function.

On the one hand, this research aims to provide a systematic evaluation of the dynamic process through which the BdPC has been internalised in the Inter-American System, with the objective of identifying concrete proposals for further evolutions and improvements. On the other hand, the possibility to count on a selection of best practices from a comparable system, allows to avoid repetition of experienced errors and setbacks and inform the function and role of the Istanbul Convention as an instrument of the Council of Europe, that will need to be guaranteed the best conditions for plausibility.

We want to evaluate whether, besides adopting a specific convention, the Inter-American system internalised the shift in understanding enshrined in both BdPC and CEDAW and through which process. We consider the changed paradigm as primarily characterized by the approach on social transformation to guarantee the achievement of that substantive equality and non-discrimination that the traditional approach to women's rights has not satisfactorily ensured. We will focus on the influence of those elements that differentiate the regional mechanism provided by the BdPC in the Inter-American System from that guaranteed by CEDAW and its Optional Protocol in the universal system. In doing so, we want to single out how the specific preconditions characterizing regional systems influence the plausibility of the new paradigm on women's rights.

On the basis of our findings, we will evaluate if specific characteristics of the Inter-American System allow for improvement in its responsiveness to the requirements set by the BdPC, understood through the conceptual tools provided within the social-legal approach and, in particular, by feminist legal scholarship. This study will allow us to determine if, in the Inter-American System, we can single out a successful method developed to respond to the peculiar challenges of Women's Conventions' approach, and whether this method is strictly dependent on Inter-American System's structural and procedural specificities or could be generalised to other regional systems. Such conclusions would provide crucial informative material to construct a concrete

proposal identifying appropriate conditions of plausibility for the Istanbul Convention in the Council of Europe.

Research structure and methodology

Our analysis has been developed through three phases. We first evaluated to what extent the structure and composition of the Inter-American System fulfils those minimum conditions previously identified as crucial to guarantee the plausibility of women's rights protection and promotion, i.e. public legitimacy of both the regional system itself and of the BdPC, established enforcement and monitoring mechanisms to guarantee BdPC effectiveness, mandate of Inter-American Institutions on the BdPC, accessibility of the mechanism of protection, suitability of the system's multilevel structure to promote national implementation.

In the second phase we assessed Inter-American System's performance with the BdPC, on the basis of the tools of analysis provided by feminist legal scholarship. In order to do so, we identify indicators suitable to account for the dynamicity of the process, signal changes, trends and obstacles. Considering the scope of our research, our choice was naturally directed to qualitative indicators, better fit to assess the characteristic of a process with such a dynamic nature. Quantitative indicators will be better suitable in follow ups to this research, directed to assess the extent to which the final objectives of substantial equality and non-discrimination have been achieved in Latin American societies, through the analysis of a wide variety of data and information gathered at national level.

We do not analyse the whole of Inter-American case law and documentation on issues related to the principles of equality and non-discrimination, since such a broad focus would be largely inconclusive with respect to our objective. We argue that, for what concerns the crucial elements of the paradigm shift reflected in the BdPC, the most appropriate focus is to concentrate the analysis on Inter-American case law on VAW. VAW case law provides a workable and informative sample for an in depth analysis of the process through which the BdPC paradigm has been "internalised" in institutions' decisions. The mere

reference to the convention is, hence, sufficient to draw conclusions on the reception of its paradigm. We needed to focus on how Inter-American Institutions evaluate concrete cases under BdPC provisions, and evaluate their decisions against the concepts elaborated in feminist legal literature and endorsed by the convention. Indicators of BdPC internalisation were:

- The use of the BdPC as a complementary tool of interpretation of general provisions enshrined in the ACHR, minimizing the risk of marginalization of women's rights.
- Elements suggesting the actual adoption of a gender perspective in the analysis, i.e. their consideration of how gender discrimination determines the causes of VAW as opposed to the narrower consideration of sex as determining the form of the violation (e.g. rape). Would such perspective be difficult to determine, the type and extent of the measures required in Inter-American Institution's decision for States compliance allows for a certain degree of objectivity in our interpretation. In general, the broader the type of measures considered appropriate, the more likely it would be that such institutions are addressing the structural gender-related determinants of the violation.
- The suitability of decisions to determine standards of protection and promotion of women's rights extending beyond the limits of the cases, besides their remedial appropriateness.
- The conditions under which international responsibility is recognised. Whether such responsibility emerges only for what concerns omissions in guaranteeing effective legal procedures to address occurred violations, or it is recognised on the basis of States' failure to fulfil positive obligations to prevent VAW and eradicate its discriminatory causes.
- Institutions' ability to hold States accountable for violations perpetrated in the case of both public agents and private individuals.
- The consideration of other factors that intersect with gender in causing VAW in concrete cases. In order to recognise the development of a multi-factorial analysis we will need to look for explicit mentions of other determinants of women's social positions in concrete cases. When finding evidence of attempts to develop intersectional analysis, we assessed the coherence of institutions' decisions with the

transformative approach enshrined in the BdPC, identifying measures to address additional causes of discrimination and subjugation in their conclusions and recommendations.

Such focus, through a chronological analysis of case law, allows us to single out the crucial elements of the incremental process through which the BdPC has been internalised and developed in the Inter-American System, as well as the strengths and weaknesses of the structural and procedural conditions provided vis-à-vis BdPC objectives.

Considering the central role that national implementation of conventional provisions perform in guaranteeing the conditions for social transformation, in the third phase we analysed the evolution of national legislation on VAW in States Party to the BdPC, that recognise the adjudicatory function of the IACrTHR. Given the subsidiary nature of inter-American institutions, national adaptation to the BdPC is a crucial engine of the multilevel structure of human rights protection established in the Inter-American System, providing the first instance for protection and constituting the primary domain for prevention. A comparative chronological analysis of the character and content of national legal reforms since the adoption of the BdPC, in 1994, provides a crucial indicator of the suitability of the regional System to promote national implementation of the understanding reflected in the BdPC and regional convergence to internationally constructed standards on women's rights. Future research should extend the focus to comprehend the use of such new legislations at national level and the interaction between Inter-American institutions and national courts. We analysed to what extent national legislations internalised the requirements set by the BdPC as elaborated by feminist scholarship considering:

- The object of the laws, i.e. whether they cover specific forms of violence or they extend to all cases of gender-based violence.
- The mechanism of protection provided to punish acts of VAW and prevent reiteration.
- Elements suggesting the internalisation of the understanding of VAW as caused by and reproducing unequal social relations.
- Explicit references to the BdPC or other human rights instruments.
- The inclusion of integrated measures of prevention directed to

eradicate discrimination, beyond providing specific measures to address VAW.

The content of Inter-American case law and national legislations of VAW was analysed and interpreted in the framework set by the BdPC, reflecting CEDAW and General Recommendation 19, assessing its responsiveness to requirements set by the paradigm shift in the understanding of VAW. Using the conceptual tools originated in feminist literature we analysed whether the paradigm shift they contributed to generate has been effectively internalised in the practice, beyond the conventional text and through which process. When needed, the legal analysis has been enriched with supplementary information providing details on the regional and universal context in which such processes take place.

While Inter-American case law is publicly available and downloadable from the Inter-American Institutions websites, for what concerns national legislations we gathered our material both through governmental websites and resorting to a network of Latin American academic contacts, established during our period of research at the Faculty of Law of the University of Buenos Aires, under the supervision of Prof. Calogero Pizzolo, our visiting period at the Centre of Excellence for International Courts (iCourts) of the University of Copenhagen, for which we are grateful to Prof. Mikael Rask Madsen, and during our previous stance at the National Autonomous University of Mexico (UNAM) in Mexico City.

This network allowed us to obtain first hand material, unavailable online, from public officials and specialized research centres in Latin American countries. With the exception of Dominican Republic, the Caribbean countries have been excluded from the analysis. The reason of such choice is that only Barbados, Haiti and Trinidad y Tobago ratified the ACHR and recognised the jurisdiction of the Court⁵⁴ and their sharp specificities and minor homogeneity with the regional legal, cultural and political context, weaken the accuracy of generalisations.

⁵⁴ In addition, Dominica ratified the Convention but did not recognise the jurisdiction of the Court. Incidentally, but out of the scope of this analysis, we mention that in September 2012 Venezuela initiated the process to withdraw from the ACHR and this decision will have effects in September 2013.

Once analysed the content of case law and national legislations chronologically, and their performance vis-à-vis the paradigm shift, we integrated our findings in a single framework, presenting a conjunct interpretation of their evolution, in order to understand whether the adoption of the convention itself and Inter-American case law had an impact on regional legal reforms, in which way and to what extent.

The indicators selected present appropriate levels of reliability and validity in order to be useful to our scope. In order to limit the sources of our analysis, an unavoidable task given the overarching nature of the principles of equality and non-discrimination (between sexes and in general), we selected case law and legislations related to one of the subjects covered in Women's Conventions, i.e. VAW. The validity of this choice is justifiable on the basis of the informative content of institutions' interpretations and national legislations on the subject vis-à-vis BdPC objectives. On the one hand, the shift in international understanding on VAW reflects the essence of the new paradigm on equality and non-discrimination, since with 1992 CEDAW Committee's General Recommendation 19 gender-based violence was recognised as a form of discrimination, originating in structural unequal relations of power between the sexes, that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men. This understanding has been broadly accepted and internalised by international instruments and institutions. On the other hand, measures to eradicate VAW are required to address legal reforms as well as social and cultural patterns which reproduce discrimination and cause this kind of violence. Therefore, a focus on legislation on VAW allows us to identify the reception of the understanding of gender discrimination as a structural element in current social relations.

Our focus on VAW is consistent with the scope of this research and based on the recognition of the distinctive features of the paradigm shift on women's rights. We argue that the reasons for this necessary restriction of the research focus are sufficiently grounded to be uncontroversially acceptable. On the one hand, the reliability of the indicators is ensured in that they do not depend on the researcher monitoring them, once explicitly identified the focus and the perspective is accepted. On the other hand, the type of indicators selected might be challenged on the grounds that qualitative indicators carry the risk of

being less objectively interpretable. However, we believe that the strength of such objection should not be overestimated. Interpretations can hardly be completely bias-free, both for quantitative and qualitative indicators, and the same can easily be argued for what concerns the selection of the indicators themselves. The best option is, hence, to limit the range of questions we want them to answer and account for their fallibility. In this sense, we use them to evaluate the internalisation of the paradigm shift, as presented in the previous part of this Section, and to assess the conditions for its plausibility provided by the Inter-American System, without expecting them to provide information on the effectiveness of women's rights in the region.

Through our analysis we do not want to evaluate Inter-American System's performance in developing the best way to address women's rights issues and eradicate discrimination. In our approach, the "best way" coincides with that indicated in current Women's Conventions, i.e. the most recent evolution of the international understanding of women's rights reflected in the conventional texts, and understood in the framework of the reviewed feminist legal literature. We look for evidence of the internalisation of the systematic approach to VAW eradication required by Women's Conventions, looking for references to its recognised discriminatory causes.

We do not question the appropriateness of the understanding of VAW as a form of discrimination to address structurally, this is taken as given, and considering the inherently dynamic nature of human rights instruments, which allow their further evolution and adaptation through interpretation. This perspective is implied in our problem-solving approach to the issue. We currently count on an impressive number of international instruments on human rights, general and specific, regional or universal. Many of them are several decades old, and are continuously actualised through interpretations by competent bodies, to respond to the historical evolution of the understanding of their content. Nevertheless, they provide the normative framework creating the very conditions for such evolution. In this perspective we consider the adoption of specific conventions addressing women's rights as a valuable contribution *per se*, enhancing the likelihood of the effectiveness of women's rights and their further conceptual evolutions.

Through this research we wish to identify which are the favourable structural

and procedural conditions determining the plausibility of the paradigm presented by Women's Conventions. Therefore, conclusions on the general state of women's rights in the region will not be drawn in this research. Indeed, we believe that such a research objective, at this early stage in Women's Conventions life, would not necessarily provide useful information about how to design a human rights system suiting the characteristics of such new instruments and make provision's effectiveness plausible. Our conclusions will assess the appropriateness of a system such as that established by the ACHR for pursuing the structural change required by the BdPC to reach its overall objectives, signalling its strengths and shortcomings. Our objective is to determine whether we can recognise a method emerging from the Inter-American System practice with the BdPC and if the specificities of the regional system allow room for improvement in responding to those challenges that the conventional approach implies, but cannot be solved through standardisation in a written instrument. Our last task will be to determine whether such method might be generalizable to other regional systems or it is suitable given the specific features of the Inter-American System.

The final Section of this research will be dedicated to outline a brief *a priori* assessment of the perspectives of the Istanbul Convention in the European System, on the basis of our findings for what concerns a similar previous experience in a comparable regional system, considering the similarities and differences of the two systems and the relations between the two Courts. We believe that the evolution of the BdPC in the Inter-American System provides a crucial informative experience for the development of a European response to VAW. However, although, the ECtHR has occasionally mentioned IACrHR's (and CEDAW Committee's) case law when confronting cases of VAW, some of the choices made when drafting the Istanbul Convention, particularly for what concerns the enforcement mechanisms, seem to have overlooked lessons that the history of the previously enacted Women's Conventions provided.

ECrHR's case law currently provides an enormous *corpus juris* that proves sufficient to serve as a norm of reference to solve the majority of problems involving human rights. Indeed, the longer experience of the ECtHR often provided the IACrHR with crucial authoritative solutions to similar problems. However, this should not lead to believe that the European System is capable, by itself, of always finding appropriate solutions to newly emerging questions

(Garlicki, 2012). Even if it were, it would prove time consuming to work out each solution from scratch, without resorting to exogenous references or experiences of comparable systems, which currently count on a long successful history and comparable legitimacy and *auctoritas*. Indeed, there is one important field in which the ECrtHR adopted a doctrine shaped in the Inter-American context, namely to address the issue of the *desaparecidos* (Massolo, 2012). With our analysis, we wish to encourage and provide bases for a stronger bi-directional dialogue between the two regional systems that, for what concerns the focus of our research, would allow the Council of Europe to better use the European System's potential to promote the ambitious objectives of the Istanbul Convention. Once completed our primary objective, we follow up to our motivation and present an *a priori* assessment of Istanbul Convention's perspectives in the European System, considering differences and analogies with the analysed Inter-American experience and identify a concrete proposal for improving expectations of its effectiveness.

Section II – Chronological review: Inter-American case law and national legislations on VAW

Introduction

In this Section we present a descriptive review of Inter-American case law and national legislations on VAW. As explained in the First Section, we focused on VAW given that the evolution of the attitude towards the subject constitutes a suitable indicator of the degree of internalisation of the paradigm shift endorsed by Women's Conventions. The period covered begins with the adoption of the BdPC, in 1994, and includes all relevant material up to the first semester of 2013. The BdPC entered into force in 1995 and the first cases reviewed were submitted to the IACommHR before its adoption in the regional system and, consequently, concern violations occurred during the period of formation of the current understanding of VAW as a human rights violation. Analysing the relevant case law chronologically allows us, in the first place, to determine whether there is evidence of an impact on Inter-American Institutions' analyses of the increased international awareness reflected in adoption of the BdPC. Considering 1979 CEDAW, 1992 General Recommendation 19 and 1994 UNGA Declaration on the Elimination of Violence Against Women, by the time of BdPC adoption the Inter-American System could count on an articulated international consensus on the origins and nature of VAW, which could be used as a framework of analysis, arguably, even before the formal entrance into force of the instrument. The same considerations apply for what concerns legislative reforms nationally adopted in the years immediately before 1995.

Given the bi-frontal structure of the protection mechanism provided by the American Convention on Human Rights (Pizzolo, 2012), and reflected in the BdPC, the reviewed cases comprehend both those ended with a decision of the

IACommHR and those judged by the Court. In fact, the IACommHR performs a “filtering” function, developing its own proceedings to evaluate a case admissibility and merits. Unless a friendly settlement can be reached, it is up to the Commission’s discretion whether to end the procedure with its Report to the State, and monitor compliance with the decision, or refer it to the IACrTHR, through a further application presenting the Commission’s view of the facts. When referring a case to the Court, the Commission indicates the provisions suggested for Court’s evaluation, drawing from those invoked by the petitioners and, if when appropriate, including others to be considered. When called to judge a case, the Court develops its own proceedings and might recognise breaches of the suggested norms, discard them, or add others, would their relevance emerge from the Court’s evaluations of the facts. The symbolic impact and regional influence of IACrTHR’s decisions is generally stronger than Commission’s Reports.

In reviewing national legislations on VAW, we noticed a sharp difference in the nature of the legislative reforms enacted before and after 2006, bringing us to identify a first and second generation of laws. As we will see, 2006 is the year in which the IACrTHR officially clarified its contentious jurisdiction on the BdPC, adopting its first relevant ruling in *Castro-Castro*. Considering this element, and the peculiar features of the two generations of reforms, we organised our descriptive review of the legislative texts on VAW in two subsections, respectively covering the period 1994-2005 and 2006-present.

While the case law is publicly available and downloadable from Inter-American Institutions’ websites, for what concerns national legislations we gathered our material both through governmental websites and resorting to a network of Latin American academic contacts established during our period of research at the Faculty of Law of the University of Buenos Aires, our visiting period at the Centre of Excellence for International Courts (iCourts) of the University of Copenhagen, and during our previous stance at the National Autonomous University of Mexico (UNAM) in Mexico City. This network allowed us to obtain first hand material, unavailable online, from public officials and specialized research centres in Latin American countries.

With the exception of Dominican Republic, the Caribbean countries have been excluded from the analysis. The reason of such choice is that only Barbados,

Haiti and Trinidad y Tobago ratified the ACHR and recognised the jurisdiction of the Court.⁵⁵ Moreover, their sharp specificities and minor homogeneity with the regional legal, cultural and political context, would have weakened the accuracy of generalisations.

⁵⁵ In addition, Dominica ratified the ACHR but did not recognise the jurisdiction of the Court. Incidentally, but out of the scope of this research, we mention that Trinidad y Tobago and Venezuela recently withdrew from the ACHR.

Inter-American case law on VAW

In the '90s, several petitions on cases of VAW were submitted to the IACommHR and, as we will see, a few reached the IACrHR.

We now proceed with a chronological description of the cases that, on the basis of CEDAW or BdPC, could have or have been interpreted in the light of the new understanding of VAW, as originating and reproducing discrimination. In reviewing relevant case law we will focus on the interpretations relative to VAW, other aspects of the decisions will be, hence, excluded from the following description.

Contentious cases

Raquel Martín de Mejía v. Peru (1996) - IACommHR

The facts refer to several violations perpetrated by agents of the Peruvian State against Raquel Martín de Mejía, a teacher who suffered repeated sexual abuse, and her husband Fernando Mejía Egocheaga, a lawyer, journalist and political activist. The facts occurred in 1991, at a time in which the BdPC was not yet in force, and the Commission's decision was adopted two months after Peru's ratification of the Convention. However, the State was already part of the CEDAW since 1982.

Building on the developments in international law for what concerns the understanding of rape in context of conflict and political instability, the Commission recognises the victim's sexual abuse, committed by members of security forces, as a human rights violation, in relation to the right to physical and mental integrity. In establishing the responsibility of the Peruvian State, the Commission follows ECrtHR's jurisprudence, addressing the case under Article 5 ACHR (Right to Humane Treatment) and, notably, Article 11 (Right to Privacy) observing that the "*concept of private life extends to a person's physical and moral integrity, and consequently includes his sex life*" (Part 3.a, para. unnumbered).

The facts constitute a relatively "easy" case to analyse: rape as a form of inhumane and degrading treatment had already been extensively addressed by international

institutions; the perpetrators were agents of the State, hence, the public/private dichotomy was unproblematic and the petitioner provided accurate documentation of her allegations, with several organisations supporting her statements with reports on relevant contextual elements. Given the *form* of violence suffered, the sex of the victim is mentioned several times in the Commission's reasoning, however, there is virtually no sign of the adoption of the broader BdPC paradigm shift in the evaluation of its origins.

The Commission quoted the Special Rapporteur against Torture: "*Rape is a particularly base attack against human dignity. Women are affected in the most sensitive part of their personality and the long-term effects are perforce extremely harmful, since in the majority of cases the necessary psychological treatment and care will not and cannot be provided*" (Part 3.a, para. unnumbered) and argued that "*Raquel Mejía was raped with the aim of punishing her personally and intimidating her*" (Part A, para. unnumbered). However, analyses of rape are mainly used in the framework of a broader understanding of torture, evaluated under Article 5 ACHR. Discrimination as a cause of VAW does not come into the picture, since the conditions to use this framework depend on the sexual abuse being: 1. An *intentional* act through which physical and mental pain and suffering is inflicted on a person; 2. Committed with a *purpose*, and 3. Committed by a public official or by a private person acting at the instigation of the former.

Considering the need to previously exhaust domestic remedies the Commission argues that: "*the reasons given by the petitioner for not submitting a petition in the domestic courts are supported by different documents published by intergovernmental bodies and nongovernmental organisations which expressly note that women who have been victims of sexual abuse by members of the security forces or police have no means open to them for obtaining a remedy for the violations of their rights*" (Part B, para. unnumbered) However, notwithstanding the documentation gathered highlighting impunity in cases of violations suffered by women, the reasoning of the Commission does not go beyond reporting extracts of it,⁵⁶ used solely to argue the admissibility of the case due to

⁵⁶ The Decision quotes a long extract from the Report of the UN Special Rapporteur Against Torture: "*it is reported... that those guilty of [rape and other sexual abuses] were rarely brought to trial even in those cases where complaints were filed with competent authorities. The military courts took no action in these cases and failed to place the accused at the disposal of the civil courts, as they were required*

unavailability of domestic remedies. While considering the issues of *public humiliation* and *society's attitude* to the victims of sexual abuse addressing the low number of reports filed by women, the arguments are again used to support the admissibility of the case, but do not trigger a broader analysis of discriminatory socio-cultural patterns, possibly reproducing VAW through its impunity, nor it implies a reference to the obligations of the Peruvian State as a party to CEDAW, specifically for what concerns its Article 5(a).⁵⁷

X and Y v. Argentina (1996) – IACommHR

The facts happened in 1989, when the BdPC was not in force. However, Argentina had been a CEDAW State Party since 1985 and the Decision of the Commission was adopted after its ratification of the BdPC. The petitioners, Ms. X and her thirteen-year-old daughter Y, reported that the Federal Government Prison authorities arbitrarily performed vaginal inspections when they visited their husband and father. They claimed that the practice constituted a violation of the American Convention, offending their dignity and right to privacy (Article 11), constituting a degrading punishment extending beyond the person condemned or on trial and an invasion of the victims' physical integrity (Article 5.3). Notably, the petitioner referred to the practice as discriminatory against women, invoking

to do by law. This situation of impunity together with other factors such as the difficulty of submitting evidence or society's attitude to the victims meant that a large percentage of these cases were never even reported". Amnesty International has stated that despite the existence of a large number of cases of sexual violations in emergency areas, to date no member of the security forces operating in those areas has been tried for rape; neither have effective investigations been made following complaints submitted by women who have been victims of sexual abuse by soldiers. Human Rights Watch, for its part, has observed that despite the widespread incidence of sexual abuse in Peru, very few police and even fewer members of the security forces have been tried for this abuse, even in cases where complaints were filed with the appropriate authorities. On the contrary, the evidence gathered demonstrates that the police and armed forces protect those guilty of these violations and grant them promotions, thereby implicitly tolerating the commission of these crimes. Human Rights Watch also maintains that it is practically impossible to prove a charge of rape against a member of the security forces. The emergency legislation specifies that crimes committed in the 'performance of duty' fall under military jurisdiction, in accordance with the Code of Military Justice. Although sexual abuse is a common crime - and not one of the so-called 'duty crimes' - there have been no rape cases in which the ordinary courts have exercised jurisdiction" (Raquel Martín de Mejía v. Peru, part B).

⁵⁷ Article 5(a) CEDAW: *States Parties shall take all appropriate measures: a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.*

ACHR Article 24 (Right to Equal Protection Before the Law), in relation to Article 1.1 (Obligation to Respect Rights with no Discrimination).

Although the violations alleged provided grounds to adopt the understanding of VAW as a form of discrimination, while the Commission considered the facts under Article 17 (Rights of the Family) and Article 19 (Rights of the Child), it discarded the reference to Article 24. The final decision recognised that, by imposing an unregulated condition for the fulfilment of their prison visits, without appropriate judicial and medical guarantees, Argentina violated the rights of Ms. X and her daughter Y guaranteed in Articles 5, 11 and 17, in relation to Article 1.1 ACHR. In the case of Y, the Commission concluded that the State of Argentina also violated Article 19.

Diana Ortiz v. Guatemala (1996) – IACommHR

Petitioner Sister Dianna Ortiz, a United States citizen and Catholic nun of the Ursuline order, alleged that she was kidnapped, brought to a clandestine detention centre and raped by agents of the Guatemalan Government in November 1989. Guatemala was part of CEDAW since 1982 and, although the BdPC was not in force at the time of the facts, the Commission's decision was adopted after its ratification. However, the Commission never mentioned these international instruments. Based on the information submitted and its own investigations, the Commission found that the Guatemalan Government had violated the ACHR Articles 1 (Obligation to Respect Rights), 5 (Right to Human Treatment), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 11 (Right to Privacy), 12 (Freedom of Conscience and Religion), 16 (Freedom of Association) and 25 (Right to Judicial Protection).

The Commission overlooked the possibly discriminatory nature of the violations, notwithstanding some informative elements that might have suggested such interpretation. During the hearings of the case, General Alejandro Gramajo, then Minister of Defence, argued: *"Sister Ortiz had invented her story to cover up her involvement in a 'lesbian tryst'. He suggested that her facial injuries resulted from a love affair"* (para. 43) and Government officials added that: *"Her accusations against the Government were fabricated, that she had staged her own kidnapping and that she was working with groups who wished to embarrass the country of*

Guatemala" (para. 117). While briefly defining these statements as "particularly serious", the Commission does not take into account an assessment of the nature of such spiteful assertions.

Ana, Beatriz, and Celia González Pérez v Mexico (2001) – IACommHR

The Centre for Justice and International Law (CEJIL) filed a petition alleging the international responsibility of Mexico for the illegal detention, rape, and torture of Tzeltal sisters Ana, Beatriz, and Celia González Pérez by members of the security forces, as well as for the subsequent failure of the national judicial system to investigate the facts and provide redress for the victims. The petitioners invoked several rights enshrined by the ACHR: right to humane treatment (Article 5); right to personal liberty (Article 7); right to a fair trial (Article 8); right to privacy (Article 11); rights of the child (Article 19); and right to judicial protection (Article 25). The facts took place in 1994, Mexico was a CEDAW State Party since 1981, and the BdPC had entered into force four years before the Commission's decision.

In its evaluation of the facts, the Commission added a reference to Article 1.1 ACHR (Obligation to Respect Rights with without Discrimination) and Article 8 (Right to impartial examinations of allegations of torture) of the Inter-American Convention to Prevent and Punish Torture, which Mexico had ratified in 1987. As in the *Raquel Martín de Mejía v. Peru* Decision, sexual violence was considered under Article 5 and 11 ACHR. Although the Commission quoted the United Nations Special Rapporteur on VAW, clarifying that "*rape during warfare has also been used to terrorize populations and induce civilians to flee their homes and villages.*" and "*the consequences of sexual violence are physically, emotionally and psychologically devastating for women victims*" (para. 45) and briefly cited the BdPC, no reference to discrimination on the basis of gender appears in its analysis. Recalling *Raquel Martín de Mejía v. Peru*, the Commission considered that the victims were "*abused and harassed for [their] alleged participation in an armed dissident group*" (para. 47), i.e. the EZLN (Zapatist Army for national liberation). However, the reasoning led to the recognition of the crime of torture, but no further element was added in relation to the sex of the victims (nor to the intersectionality with other factors such as their indigenous origins).

The Commission argued that the abuses “led [the victims] to flee their community in a situation of fear, shame, and humiliation” (para. 52), that the anguish and suffering “extended to Delia Pérez de González, who had to stand by helplessly and witness the abuse of her three daughters by members of the Mexican Armed Forces and then to experience, along with them, ostracism by her community, constitutes a form of humiliation and degradation that is a violation of the right to humane treatment guaranteed by the American Convention” (para. 53) and that “that the pain and humiliation suffered by the women was aggravated by their condition of members of an indigenous group” (para. 95), which aggravates State’s responsibility given “its obligation to respect indigenous cultures”⁵⁸. Although this might appear as the embryo of an intersectional analysis, the Commission did not go beyond describing a context, without coming to any conclusion for what concerns the nature of the violations perpetrated. Additionally, as we will see in the Third Section of this research, the position adopted by the Commission arguably implies a conceptual error in its interpretation of the consequences of the abuses suffered in relation to the victims’ rejection from their communities.

María Eugenia Morales de Sierra v. Guatemala (2001) - IACommHR

This case does not refer to facts of VAW, and indeed sharply differs from all other cases on women’s human rights presented to Inter-American Institution to date. Nevertheless, it is of paramount interest in this analysis, given the framework of analysis in which the IACommHR develops its reasoning and conclusions, largely referring to CEDAW.

In 1995 the Commission received a petition from CEJIL and María Eugenia Morales de Sierra, alleging that several articles of the Guatemalan Civil Code⁵⁹

⁵⁸ This argument uncovers a conceptual error in the Commission’s reasoning, which disregards the discriminatory nature of ostracism. This issue will be thoroughly addressed in the Third Section of this research.

⁵⁹ In particular, the petitioners claimed that: “Article 109 of the Civil Code confers the power to represent the marital union upon the husband, while Article 115 sets forth the exceptional instances when this authority may be exercised by the wife. Article 131 empowers the husband to administer marital property, while Article 133 provides for limited exceptions to that rule. Article 110 addresses responsibilities within the marriage, conferring upon the wife the special “right and obligation” to care for minor children and the home. Article 113 provides that a married woman may only exercise a

provided a discriminatory definition of the roles of spouses in marriage. In 1992 the Guatemalan Constitutional Court had ruled the provisions constitutional (Constitutional Court, Case 84/92) since, *“inter alia, they provided juridical certainty in the allocation of roles within the marriage”* (para. 3). The petition alleged that such provisions of the Civil Code violated, *in abstracto*, Articles 1.1, 2 (Domestic Legal Effects), 17, 11 and (for the second time in a petition on women’s human rights) Article 24 ACHR. Moreover, the petitioners extensively refer to CEDAW, with particular reference to Articles 15 (Equality of Women Before the Law) and 16 (Positive Obligations of the State to Eliminate Discrimination against Women in Family Relations). In 1997, they filed a second petition concretely identifying the victim in María Eugenia Morales de Sierra.⁶⁰ They alleged that *“as a married woman living in Guatemala, a mother, a working professional, and the owner of property acquired jointly with her husband during their marriage, Ms. Morales de Sierra is subject to the immediate effects of this legal regime by virtue of her sex and civil status, and the mere fact that the challenged provisions are in force (...) These articles prevent Ms. Morales de Sierra from legally representing her own interests and those of her family, and require that she depend on her husband to do so (...) her right to work is conditioned on what the petitioners characterize as the anachronistic legislative division of duties within marriage”* (para. 23). In arguing the discriminatory

profession or maintain employment where this does not prejudice her role as mother and homemaker. They stated that, according to Article 114, a husband may oppose his wife’s activities outside the home, as long as he provides for her and has justified reasons. In the case of a controversy with respect to the foregoing, a judge shall decide. Article 255 confers primary responsibility on the husband to represent the children of the union and to administer their property. Article 317 provides that, by virtue of her sex, a woman may be excused from exercising certain forms of guardianship” (para. 2).

⁶⁰ This second petition was filed to comply with the limitations to Commission’s jurisdiction, which can only be exercised on cases involving breaches to rights of specific individuals. In the Merits of the case the Commission clarifies that: *“The Commission entertains a broader competence under Article 41.b of the Convention to address recommendations to member states for the adoption of progressive measures in favour of the protection of human rights. Pursuant to their original petition for a decision in abstracto, which appeared to rely on the Commission’s competence under Article 41.b of the American Convention rather than that under Article 41.f, the petitioners modified their petition and named María Eugenia Morales de Sierra as an individual victim, as previously noted, in their communication of April 23, 1997. With the identification of an individual victim, the Commission may advance with its decision on admissibility in the present case. As the Honourable Court has explained, in order to initiate the procedures established in Articles 48 and 50 of the American Convention, the Commission requires a petition denouncing a concrete violation with respect to a specific individual”* (María Eugenia Morales de Sierra v. Guatemala, para. 31). The Commission refers to IACrTHR Advisory Opinion 14/94, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 ACHR). Similarly, the IACrTHR holds contentious jurisdiction only on cases involving breaches to individual rights and freedoms in concrete cases, and may not solve questions *in abstracto*.

content of several norms of the domestic legal system, the petitioners explicitly presented them as contributing to reproduce those unbalanced relations of power that create a conducive context for VAW and, specifically, for domestic violence (para. 25).

At the time of the petition Guatemala was part of CEDAW and had ratified the BdPC. Moreover, with 1992 General Recommendation 19, CEDAW Committee had officialised the link between discriminatory social structures and VAW. Notably, counting on a regional specific instrument on women's rights, the Commission never mentions it, while it refers to CEDAW, in the terms proposed by the petitioners. After the Commission's first recommendations, Guatemala derogated several controversial articles with Decree 80 in 1998 and Decree 27 in 1999, reforming the Civil Code. Furthermore, in 1999 Decree Law 7 established, *inter alia*, the prohibition of any discrimination on the basis of civil status (Cotula, 2007).

In considering the merits of the case, the IACommHR clarified its position on several crucial issues, besides the reference to Article 11 ACHR on the basis of European case law.⁶¹ After having (silently) discarded the evaluation under Article 24 ACHR in *X and Y v. Argentina*, in this case the Commission used the provision to tackle the issue of *substantial* equality,⁶² as opposed to formal equality, and found the Guatemalan marital regime incompatible with the terms of Article 17(4) ACHR, read in conjunction with Article 16(1) CEDAW (para. 45). The decision explicitly recalled CEDAW extensive definition of discrimination against women, explaining this choice as due to the fact that "*responding as it does to the specific causes and consequences of gender discrimination, covers forms of systemic disadvantage affecting women that prior standards may not have contemplated*" (para. 32). The Commission referred to the challenged Civil

⁶¹ See, *inter alia*, ECtHR *Gaskin v. United Kingdom*, on the interest of applicant in accessing records concerning childhood and early development, and *Niemetz v. Germany*, where the ECtHR notes that respect for private life includes the right to establish and develop relationships, both personal and professional.

⁶² In doing so, the Commission recognises that the distinction established by the Civil Code is not based on reasonable and objective criteria, i.e. it does not: (1) pursue a legitimate aim and (2) employ means which are proportional to the end sought, (para. 31, referring to ECtHR *Belgian Linguistics* case). The concept of substantive equality has also been used to argue the legitimacy of "affirmative actions". For ECtHR jurisprudence in this sense, refer to: *Karlheinz Schmidt v. Germany* (1994), para. 24; *Schuler-Zgraggen v. Switzerland* (1993), para. 67 and *Burghartz v. Switzerland* (1994), para. 27.

Code provisions as “*establish[ing] a situation of de jure dependency for the wife and creat[ing] an insurmountable disequilibrium in the spousal authority within the marriage*” (para. 44) and “*reinforcing systemic disadvantages which impede the ability of the victim to exercise a host of other rights and freedoms*” (para. 40), thus recognising a structural problem in the disadvantaged position of women in Guatemalan society.⁶³

Notably, the IACommHR reinforced the reasoning stating that “*the dispositions of the Civil Code apply stereotyped notions of the roles of women and men which perpetuate de facto discrimination against women in the family sphere, and which have the further effect of impeding the ability of men to fully develop their roles within the marriage and family*” (para. 44),⁶⁴ and clarified that, although in the considered case the husband of the victim did not make use of the such Civil Code provisions, the mere fact that he might do so implied a discrimination that “*has consequences from the point of view of her position in Guatemalan society, and reinforces cultural habits (...) This situation has a harmful effect on public opinion in Guatemala, and on María Eugenia Morales de Sierra’s position and status within her family, community and society*” (para. 50).

Gender-discrimination is explicitly mentioned as operating “*to impair or nullify the ability of women to freely and fully exercise their rights, and gives rise to an array of consequences*” (para. 51). Discrimination includes VAW, which the Commission defines according to BdPC “*a manifestation of the historically unequal power relations between women and men*” (para. 52), and recalling CEDAW Committee’s General Recommendation 19, pointing at “*Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse (...) De jure or de facto economic subordination, in turn, forces many women to stay in violent relationships.*”

⁶³ The petitioner claimed that, while the relationship with her husband was based on mutual respect, her status in the family, community and society was conditioned by the attribution of authority to her husband to represent the marital union and their minor child (para. 48).

⁶⁴ Notably, the interpretation underlines that the social position of men is also affected by this arbitrary distinction, inhibiting their role with respect to the home and children and, inherently, depriving children of the full and equal attention of both parents (para. 44).

Maria da Penha Maia Fernandes vs. Brazil (2001) - IACommHR

The petitioners presented a case of reiterated domestic violence, alleging the violation of Articles 1.1, 8, 24 and 25 ACHR, several provisions of the American Declaration of the Rights and Duties of Men (ADHR) and, notably, Articles 4 (Equal Treatment of Women), 5 (Protection of Civil, Political, Economic, Social and Cultural Rights) and 7 (Positive Obligations and Domestic Legal Effect) of the BdPC.

The facts refer to a violation perpetrated by the victim's husband, i.e. a private individual, in the intimate domain of the family, a case in which the traditional approach in international law would have limited State's intervention. The victim suffered maltreatments from her husband throughout their whole married life, which culminated in her attempted murder, causing her irreversible paraplegia. The petitioners argued that the Brazilian justice system, notwithstanding the amount of evidence of his charges, did not hand out a final ruling.⁶⁵ Their analysis extended beyond the concrete case, which they presented as "*an example of a pattern of impunity in cases of domestic violence against women in Brazil*" (para. 20).

In 1983, when the facts occurred, the State had not ratified the CEDAW⁶⁶ and the BdPC had not been even drafted. However, at the time of the petition Brazil had ratified the BdPC. Consequently, the Commission based its competence to hear the case pursuant the BdPC on the *continuous nature* of the violation⁶⁷ of the right to effective legal procedures, which manifested State's tolerance of a situation of impunity,⁶⁸ implying the reproduction of a conductive contest for VAW.

⁶⁵ They underlined that 70% of the cases of VAW are, indeed, cases of domestic violence, denouncing that a police officer in Rio de Janeiro had stated that of the more than 2,000 cases of rapes or beatings reported at his police station, only a few resulted in the punishment of the perpetrator (Human Rights Watch, Report on Brazil, 1991, pp. 351-367).

⁶⁶ As we will see in the Third Section of this research, Brazil ratified CEDAW in 1984, with reservation on Article 29.1, 15 and 16.

⁶⁷ For precedents in this sense involving Brazil, see Commission's *Ovelario Tames v. Brazil*, *Newton Coutinho Mendes et al. v. Brazil*, *Alonso Eugenio da Silva v. Brazil*, *João Canuto de Oliveira v. Brazil*. As we will see further on in this research, this doctrine has been elaborated by the IACrHR in relation to the cases of the *desaparecidos*.

⁶⁸ Case documents indicate that 70% of the criminal complaints on domestic violence do not reach a conclusion and only 2% of such complaints lead to criminal conviction of the responsables (Report of the San Pablo Catholic University, 1998).

The IACommHR referred to its own 1997 Report on Brazil to state that *“The crimes which fall within the heading of violence against women constitute human rights violations (...), where conduct may not initially be directly imputable to a state (for example, because the actor is unidentified or not a state agent), a violative act may lead to state responsibility ‘not because of the act itself, but because of the lack of due diligence to prevent the violation or respond to it as the Convention requires’”* (IACommHR, Report on the Situation of Human Rights in Brazil, 1997, Chapter VIII).

The evaluation of the facts presents extensive reference to documentation on the Brazilian social context, providing evidence of the fact that women were victims of domestic violence in disproportionate numbers, and that there *“was clear discrimination against women who were attacked, resulting from the inefficiency of the Brazilian judicial system and inadequate application of national and international rules, including those arising from the case law of the Brazilian Supreme Court”* (para. 47). Tolerance by State organs is recognised as a pattern, which *“only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women”* (para. 55), creating *“a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts”* (para. 56).

As in the previous cases, the IACommHR finds the State responsible for the violation of Articles 1.1, 8 and 25 ACHR, because of the unwarranted delay and negligent processing of the case, whereas no mention is made to Article 11 (Right to Privacy). Notably, the Commission replaces it establishing a violation of Article 7 BdPC, including at the end of its recommendations a detailed list of public measures to enact for improving the judicial system’s response to VAW and eradicate impunity.⁶⁹

⁶⁹ The recommendations include: *“Continue and expand the reform process that will put an end to the condoning by the State of domestic violence against women in Brazil and discrimination in the handling thereof. In particular, the Commission recommends: a. Measures to train and raise the awareness of officials of the judiciary and specialized police so that they may understand the importance of not condoning domestic violence; b. The simplification of criminal judicial proceedings so that the time taken for proceedings can be reduced, without affecting the rights and guarantees related to due process; c. The establishment of mechanisms that serve as alternatives to judicial mechanisms, which resolve domestic conflict in a prompt and effective manner and create awareness regarding its serious nature and associated criminal consequences; d. An increase in the number of*

Castro-Castro v. Peru (2006) - IACrHR

This is a crucial case for the development of women's rights protection in the Inter-American System. For the first time, the IACommHR submits to the Court a case that gives the occasion, on the basis of the extensive documentation provided by the petitioners, to uncover the systematic discriminatory pattern of the violence inflicted to women detained in *Castro-Castro* prisons and clarify the Court's contentious jurisdiction on the BdPC.

Submitted to the Court in 2004, the case originates in two petitions, separately presented to the IACommHR in 1992 and 1997, denouncing facts occurred in 1992 in the Miguel Castro-Castro Prison. A large number of the victims were women, some of them pregnant, and Peru had ratified the BdPC in 1996. Notwithstanding the arguments of the petitioners, the Commission's application to the IACrHR only referred to violations of the ACHR: Article 1.1 (Obligation to respect rights); Article 4 (Right to life); Article 5 (Right to human treatment); Article 8.1 (Right to a fair trial) and Article 25 (Right to judicial protection). However, based on the specific features of the facts and on the information gathered during the hearings, the Court evaluated the violations under provisions of the BdPC, clarifying its competence on the instrument through a detailed argumentation, that inaugurates its full justiciability in the Inter-American System. This issue will be thoroughly addressed in the Third Section of this research.

Although the Commission excluded BdPC provisions from its application to the Court, during IACrHR's hearings we found strong evidence of the integration of a gender perspective in its following contributions to Court's proceedings as representative of the petitioners. Its arguments are cited in IACrHR's ruling,

special police stations to address the rights of women and to provide them with the special resources needed for the effective processing and investigation of all complaints related to domestic violence, as well as resources and assistance from the Office of the Public Prosecutor in preparing their judicial reports; e. The inclusion in teaching curriculums of units aimed at providing an understanding of the importance of respecting women and their rights recognised in the Convention of Belém do Pará, as well as the handling of domestic conflict; f. The provision of information to the Inter-American Commission on Human Rights within sixty days of transmission of this report to the State, and of a report on steps taken to implement these recommendations, for the purposes set forth in Article 51 (1) of the American Convention" (point 4 of the Conclusions).

which recalls Commission's presentation of the facts stressing that the majority of the victims were women, which suffered the worst consequences of the breaches and emphasised the comprehensive connection between the guarantees established in the BdPC and the basic rights and liberties stipulated in the ACHR, when dealing with the violence against women as a breach to human rights. According to the Commission's testimony: *"even though the BdPC was not in force in Peru at the time of the facts, it could be used in order to analyse the State's responsibility for the violations to Articles 4, 5, 8, and 25 of the American Convention, in virtue of the stated in Article 29 of the same; and that the right to be exempt of violence in the public and private sphere, stipulated in Article 3 of the Convention of Belém do Pará, includes the right to the protection of other basic rights including life"* (points p and r of the arguments submitted by the Commission). The petitioners were, somehow, more precise, invoking Article 5 ACHR and Articles 1, 6, 7, 8, and 9 of the BdPC, arguing that *"covering the period as of July 12, 1995, said violations constituted a violation to the object and purpose of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, [...] which was signed by Peru on July 12, 1995[,] and violations [to] Article[s] 4 and 7 of the same Convention for the period that covers from 1996 on, as of when Peru ratified said treat on June 4, 1996. The State of Peru intentionally inflicted violence against the female political prisoners as punishment for their double transgression of the prevailing system: the use of the gender factor to cause damage and torture prisoners"* (point t of the arguments of the Common Intervener).

As we will see, while solving the impasse on the IACrTHR's competence on the BdPC, the judgment shows the signs of a change in the interpretation of ACHR norms when addressing cases involving gender-sensitive issues. Indeed, the Court affirms: *"When analysing the facts and their consequences the Court will take into account that the women that were affected by the acts of violence differently than the men, that some acts of violence were directed specifically toward the women and others affected them in greater proportion than the men. Different Peruvian and international organisations have acknowledged that during the armed conflicts women face specific situations that breach their human rights, such as acts of sexual violence, which in many cases is used as 'a*

symbolic means to humiliate the other party” (para. 223).⁷⁰ In setting the scope of Article 5 ACHR in cases of VAW, the Court mentions CEDAW, ratified by Peru in 1982, as part of the international *corpus juris* on the matter (par. 276). Referring to BdPC provisions as directly applicable to the case, the Court clarifies: “(...) *they specify and complement the State’s obligation with regard to the compliance of the rights enshrined in the American Convention*” (par. 346).

The written deposit of the petitioners dedicates a whole chapter to the analysis of the facts as *gender violence*,⁷¹ arguing BdPC breaches. They present a thorough interdisciplinary analysis, providing extensive documentation and emphasising gender-specific features of the violations perpetrated. The Court quotes extensive pieces of documentation, such as: the evaluation submitted by Specialist in the Attention of Torture Victims Ana Deutsch, arguing that “*The fact that the attack started in the pavilion where the women that were political prisoners were located and where several of them were pregnant, would indicate an intentional selection against the women*” (Section 3 of the experts’ testimonies); the Final Report of the Commission for Truth and Reconciliation (CVR) indicating that “*during the mentioned conflict the acts of sexual violence against the women were intended to punish, intimidate, pressure, humiliate, and degrade the population*” (para. 225) and the Report of the Ombudsman of the People of Peru, which concluded that “*the involvement of women in the armed conflict changed the perception of women and caused ‘a more cruel and violent treatment regarding those women considered suspects’*” (Ombudsman Defence Report N. 80, p. 33). The Common Intervener for the victims, argued that women were specifically punished for a *double transgression*: the transgression to the norms of society, i.e. *status quo* (common to the male political prisoners), and the transgression of the role assigned to women in Peruvian society, i.e. their supposed loss of femininity due to political activism.⁷² The Intervener underlined symbolic elements, such as the deliberate confinement of the women prisoners in a men’s prison, the separation from their children, the

⁷⁰ The Commission argues this point referring to CEDAW Committee’s General Recommendation 19, the 2001 Report of the UN Special Rapporteur on VAW Radhika Coomaraswamy and the Defence Report N. 80 of the Ombudsman the People of Peru, attached to the case file.

⁷¹ See documents attached to the case file, available on-line at: http://www.corteidh.or.cr/docs/casos/expedientes/alefi_int.pdf (p. 36).

⁷² The Court recognised that “*The use of state power to breach the rights of women in a domestic conflict, besides affecting them directly, may have the purpose of causing an effect in society through those breaches and send a message or give a lesson*” (para. 224).

scheduling of the massacre in the week of Mother's Day and its coincidence with the day of visit of the female relatives of the inmates, forced to assist to the cruelties suffered by their sons, daughters and spouses,⁷³ interpreting them as punishments for being *"mothers and wives of terrorists"*. According to the Commission: *"women have been the victims of a history of discrimination and exclusion due to their gender, which has made them more vulnerable to being abused when violent acts are carried out against specific groups for different reasons, such as inmates. The violence against women is a war strategy used by the actors of the armed conflict to advance in their control of both territory and resources. Additionally, these aggressions act as a tactic to humiliate, terrify, destroy, and injure the 'enemy', the family or the community to which the victim belongs"* (point i of the Commission's written arguments). In finding the State responsible of the violation of Article 7.b of the BdPC (besides other provisions), the IACrTHR extensively adopted the suggested framework of analysis, recognising a complex structural problem rooted in the social and cultural patterns of society, preventing women to freely develop their personality and violating their human rights.

In his Concurring Vote, Judge Cançado Trindade puts a special emphasis in advocating the adoption of a gender perspective. Cançado Trindade recalls the holistic approach developed in 1979 with CEDAW, and the centrality of triggering change in the socio-cultural patterns of behaviour. His reasoning explicitly provides an overview of the evolution of the approach to the subject, fixed in documents such as the Declaration and Action Programme of Vienna in 1993 (Global Conference on Human Rights), the Beijing Platform adopted in 1995, the Inter-American Convention to Prevent, Sanction and Eradicate Violence Against Women of 1994 and CEDAW Optional Protocol, entered into force in 2000.

Perozo et al. v. Venezuela and Ríos et al. v. Venezuela (2009) - IACrTHR

Both petitions alleged hindrance to broadcast and acts of harassment and physical and verbal assault against men and women working at Globovisión

⁷³ Incidentally, as we will see further on in this research, feminist scholars tend to consider this line of argumentations paternalistic.

television station. In the final judgement, the allegations invoking BdPC provisions in relations to women victims were discarded as unfounded. However, these cases are worth a mention, since they provide evidence of the Court's careful attitude towards abusing the use of the new specific instrument. The IACommHR requested the Court to declare the violation of several articles of the ACHR, such as the right to freedom of thought and expression (Art. 13). However, during the proceedings before the Court, the representatives alleged that *"the physical and moral attacks the [female] reporters suffered 'mainly responded to the gender'"* (Perozo, para. 289) and were recurring and tolerated by the State. In this case the Court did not find the reference appropriate, noting that *"the representative based their arguments, mainly, on quantitative criteria to allege that the aggressive acts were caused 'because of the sex' of the alleged victims"* (Perozo, para. 292) and, in relation to one of the victims in particular, the Court considered that the facts related did not reveal *"a reason or purpose, or at least, a connotation or effect based on the sex or gender of the victim or her condition of pregnancy"* (Perozo, para. 289). Regarding the allegation that pro-government newspapers had denigrated one of the victims *as a woman* (Perozo, para. 289), the Court discards the argument due to the representatives' failure to provide documentation. Considering its conclusions, the Court recognised the need to clarify that *"not all human right violation committed against a woman implies necessarily a violation of the provisions established in the Convention of Belém do Pará. Even though female reporters have been attacked in the facts of this case, in all the situations, they were attacked together with their male colleagues. The representatives have neither demonstrated in what way the attacks were 'especial[ly] address[ed] to women' nor have they explained the reasons why women turned into a special target '[due to their] gender'. [...] The representatives did not specify the reasons for and the way in which the State committed a 'planned or directed' action towards the alleged female victims and they neither explained to what extent the proven facts in which they were impaired 'were aggravated due to the condition of being a woman'. The representatives also failed to specify which facts and in which way those facts represent attacks that 'disproportionately affected women'"* (Perozo, para. 295). These rulings represent an important warning from the Court that, while increasingly using the BdPC to guarantee appropriate protection to women victims of violence and endorsing the emerged international consensus on the link between discrimination and VAW, at the same time needs to protect its own legitimacy and that of the new available specific instrument.

González et al. v. Mexico (2009) – Cotton field - IACrTHR⁷⁴

The facts refer to the forced disappearance and death of Mss. González, Herrera and Ramos, whose bodies were found in 2001 in a cotton field in Ciudad Juárez, and to omissions to investigate on the facts. Besides referring to breaches of several ACHR provisions, including Article 1 (Obligation to Respect Rights without Discrimination), Article 2 (Domestic Legal Effects), Article 5 (Right to Humane Treatment and Article 11 (Right to Privacy), the Commission's application to the Court includes the request to consider the facts under Article 7 (Positive Duties and Due Diligence to Eradicate Violence), 8 (Specific measures and Programmes) and 9 BdPC (Obligation to consider of Special Vulnerabilities).

During the proceeding, the Court gathered an extensive amount of information and testimonies both from the representatives of the petitioners and from the State. The documentation provided evidence of gender being the common denominator of systematic violations (para. 128). The representatives of the State recognised the problem, considering such facts as “*influenced by a culture of gender-based discrimination*” (para. 128-129), exacerbated by the structural factor of the change in family roles⁷⁵ in an *essentially patriarchal society*. The IACommHR Rapporteur, CEDAW Committee and Amnesty International, provided further analysis on the same line. In evaluating the responsibility of the State, the IACrTHR referred to the definitions of *due diligence* adopted by CEDAW, to the 1993 Declaration on the Elimination of Violence Against Women of the UN General Assembly, to the Beijing World Conference on Women, to the 2006 statements of the UN Special Rapporteur on VAW and to IACommHR's conclusions in *Maria Da Penha v. Brazil*. Additionally, considering the omissions of the national judicial system, the Court recalled ECrTHR's

⁷⁴ Incidentally, as we will see in detail in the Third Section of this research, we note that in this case Mexico raised a preliminary objection on IACrTHR's contentious jurisdiction on the BdPC.

⁷⁵ State's representatives explicitly refers to the changes occurred after the establishment of the *maquiladora* industry, started in 1965 and increased in 1993, with the implementation of the North American Free Trade Agreement (NAFTA). The majority of the employees in these industries are women and their increased economic independence triggered a sudden change in the traditional division of roles in the Mexican family, often making them the household providers (Cravey, 2008). For an interesting analysis of the transformation of gender relations brought forth by globalization, specifically referred to rural areas, refer to Brenner, 2004.

jurisprudence on *procedural obligations* (*Cotton field case*, 2009, par. 292) to carry out effective official investigations in cases of violation of the right to life, and analogically adopted ECtHR's doctrine on the *reinforced* duty of due diligence in the investigation of racially motivated aggressions. On the basis of the available evidence, the Court established that the lack of due diligence in investigating the facts originated in a general context of discrimination against women signalled, *inter alia*, by the stereotyped comments made by public officials to the family members of the victims (paras. 201, 408).

Notably, as suggested by experts and civil society actors during the hearings, when defining the violations occurred the Court uses the concept of *femicide*: "*In the light of the preceding paragraphs, in the instant case the Court will use the expression 'gender-based murders or women', also known as femicide*" (para. 143). In Section 1.6 of the judgment, "*Regarding the alleged femicide*", the Court extensively refers to the analysis presented by the petitioner's representatives, Art. 21 of Mexico's General Law on "*Access of Women to a Life Free of Violence*", enacted in 2007,⁷⁶ Government agencies, experts' testimonies, international agencies and NGOs.

The Court's definition of discrimination against women follows that of CEDAW: "*any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*" (para. 394). The interpretive framework is further enriched with references to BdPC understanding of VAW as "*a manifestation of the historically unequal power relations between women and men*", to *Opuz v. Turkey*, where the ECtHR argued that "*State's failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional*" (para. 396), as well as to its own precedent, the *Castro-Castro* case.

The argumentative choice of explicitly referring to a wide range of authoritative sources contributed to ground a judgment of evolutionary

⁷⁶ National legislations on VAW are reviewed in the second part of this Section and analysed in the Third Section of this research.

nature.⁷⁷ On this basis, the Court required Mexico to adopt measures directed to eradicate a context of entrenched social inequality, addressing its complex dimensions with a broad range of appropriate measures and overcoming the tendency to “naturalize” the issue of VAW, and to promote the adoption of a gender-perspective in social policies and judicial proceedings.

“Las dos Erres” Massacre v. Guatemala (2009) - IACrTHR

The case refers to the 1982 massacre of 251 inhabitants of the community (*parcelamiento*) of Las Dos Erres, perpetrated by a specialized group of the armed forces of Guatemala. At the time of the facts, the BdPC had not yet been drafted, however, Guatemala had ratified CEDAW just a few months earlier. Besides evaluating the facts under Articles 25 (Right to Judicial Protection) and 8 (Right to a Fair Trial), read in conjunction with Article 1 (Obligation to Respect Rights) ACHR, the Court considered breaches to the BdPC, ratified by the State well before the application to the Court, as requested by the Commission in relation to the *continuous nature* of the violation constituted by the lack of an exhaustive investigation, prosecution, and punishment of those responsible of acts of VAW. The Court found that the investigations carried out by the national judicial system disproportionately disregarded allegations of torture suffered by women victims (paras. 18-81), recognising that this neglect infringed “*non-revocable laws (jus cogens)* [which] *generate obligations for the States in conformity with the American Convention and in this case in light of the CIPST and the BdPC*” (para. 140).

Again, the Court referred to experts’ documentation, establishing as a proven fact that “*during the armed conflict women were particularly chosen as victims of sexual violence*” (para. 139) and recognising it as a systemic pattern⁷⁸ on the

⁷⁷ For an extensive analysis of this *praxis* in the Inter-American System, refer to Garcia Roca, 2012.

⁷⁸ The Court argues: “*In this regard, it is worth noting that in international law different courts have ruled on this, such as the International Criminal Tribunal for the Former Yugoslavia, which has qualified sexual violence as comparable to torture and other cruel, inhumane, and degrading treatment, when it has been committed within a systematic practice against the civil population, or with the intention of obtaining information, punishing, intimidating, humiliating, or discriminating the victim or a third party*” (para. 140). The reference is to the case law of the International Criminal Tribunal for former Yugoslavia in: *Prosecutor v. Anto Furundzija*; *Prosecutor v. Delalic et al (Celebici case)* and 2001 Appeals Ch. *Prosecutor v. Delalic et al (Celebici case)*; *Prosecutor v. Kunarac*

basis of 1999 CEH Report, submitted in occasion of another case involving Guatemala (*Plan de Sánchez Massacre v. Guatemala*), which stated that “*the rape of women was a State practice, executed in the context of massacres, directed to destroying the dignity of women at a cultural, social, family, and individual level*” (para. 139), reinforced by the testimony of psychologist Nieves Gómez Dupuis, who argued that “*torture, rape, and acts of extreme cruelty caused the victims [...] grave damages to their mental integrity*” (para. 139). Notably, in *Plan the Sanchez Massacre vs. Guatemala* (2004), adopted two years before the path-breaking *Castro-Castro case*, similar facts occurred in 1982 were not given the same interpretation.

In its conclusions on State’s responsibilities, the Court specified that investigations should have included specific and systemic violations against humane treatment of women victims adopting a *gender perspective*,⁷⁹ in abidance to Articles 8(1) and 25(1) ACHR, and to the specific obligations set forth in Articles 1, 6, and 8 of the Inter-American Convention against Torture and Article 7(b) BdPC.

In his Concurring Opinion, the *ad hoc* Judge Cadena Rámila articulated further the reasoning on this requirement, linking it to the need to address the socio-cultural roots of gender-based violence, beyond the limits of the case: “*It may be asserted that the application of the gender perspective enriches the manner of looking at reality and acting on it, hence the need to mention it and apply it in the case of Las Dos Erres. In terms of human rights, it allows, among other things, to visualize the inequities construed artificially, socio-culturally, and to better detect the specificity in the protection needed by those who suffer inequality or discrimination. Thus, it offers large advantages and possibilities for the effective protection of individuals and, concretely, of women*” (p. 4). According to Cadena Rámila the case provides evidence of what stated in BdPC Preamble, namely that VAW is “*a manifestation of the historically unequal power relations between*

et al; to the case law of the International Criminal Tribunal for Rwanda: *Prosecutor v. Akayesu, Jean-Paul*; and to ECtHR’s *Aydin v. Turkey* and *Maslova and Nalbandov v. Russia*.

⁷⁹ At paragraph 233, the Court recalls what established by CEDAW Committee’s General Recommendation 19: “*within the framework of armed conflicts States must adopt protective and punitive measures; additionally, it recommended for the States to ensure that the laws against attacks respect the integrity and dignity of all women, and provide protection to the victims; as well as to perform an investigation of the causes and effects of violence and the effectiveness of the response measures; and that they enshrine efficient procedures for reparations, including compensation*”.

women and men”, showing that “*this inequality indeed exists*” (p. 4). The opinion of Judge Ramón Cadena Rámila is noteworthy as it stresses the emphasis on the need to modify social and cultural patterns causing VAW, underlining the importance to intensify the use of a gender perspective not only in assessing the specific features and consequences of VAW, but also to eliminate its roots. He suggested to consider “*more concrete aspects in relation to reparation measures, and, concretely, of non-repetition*” (p. 4), including training programmes for public functionaries and security forces on the causes, nature and consequences of gender-based violence, and focused on the implementation of measures of protection and prevention to guarantee to women a life free from violence.⁸⁰

Fernández-Ortega et al. v. Mexico and Rosendo-Cantú et al. v. Mexico (2010)

These are essentially twin sentences, given the analogy of the elements of the cases and of their proceedings before the Commission and the Court. Moreover, the judgments were delivered within one day of distance.⁸¹ Besides some factual difference, not relevant for what concerns this analysis, the allegations referred to the rape and torture of Mss. Fernández-Ortega and Rosendo-Cantú, two indigenous women of the State of Guerrero, by members of the Mexican military forces, in a context of political tension. As in the previous case, the Commission’s application to the Court recognised the lack of due diligence in investigating the facts and punishing the perpetrators, and underlined the difficulties encountered by indigenous women in accessing justice and health

⁸⁰ The Court referred to the obligation to adopt a permanent policy to train armed forces and judiciary personnel in human rights and international humanitarian law, to prevent the occurrence of similar facts and eradicate impunity (point b.4, para. 250-251). However it did not make any specific reference to the need of training on gender-based violence.

⁸¹ These are the cases in which the Commission’s application explicitly refers, *inter alia*, to violations of Article 7 BdPC. Notably, as happened in the *Cotton Field case*, Mexico filed a preliminary objection to IACrTHR’s jurisdiction on the BdPC. However, after Court’s clarifications, the State withdrew its objections in both cases. Additionally, the State made a partial acknowledgment of its international responsibility, which the Court evaluated positively, notwithstanding the doubts expressed by both the Commission, considering the admission partially contradictory, and the petitioners, interpreting them as directed to achieve a lenient judgment. Given that the dispute between the parties remained with regard to several other alleged violations, the IACrTHR found necessary to deliver judgments evaluating the facts and the merits of the matters, as well as the possible reparations.

care.⁸² The Commission stressed that the perception of impunity “*in the cases of gender-based violence has a particular level of violence, danger, fear, and restriction of their activities*” (Rosendo-Cantú, para. 84) and referred to sexual violence as having “*specific gender based causes and consequences [given that] it is used [...] to submit and humiliate and as a method of destroying the autonomy of the woman*” (Rosendo-Cantú, para. 81), being used to send a warning to their communities. Intersectionality is explicitly mentioned defining rape as an extreme form of discrimination against the victim: “*owing to her condition as an indigenous person and owing to her condition as a woman*” (Fernandez-Ortega, para. 92), and clarifying, in one case, that the violence suffered had the “*effect of humiliating and expressing domination over her, her husband, and all of the indigenous men and/or members of organized groups,*” (Rosendo-Cantú, para. 84) being “*aggravated by her condition as an indigenous girl child in a situation of poverty, ‘making her a victim at an intersection of discrimination’*” (Rosendo-Cantú, para. 82).

In relation to the indigenous origins of the victims, the Courts took into account that indigenous communities conserve their traditions and cultural identity and reside in the poorest and most marginalized municipalities, constituting an especially vulnerable group,⁸³ to which the national judicial system is, *de facto*, inaccessible, due to their distrust and fear of reprisals and to the language barrier.⁸⁴ The Court recognised that this context affected women in particular,

⁸² In Rosendo-Cantú (para. 169), the Court refer to Commission’s arguments about the barriers that indigenous women face to obtain access to justice, consequences of their social exclusion and ethnic discrimination: “*these barriers can be particularly serious, since they represent forms of ‘multiple discrimination’ because the alleged victims are women, indigenous, and poor. Particularly in cases of the rape of indigenous women, the investigators frequently refute the complaints and place the burden of proof on the victim, and the investigation mechanisms are flawed and even threatening and disrespectful*”. Evaluating the difficulties in accessing health care services, the Court recalls that: “*the Inter-American Commission argued that the State restricted the access to justice of Mrs. Rosendo Cantú by denying her medical care and by not acting with due diligence to investigate and punish the rape of which she was a victim*” (para. 168).

⁸³ Refer to: *Model of Reference of Cases of Gender Violence for the state of Guerrero* [Modelo de Referencia de Casos de Violencia de Género para el Estado de Guerrero], Secretariat of Women’s Affairs for the State of Guerrero, December 2008 (file of annexes presented by the State at the public hearing, Tome V, Annex 8).

⁸⁴ The Court argues that: “*Mrs. Rosendo-Cantú, who did not speak Spanish fluently at the time of the incident, was not provided with the assistance of an interpreter, but had to be assisted by her husband, and in the Court’s opinion this was inappropriate to: respect her cultural diversity; ensure the quality of the contents of the statement, and duly protect the confidentiality of the complaint. The Court deems that it is particularly inappropriate that Mrs. Rosendo-Cantú had to turn to her husband to narrate the facts of the rape*” (para. 179).

that needed to overcome additional problems to their access to justice, such as rejection from their communities, depending on the facts of their cases.⁸⁵ This latter clarification is significant, compared to the conclusions of the Commission in *Ana, Beatriz, and Celia González Pérez v Mexico*. While the Commission had considered the rejection of sexually abused women as an aggravating element considering the State's duty to protect indigenous communities cultural diversity arguably incurring in a conceptual error, as we will explain in the Third Section of this research, in this case the Court refers to it as a *problem* and an *additional obstacle* for women. In *Fernandez Ortega* the Commission argues that: "*in cases involving the rape of indigenous women, the pain and humiliation is exacerbated because they are indigenous, since 'they do not know the language of their attackers and of the authorities that intervene [, and] also owing to the repudiation of their community as a result of the facts'*" (*Fernandez-Ortega*, para. 90) Moreover, the Court added, "*sexual abuse constitutes a paradigmatic form of violence against women, the consequences of which even transcend the personhood of the victim*" (*Fernandez-Ortega*, para. 119)

In considering women's particular exposure to violence, the Court refers to extensive documentation gathered from a wide range of sources during the proceedings of both cases, such as the Secretariat for Women's Affairs in the state of Guerrero, arguing that "*indigenous women continue to suffer the consequences of a patriarchal structure that is blind to gender equity, particularly within institutions such as the Armed Forces or police, whose members are trained to defend the nation, and to combat or attack criminals, but who are not sensitized to the human rights of the community and of women*" (*Fernandez-Ortega*, para. 79).

The Court defines the violations in the light of the BdPC as "*an offense against human dignity and a manifestation of the historically unequal power relations between women and men (...) [that] pervades every sector of society, regardless of class, race, or ethnic group, income, culture, level of education, age or religion, and strikes at its very foundation*" (*Fernandez-Ortega*, para. 79), and refers to

⁸⁵ Refer to: *Network Development 2008*, Secretariat for Women's Affairs of the State of Guerrero (file of annexes presented by the State at the public hearing, Tome V, Annex 8).

CEDAW Committee's position to strengthen its arguments on the link between VAW and discrimination against women.

Both cases are evaluated also under Article 11 (Right to Privacy) ACHR. In *Rosendo-Cantú*, the IACrTHR largely refers to ECrtHR's jurisprudence (e.g. *Dudgeon v. the United Kingdom*; *X and Y v. the Netherlands*; *Niemietz v. Germany*; *Peck v. United Kingdom*) to recall the broad concept implied in Article 11, including private life, sexual life, the right to establish and develop relationships with other human beings and the "*right to decide freely with whom to have intimate relations, causing her to lose complete control over this most personal and intimate decisions, and over her basic bodily functions*" (para. 150, referring in particular to *M.C. v. Bulgaria*). In *Mrs Fernández Ortega's* case, members of the Army invaded her residence, which gave the Court the basis to refer to Article 11.2, considering "*an individual's home and private and family life are intrinsically connected, because the residence is the space in which private and family life can evolve freely*" (para. 157).

Notably, when determining the obligations established in Articles 8 and 25 ACHR, the Court defines them as "*complemented and enhanced by the obligations arising for States parties from the specific obligations of the Inter-American treaty, the Convention of Belém do Pará. Article 7(b) of this Convention specifically obliges the States parties to apply due diligence to prevent, punish, and eradicate violence against women*", given "*society's obligation to reject violence against women and the State's obligation to eliminate it and to ensure that victims trust the State institutions there for their protection*" (*Fernandez-Ortega*, para. 193 and *Rosendo-Cantú*, para. 177).

Another peculiar feature of these cases is extensive treatment the guarantees of non-repetition, based on which the Court requires the State to adapt domestic law to the established standards, and suggests policies, measures and programmes to improve access to justice for indigenous women,⁸⁶ guarantee multidisciplinary health services for women victims of rape and programmes of reinsertion in their communities, and develop training programmes for officials and armed forces, including specific human rights instruments related

⁸⁶ And "(...) respect[ing] their cultural identity" (*Rosendo-Cantú*, Point V, Guarantees of non-repetition).

to the protection of women's rights, VAW and non-discrimination. Notably, Mexico provided information and documentation about several programmes responding to those requested by the Court, implemented not long before the judgments and following the previous Commission's Reports on the cases.

Jessica Lenahan (Gonzales) et al. v. United States (2011) - IACommHR

In this decision the IACommHR finds that United States violated Articles I (Right to Life), II (Equality Before the Law), VII (Protection of Mother and Child), IX (Inviolability of the Home) and XVIII (Right to a Fair Trial) of the American Declaration of the Rights and Duties of Men (ADHR),⁸⁷ by having failed to exercise due diligence to protect Jessica Lenahan and her three daughters from repeated acts of domestic violence perpetrated by her ex-husband, which culminated in the murder of the three children, never duly investigated.

Although, concerning United States, this case was initially excluded from our review, we finally decided to include it because it provides evidence that, through a fifteen years long process, Inter-American Institutions internalised the current international consensus on VAW to a point of using it even when the BdPC cannot be applied, interpreting general norms through a gender-perspective. This issue has significant implications for what concerns the usefulness of a specific instrument to guarantee women's rights, and will be thoroughly addressed in the next Section of this research.

After signing the BdPC in 1977, the United States never ratified it, nor they submitted to the ACHR and IACrTHR jurisdiction. Petitioners can, therefore, only access the protection mechanism established by the ADHR (not the ACHR), ensured by the IACommHR, as a body of OAS. Notably, the State contested that the ADHR is a non-binding instrument⁸⁸ and its provisions are

⁸⁷ The petitioners had also claimed breaches to Articles V (Right to Personal Integrity) and VI (Right to form a Family), but the Commission did not consider the information sufficient to establish these violations.

⁸⁸ According to the State, the case law of both the IACrTHR (*Cotton Field*) and the IACommHR (*Maria da Penha*) could not be interpreted as imposing upon the United States an affirmative obligation to prevent private crimes (para. 55). The State argued that: "*it is essential to bear in mind that the judging of governmental action such as in this case has been and will remain a matter of*

aspirational, arguing that non of them imposes an affirmative duty to prevent crimes perpetrated by private actors and that, even though the due diligence principle found expression in several international instruments related to the problem of VAW, its content was still unclear. Additionally, referring to the *Cotton field* precedent, the State clarified that it did not consider IACrTHR's case law as imposing an affirmative obligation to prevent private crimes.

The IACommHR dedicates a long part of its reasoning to clarify ADHR legal effect, the binding nature of the principle of non-discrimination, the negative and positive duties that it enshrines and the evolved standards of interpretation of norms and principles in cases of VAW. It defined the principle of non-discrimination as the backbone of any system of protection of human rights and a fundamental principle of the Inter-American System of human rights, implying not only an obligation for States to guarantee equal legal protection of the law, but also the positive duty to guarantee the effective enjoyment of such right. Evaluating the facts, the Commission referred to gender-based violence as *“one of the most extreme and pervasive forms of discrimination, severely impairing and nullifying the enforcement of women’s rights”* (para. 110), strengthening its arguments through extensive references to resolutions and declarations adopted in the Universal System.⁸⁹ The Commission determined State’s obligations on the basis of Article II ADHR, arguing that they *“extend to the prevention and eradication of violence against women, as a crucial component of the State’s duty to eliminate both direct and indirect forms of discrimination”* (para. 120). Referring to *Maria Da Penha* and ECrTHR’s *Opuz v. Turkey*, the Commission argued that the same obligations hold in case of acts of violence perpetrated by private actors, being domestic violence internationally understood as a human rights violation. Additionally, the Commission clarified that *“State failures in the realm of domestic violence [are] not only discriminatory, but also violations to the right to life of women,”*

domestic law in the fulfilment of a state’s general responsibilities incident to ordered government, rather than a matter of international human rights law to be second-guessed by international bodies” (para. 57).

⁸⁹ Amongst the many cited: 2010 UNGA Resolution, Human Rights Council, *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*; 1994 UN Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104; 1995 Beijing Declaration and Platform for Action, Fourth World Conference on Women; CEDAW Committee, General Recommendation 19: Violence against Women.

(para. 119)⁹⁰ considering the right to life as part of customary international law and “as the supreme right of the human being, respect for which the enjoyment of all other rights depends” (para. 38). In order to fulfil their obligation of due diligence with respect to VAW “States must adopt the required measures to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and other practices based on the idea of the inferiority or superiority of either of the sexes, and on stereotyped roles for men and women” (para. 126).

Significantly, the Commission recognised a generalised pattern tolerance and judicial inefficiency towards cases of domestic violence, which promoted their repetition, and reaffirmed the inextricable link between the problem of violence against women and discrimination in the domestic setting.

Intersectionality is taken into account through Article VII ADHR, as giving rise to a *reinforced duty of due diligence* (para. 164): “international and regional systems have identified certain groups of women as being at particular risk for acts of violence due to having been subjected to discrimination based on more than one factor, among these girl-children, and women pertaining to ethnic, racial, and minority groups; a factor which must be considered by States in the adoption of measures to prevent all forms of violence” (para. 127).⁹¹

While reaffirming that the organs of the Inter-American System are not bound to follow the judgments of international supervisory bodies, IACommHR extensively referred to ECtHR and CEDAW Committee’s case law as “providing constructive insights into the interpretation and application of rights that are common to regional and international human rights systems” (para. 135). This is the case for such bodies case law on domestic violence,⁹² with particular reference to the obligation to protect as an obligation to adopt reasonable

⁹⁰ Referring to ECtHR’s *Opuz v. Turkey*, *Kontrová v. Slovakia* and CEDAW Committee’s *Sahide Goekce v. Austria*.

⁹¹ Referring to: 2010 UNGA Resolution, Human Rights Council, *Accelerating efforts to eliminate all forms of violence against women: ensuring due diligence in prevention*; IACommHR, *Violence and Discrimination against Women in the Armed Conflict in Colombia*, 2006; IACommHR, *Access to Justice for Women Victims of Violence in the Americas*, 2007; CEDAW Committee, General Recommendation 25, on *Temporary Special Measures*, 2004.

⁹² Referring to: CEDAW Committee’s *Sahide Goekce v. Austria*, *Fatma Yildirim v. Austria* and ECtHR’s *Branko Tomasic et al. v. Croatia*, *Kontrová v. Slovakia*, *Opuz v. Turkey*, *E. et al. v. the United Kingdom*, *Z et al. v. the United Kingdom*.

means, to the irrelevance of the intentionality of a State's breach of the right to equal protection of the law, and to the hidden nature of domestic violence, which might imply a reason to bypass the withdrawal of a complaint.⁹³

In its conclusions, the IACommHR found the State responsible of *systemic failures* to protect the petitioner, "*particularly serious since they took place in a context where there has been a historical problem with the enforcement of protection orders; a problem that has disproportionately affected women - especially those pertaining to ethnic and racial minorities and to low-income groups - since they constitute the majority of the restraining order holders*" (para. 161). Notably, in establishing the State's inaction to protect the petitioner and her daughters, the Commission highlighted "*the insensitive nature of some of the CRPD comments to Jessica Lenahan's calls, considering that in her contacts she demonstrated that she was concerned for the well-being of her daughters*" (para. 164), fostering an environment of impunity and promoting the repetition of violence "*since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts*" (para. 168).

Maria Isabel Véliz Franco et al v. Guatemala (pending) - IACrTHR

The 2012 IACommHR's application to the Court reports that the petitioner alleged State's responsibility for its lack of due diligence in the investigations referred to the *femicide* of María Isabel Véliz Franco, 15 years old, disappeared in 2001 in Guatemala City, and whose body was found presenting signs of brutalities. According to the Commission, besides several Articles of the ACHR, Guatemala violated Article 7 BdPC, read in conjunction with Article 24 and 1.1 ACHR. In its Fifth Report on the Situation of Human Rights in Guatemala (para. 59), the IACommHR reported that VAW is a severe problem in Guatemala and among the main causes of death and disability among women between the ages of 15 and 44.

Notably, in assessing the conduct of investigations, the Commission stated that there was evidence of discriminatory stereotypes, operating in the practice

⁹³ Referring to ECtHR's *Opuz v. Turkey* (para. 136) and *E. et al. v. the United Kingdom* (para. 99).

during the investigation of the case. As maintained by the petitioners, the investigative corps had *“endeavoured to discredit the victim and her family”* (para. 126), by insulting and humiliating her and her deceased daughter, devaluating the person, which led to the impunity of those responsible. According to Amnesty International *“from the attitude of the state agents toward these cases, one is left with the impression that a woman’s murder is unimportant and not worth a deep and thorough investigation. This is largely due to prejudices and rigid stereotypes about gender roles that factor into the thinking of state agents when they conduct the investigations. Hence, gender discrimination is itself an obstacle in the investigative process”* (para. 24). Public authorities discredited and blamed the victims for their actions, implying they did not deserve State’s protection. The petitioners underlined that in Guatemala femicide and *“impunity that attends it are not isolated incidents; instead they are an accurate and telling reflection of a pattern of gender violence”* (para. 24). Indeed, in *Access to Justice for Women Victims of Violence in the Americas*, the IACommHR observed that authorities in charge of investigations into incidents of VAW were neither competent nor impartial, which considerably foreshortened any possibility that these cases would ever be prosecuted and the guilty parties punished (para. 91). This climate of impunity is considered *conductive to VAW*, as *“society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts”* (para. 56).

Building on both BdPC and CEDAW framework of interpretation and on relevant jurisprudence, the Commission reasserted the link between discrimination, subjugation and VAW, and observed that traditionally unequal power relations lock women (and men) into stereotyped roles, perpetuating violence and abuse. Thus, VAW is a form of discrimination that seriously impairs women’s ability to exercise and enjoy their rights and freedoms. The IACommHR reaffirmed that due diligence obligations have special connotations in the case of VAW, including the duty to investigate and punish acts perpetrated by private persons. On the basis of the reasoning of the United Nations Commission on Human Rights, the IACommHR maintained that *“all forms of violence against women occur within the context of de jure and de facto discrimination against women and the lower status accorded to women in society and are exacerbated by the obstacles women often face in seeking remedies from the State”* (para. 57).

In 2004, the IACommHR Rapporteur on the Rights of Women made a working visit to Guatemala and observed that several sources indicated that the degree of violence and cruelty inflicted on the bodies of many female victims had intensified, a situation of which the State was well aware. The Report cited documentation that provides evidence that women were murdered *“to set an example,”* and that *“abuse reflected by the state of the victim’s body and the areas in which the corpses were left, is designed to send a message of terror and intimidation.”*⁹⁴

In the 2003 Report on Human Rights in Guatemala, the IACommHR evaluated the measures undertaken by the government to address VAW: *“a Law to Prevent, Punish and Eradicate Intrafamily Violence (Decree 97-96) was enacted in 1996; in 2000 and 2001, the legal framework was further expanded with the addition of the regulations for enforcement of the law and the creation of the Organ to Coordinate Prevention, Punishment and Eradication of Domestic Violence and Violence against Women (CONAPREVI), which is charged with coordinating the institutions active in this area. The Presidential Secretariat of Women (SEPREM) was created by Government Agreement 200-2000. A National Policy for Guatemalan Women’s Advancement and Development was also established, as was their Equal Opportunity Plan (2001-2006). In 2005, the Commission to Address the Problem of Femicide was created. It is made up of representatives from the Attorney General’s Office, the Public Prosecutor’s Office, and the Office of the Human Rights Ombudsperson. On March 8, 2006, the ‘Specific Commission to Address Femicide in Guatemala’ was officially introduced. On October 6, 2006, the Supreme Court created the Women’s and Gender Analysis Unit. On November 23, 2007, the Congress of the Republic adopted Resolution 15-2007, in which it condemned femicide in Guatemala. Then, in 2008, the Law against Femicide and Other Forms of Violence against Women was approved”.* However, the Commission was not satisfied with the information provided (as in the 2010 IACrHR’s judgments against Mexico) given the lack of coordination and funding reported by institutions working in the field of VAW. Moreover, such measures had not been adopted at the time of the events of the case. The IACommHR Rapporteur argued that, while the State had taken measures to address violence against women, they were still not sufficient to

⁹⁴ IAommCHR, Press Release No. 20/04.

deal with the problem.⁹⁵ In fact, in order to prove its abidance to Article 7 BdPC, evidence of the measures taken to eliminate *society's general tolerance* of VAW are not sufficient, whereas it is demanded to prove it also for what concerns the facts of the concrete case.

In its 2004 Report, the Commission noted that “*the state must urgently intensify its efforts to combat the violence and discrimination against women by measures including applying due diligence to investigating and solving crimes of violence against women, by bringing those responsible to justice and punishing them, as well as by providing access to protection measures and support systems for victims*” underlining that it “*is essential that the state should not only concern itself about this problem of violence against women, but also should concern itself with providing effective solutions.*” (para. 32). In establishing its view on State’s responsibility, the Commission stressed that authorities did not investigate the victim’s death as a case of *gender violence* and, while having ratified the BdPC, it did not adopt measures, protocols or directives on how to properly investigate violence of that kind.

Friendly settlements

As mentioned, the Commission has the duty to evaluate if a friendly settlement can be reached before initiating the proceedings established by the protection mechanism. Several petitions invoking the BdPC, indeed, resulted in a friendly settlement. In the following paragraphs we present only those relevant for the scope of our analysis.

María Mamérita Mestanza Chavez v. Peru (2003)

The NGO *Estudio para la Defensa de la Mujer* (DEMUS), the Latin American and Caribbean Committee for the Defense of Women’s Rights (CLADEM), and the *Asociación Pro Derechos Humanos* (APRODEH), with the co-petitioners *Centro Legal para Derechos Reproductivos y Políticas Públicas* (CRLP) and Center for Justice and International Law (CEJIL) alleged that the victim had been

⁹⁵ Id. *supra* note 94.

forcefully subjected to surgical sterilization, which ultimately caused her death. The petition invoked several provisions of the ACHR, the BdPC, the ACHR Protocol on Economic, Social and Cultural Rights (Protocol of San Salvador) and CEDAW. However, the Commission admitted the case on more limited grounds, evaluating the facts under Articles 1, 4, 5, and 24 ACHR and Article 7 BdPC.

Based on evidence provided by the Office of the Human Rights Ombudsman (*Defensoría del Pueblo*) and CLADEM, the petitioners argued that the case of the victim represented one example of a significant number of cases of women affected by the implementation of a systematic government policy to modify the reproductive behaviour of the population, especially of poor, indigenous, and rural women. According to the allegations, María Mamérita Mestanza, an indigenous women, mother of seven children, had been repeatedly threatened by the health centre for the District of *La Encañada*, part of the public health system, and had ultimately consented, under coercion, to undergo surgery for a tubal ligation. After the surgical procedure, the victim experienced serious anomalies, underestimated by the personnel of the health centre, which resulted in her death for sepsis. Following these events, the victim's permanent partner was offered a sum of money for settling the problem. The man denounced the Chief of the health centre, but his claims were discarded as not providing grounds to open an investigation.

A friendly settlement with the Peruvian government was signed in 2003, where the State acknowledged its international responsibility and agreed to compensation to the victim's partner and children, as well as to abide to the recommendations of the Human Rights Ombudsman concerning sterilization procedures.

MZ v. Bolivia (2008)

In 2001 the *Oficina Jurídica para la Mujer*, the Latin American, the Caribbean Committee for the Defence of Women's Rights (CLADEM), and the Center for Justice and International Law (CEJIL), presented a petition alleging the rape of MZ and the lack of impartiality of the national judicial system, invoking several ACHR provisions and Article 7 BdPC.

The facts occurred in 1994 and the victim claimed that, after appealing the first judgment, which had imposed a scant punishment to the perpetrator, the appeal court acquitted him on the basis of an arbitrary and discriminatory decision. The documentation and evidence provided by the petitioners and other testimonies presented a thorough analysis of the *rape myths* on which the appeal judges had based their decision (e.g. considering that rape cannot be established if the alleged victim failed to resist, that women generally resist sexual relations they are actually willing to have, etc....). On the basis of the evidence provided, the friendly settlement focused on the lack of due diligence on the part of the justice system originating in discriminatory gender prejudice. Bolivia recognised its responsibility for the breaches, including BdPC provisions, and committed to implement measures to prevent reiteration and to provide training to judiciary officials.

X and Relatives v. Colombia (2008)

The facts refer to the sexual assault suffered by Ms. X from three members of the Colombian Military Forces. One of the perpetrators was convicted and sentenced, however, the petitioners alleged that the State had neither investigated nor prosecuted the other two individuals who took part in the assault.

Although the facts occurred in 2001, and Colombia was then part of CEDAW and BdPC, the petition only refers to provisions of the ACHR and the ADHR. In its short Report, the Commission does not provide any evidence of taking into account the specificities of the case, such as the fact that the perpetrators were members of the military forces, nor to the general context in which the violation occurred. However, the friendly agreement contains a reference to the BdPC for what concerns the elimination of discriminatory practices in the national judicial system, perpetuating the contexts in which VAW originates. However, as opposed to the previous friendly settlements, the Commission did not suggest specific measures to adopt to guarantee non-reiteration.

Marcela Andrea Valdés Díaz v. Chile (2009)

The facts relate to physical and psychological abuse of the victim by her husband, both members of Carabineros de Chile. She had obtained an order of permanent protection in 1999, however, the police opened a proceeding to investigate her marital relationship, which resulted to her detention for ten days on the grounds of *“unbecoming private conduct”* for having maintained a deep friendship with a Lieutenant and on the basis that, *“although the inquiry was unable to establish whether the friendship had developed into a romance, there were grounds to conclude that the relationship had provoked gossip to that effect and led to the breakup of the marriage’ with Captain Claudio Aurelio Vásquez Cardinalli, and that the situation had grown to include officers and certain civilians, thus disrupting the professional work of the Unit and sullyng the institution’s good name”* (para. 39). Her husband was also sentenced to four days of arrest for domestic violence and ten days of detention were ordered for the Lieutenant, for having *“displayed a series of improper behaviours (...) prejudicial to the institution’s reputation and to the work of the professionals in the First Valdivia Precinct; by his attitude, he was responsible for the irreversible breakup of the marriage.”* (para. 16). Mrs Marcela Andrea Valdés Díaz appealed the decision, but only obtained an increase in her sanction.

A later review carried by the Junior Officers Classifications Board led to her unconditional discharge from her post, based on her inappropriate *“personal and moral character and professional credentials”* (para. 22). She then filed an appeal alleging the violation of equality before the law, due process, the right to humane treatment and privacy, invoking protection against arbitrary and abusive interference with private life, home or personal correspondence. The appeal was denied on the grounds that there were no procedural errors in the rating procedure, and that the conduct of the police authorities was based on *“substantive assessments that, on the one hand, are the exclusive purview of that authority and, on the other hand, do not appear to be unreasonable or beyond the realm in which the institution in question operates or moves.”* (para. 24) The Chilean Supreme Court upheld this decision in a ruling on April 5, 2000.

In this case, the IACommHR admitted the petition based on several provisions of the ACHR (including Article 24), in connection with Articles 1.1 and 2 ACHR and 7 BdPC. Notably, amongst several measures prescribed to enhance

protection for domestic violence victims and tackle VAW as a socio-cultural phenomenon, the Commission addressed the problem of gender-inequities in institutional rules and regulations. Once again, given the brevity of the Report, no attention is given to the specificities of the general context in Chile.

National legislations on VAW

The first generation of legislations on VAW (1994-2005)

In the first decade after the adoption of the BdPC, all Latin American countries adopted new specific legislations on VAW, in abidance to its Article 7. This first wave of legislations was focused on reforming Penal codes for what concerns sexual violence and harassment and on adopting specific laws on domestic violence, previously unaddressed. However, apart for what concerns sexual violence, already penalized in most Latin American national legal systems, the focus on domestic violence left uncovered VAW occurring in other contexts. Although some Latin American countries adopted specific laws to promote women's equality, the link between discrimination and VAW is generally never explicit. Consequently, legislations on VAW present an overall scarce attention to the causes of VAW and an overall deficiency with respect to measures of prevention and eradication of this phenomenon.

At the time of BdPC adoption, a few countries presented constitutional norms protecting the family and occasionally mentioned them in their successive legislation:

- Brazil with Article 226 of its 1988 Constitution, stating that “(...) 5. *The rights and duties implied in the marital status are exercised by men and women in equal conditions; (...) 8. The State guarantees assistance to the family and each one of its members, creating mechanisms to restrain violence in the context of family relations*”;
- Article 42 of the 1991 Colombian Constitution, establishes that: “(...) *Relations in the family are based on equal rights and duties of the couple*

and mutual respect of all the family members. Any form of violence in the family is considered destructive of its harmony and unity, and is sanctioned by law. (...)”;

- Article 32 of El Salvador’s 1983 Constitution states: *“The Family is the basic foundation of society and the State will protect it providing the necessary legislation and appropriate services for its integration, well-being and social, cultural and economic development. The legal foundation of a family is the marriage and it is based on the juridical equality of the spouses”*;
- Article 60 of Paraguay’s 1992 Constitution commits the State to “ (...) *promote policies to prevent violence in the family and other factors disrupting its solidarity*”;
- Article 42 of Guatemala’s 1993 Constitution, establishes the duty of the State to protect the family and the equal rights of spouses.

We now proceed identifying the relevant legislations reviewed for each Inter-American Member State.

Argentina: Decree Law 2385 prohibiting sexual harassment in the public sector (1993); Law No. 24.417, Protection against Family Violence (1994) and Law 25.087 amending the Penal code in relation to sexual violence (1999).

Bolivia: Law 1674, Law against Domestic and Family Violence (1995); reforms of the Penal code for what concern crimes of sexual violence (1997) and Law 2033 Protection to Victims from Crimes against Sexual Liberty (1999).

Brazil: the BdPC becomes national legislation through Decree 107 (1995); Law 10.224 amending the Penal code to add sexual harassment (2001); amendments to the Penal code repealing inappropriate language from the norms referred to sexual violence, e.g. the expression “decent woman,” (2005).

Chile: Law 19325 Norms on procedures and sanctions related to acts of violence in the family (1994); Law 19.617, amending the Penal code on the subject of sex offenses (1999); Law No. 20.066, Law of Intra-family Violence

(2005) and Law 20.005, including and sanctioning sexual harassment in the Penal code (2005).

Colombia: Law 248 reproduces the text of the BdPC (1995); Law 294 Prevent, Remedy and Punish Intra-family Violence (1996); Law 360 on Crimes Against Sexual Freedom and Human Dignity (1997); Law 575, partially amending Law 294 (2000).

Costa Rica: Law 7142 on Promotion of Women's Social Equality, Chapter 4, (1990); Law 7586 against Domestic Violence (1996).

Dominican Republic: Law 24 Against Violence in the Family, criminalizing domestic violence, sexual harassment and incest (1997).

Ecuador: Law Prohibiting Violence Against Women and Family (1995); Law 105, which amends the Penal code on the subject of sex offenses (1998) and amendments of the Penal code repealing language considered inappropriate for what concerns VAW.⁹⁶

El Salvador: Decree Law 902 against Intra-family Violence (1996) and reforms the Penal code on the subject of sex offences (1998).

Guatemala: Decree Law 97 to Prevent, Punish and Eradicate Intra-family Violence (1996); Decree Law 7 on the dignity and integral promotion of the woman (1999); Decree 57 (2002) introduces discrimination, in general, as a criminal offence.

Honduras: Decree Law 132 Prevention, Punishment and Eradication of Violence Against Women (1997) and amendments to the Penal code to introduce sexual harassment.

⁹⁶ The Ecuadorian Penal code was amended on June 1, 2005, to remove the expression "decent women" and replace it with the word "victim"; in the case of sexual crimes, the language "attack on decency" was replaced with the expression "sexual abuse"; no exceptional circumstances can now be considered to reduce judgments in sexual crimes; discrimination on certain grounds may constitute an aggravating factor in the commission of sexual offenses, such as: place of birth, age, sex, ethnicity, colour, social origin, language, religion, political affiliation, economic status, sexual orientation, sexual health, disability and other differences.

*Mexico:*⁹⁷ Law on Prevention of Family Violence and Related Assistance (1996), reforms of the Civil and Penal codes with respect to intra-family violence and rape (1997).

Nicaragua: Law 230 Integrations to Prevent and Sanction Violence in the Family (1996), reforming the Penal code.

Panama: Law No. 27 Typifying Crimes of Violence in the Family and Child Abuse, establishing special institutions to attend victims of such crimes, reforming and integrating articles of the Penal code and adopting other measures (1995), reformed by Law 3 (1999) and Law 38 on Domestic Violence (2001).

Paraguay: Law 1.160 amending the Penal code to criminalize sexual harassment (1997) and Law 1600 Against Domestic Violence (2000).

Peru: Law 26260 Protection from Violence in the Family (1993), reformed by Law 26.763 (1997); Law 27.115 introduces public criminal prosecution of offenses against sexual freedom (1999); Law 27.942 on Sexual Harassment Prevention (2003).

Uruguay: Law 16707 on Citizen's Safety, introducing a reference to domestic violence and amending the Penal code (1995), replaced by Law 17541 Prevention, Early Detection, Attention and Eradication of Domestic Violence (2002).

Venezuela: Law on Violence Against Women and the Family (2000).

The reviewed laws focus on domestic/intra-family violence, although the definition of family tends to be broad, including former spouses, partners and former partners, relatives and persons living in the same household. Nicaraguan Law 230 (1996), a reform of the Penal code, adopts the most restrictive definition of family, limiting it to marital relations and partnerships (current or former) and parents of a common child.

⁹⁷ Mexico had introduced more severe penalties for the crime of rape in 1989, with a reform of the Penal code.

The majority of the legislations establish precautionary measures to avoid reiteration and, in some cases, provide for alternative punishments in cases of minor violence. However, only few include specific sanctions or reforms of the Penal codes, as required by Article 7.d. Such cases are: Nicaragua's Law 230; Panama's Law 27 and successive Law 38; Dominican Republic's Law 24; Uruguay's 1995 Law 16.707 and Law 17541, replacing the previous one; Colombia's Law 294; El Salvador's Decree Law 902 and Chile's Law 19325 and successive Law No. 20.066.

The language to define acts of domestic violence, their features, victims and perpetrators tends to be gender neutral. However, in some cases women are directly mentioned as the main victims of domestic violence such as in Ecuador's Law 103 and in that adopted by Venezuela. Honduras' Decree Law 132 (reformed and reinforced by the later Law 250), at Article 5.2 explicitly refers to the reproduction of unequal power relations as *"(...) any behaviour directed to affect, compromise or limit the free development of the personality of a woman for reasons related to her gender"*. Panama's Law 4, which addresses the shortcomings of previous Law 27, dedicates Chapter VI to the social policy to be promoted by the State on the subject of gender violence and, similarly, Dominican Republic's Law 24 introduces the term *gender* in its wording.

Several legislations directly refer to the BdPC as an international instrument providing further measures to protect and guarantee women's rights: Article 3.e of Chile's Law 20.066; the Considerandum of El Salvador's Law 902;⁹⁸ the Considerandum of Guatemala's Decree Law 97; Article 1 of Honduras' Decree Law 132;⁹⁹ Article 1 of Panama's Law 4; Article 3 of Peru's Law 26.763; the Considerandum of Dominican Republic's Law 24 and Article 2 of Venezuela's Law on VAW. Two countries reproduce the whole conventional text into their national legislations: Brazil with Decree Law 1973 and Colombia, through Law 248.

⁹⁸ However, it is worth mentioning that Decree Law 902 explicitly cites the previously mentioned Article 32 of the 1983 Constitution as its foundation.

⁹⁹ Although the country did not count on a specific constitutional provision referred to the protection of the family, Decree Law 132 explicitly refers to Article 59 of the 1982 Constitution, establishing the obligation of the State to protect the individual's inviolable dignity.

Some of the texts extensively reproduce Article 9 BdPC when defining the duties of the State to *“modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women”*. These are the cases of: Article 3 of Bolivia’s Law 1674; Article 21 of Costa Rica’s Law 7586; Article 13 of Guatemala’s Decree Law 97; the Considerandum of Honduras’ Decree Law 132; Article 17 of Mexico’s Law Prevention of Family Violence and Related Assistance; Article 4 and Article 12 of Panama’s Law 4 and Chapter II of Venezuela’s Law on Violence against Women and the Family.

The legislative texts reviewed generally refer to several forms of violence, encompassing physical and psychological dimensions. Some of them provide noteworthy wording, such as: Article 3 of Mexico’s Law referring to *“physical, verbal, psycho-emotional or sexual violence in its bio-psycho-sexual sphere”*; Article 2.e of Costa Rica’s Law 7586, introducing patrimonial violence; Article 16 of Venezuela’s Law, that includes threat of violence and Article 1 of Ecuador’s Law 103, mentioning the protection of women’s *sexual freedom*.

Second generation of legislations on VAW (2006-present)

In the following paragraphs we describe the additional changes introduced since 2006, the year of IACrTHR’s first ruling using the BdPC (submitted to the Court in 2004), which follows several relevant decisions of the IACommHR.

In three countries constitutional reforms included specific provisions on the issue of VAW:

Article 15.2 of the 2009 Constitution of Bolivia *“Everyone, particularly for what concerns women, have the right not to suffer from physical, sexual or psychological violence, in the family as in the society”*;

Article 42.2 of the 2010 Constitution of Dominican Republic *“Any form of violence in the family or based on gender is condemned. The State will guarantee*

by law the adoption of the necessary measures to prevent, sanction and eradicate violence against women”;

Article 66.3.b of the 2008 Constitution of Ecuador *“It is recognised and guaranteed to all: (...) 3. The right to personal integrity, which includes: (...) b. A life free from violence in the private and public sphere. The State will adopt the necessary measures to prevent, eliminate and sanction all forms of violence, especially those against women, children (...)”*. On the other hand, Ecuador did not enact a law replacing or reforming the one promulgated in 1995. However, in 2005 Ecuador showed further commitment to internalise BdPC paradigm shift amending the Penal code and removing language considered inappropriate in the new understanding on VAW.

Following the same structure of the previous subsection, we now identify the relevant material reviewed:

Argentina: Law 26.485 Integral Protection of Women (2009), regulated by Decree 1011 (2010).

Bolivia: Law 243 Against Harassment and Violence Against Women in Politics (2012); Law 348 Guaranteeing to Women a Life Free From Violence (2013).

Brazil: Law 11.340 Mechanisms to Eradicate Domestic Violence and Violence Against Women in the Family – Maria da Penha (2006).

Chile: Law 20.480, introducing the crime of femicide (2010).

Colombia: Law 47.193 dictating norms for raising awareness, prevent and sanction all forms of violence and discrimination against women, reforming the Penal code, the Penal Procedure Code and Law 294/1996 (2008).

Costa Rica: Law 8589 Penalizing Violence Against Women (2007).

El Salvador: Decree 520 Special Law for a Life Free from Violence for Women (2012).

Guatemala: Decree 22 Law Against Femicide and other Forms of Violence Against Women (2008).

Mexico: Law for Equality between Men and Women (2006) and Law for a Life Free from Violence for Women (2007).

Nicaragua: Law 779 Against Violence Against Women and reforming the Penal code (2012).

Panama: Draft Law 401 reforming the penal code to typify femicide and sanction violence against women and dictating measures of prevention of this conducts (iter started in 2011).

Paraguay: Draft Law to Prevent, Sanction and Eradicate Violence Against Women (submitted to the National Congress).

Venezuela: Law On the Right of Women to a Life Free from Violence (2007).

The majority of the new legislative texts contain specific references to the BdPC or, in general, to specific international instruments ratified. These are the cases of: Article 3 of Argentina's Law 26.485; Article 1 of Bolivia's Law 348; Article 1 of Brazil's Law 11.340; Article 4 of Colombia's 2008 Law 47.193; Article 1 and 3 of Costa Rica's Law 8589; Article 2 of El Salvador's Decree 520; the Considerandum and Article 1 of Guatemala's Decree 22; Article 4 of Mexico's 2006 Law and Article 2 of the 2007 Law; Considerandum II and Article 4 and 5 of Nicaragua's Law 779; Article 2 of Panama's Draft Law 401 and Article 3.6 of Venezuela's 2007 Law.

Overall, VAW is addressed in the public and private dimension, independently from a family or affective (current or former) relationship. However, a few countries maintain the ambit of application limited to the family sphere, although broadly defined. It is the case of Chile's Law 20.480, which introduces the crime of *femicide* referring to spouses, relatives and co-habitants and of Peru's Law 29.819, introducing the same crime in relation to spouses, relatives, co-habitants or other people with whom the victim maintained a sentimental relationship. Notably, Costa Rica's Law 8589 presents the most limited ambit of application, considering only the cases of spouses and partners. Brazil

maintains the scope of Law 11.340 limited to domestic violence and violence within the family, although both the family nucleus and the forms of violence are broadly defined. In Brazil's case, however, we should underline that the State did not have a law similar to the first generation of laws on domestic violence, described in the previous sub-section, and that Law 11.340 was promulgated to follow-up to the Commission's decision in *Maria da Penha v. Brazil* (2001).

With the exception of those laws limited to reforming Penal codes, the reviewed texts explicitly mention discrimination against women as a structural element causing and reproducing VAW, and its elimination is set as a priority. A few countries further internalise this understanding, mentioning cultural and social patterns and the reproduction of stereotypes as the origins and roots of discrimination and gender-based violence. This is the case of Argentina (Article 2.e); Bolivia (Article 4.12, introducing the term *de-patriarchalization*); El Salvador (Article 2); Guatemala (Considerandum); Mexico (Articles 38.2, 45.7 and 52.7); Nicaragua (Article 1 and 4.1, 8-10); Panama (Articles 3, 4.7, 8.4, 31, 32, 38 and 39) and Venezuela (Articles 1, 20.6 and 20.8).

With the exception of those limited to Penal code reforms, all new laws establish the need for inter-institutional and interdisciplinary programmes and policies for prevention, as well as provisional measures to prevent acts of violence. Evidence of the adoption of a structural perspective is provided by the emphasis put on co-responsibility, i.e. the responsibility of society, family and the State towards eradicating all forms of violence against women, and the centrality of societal proactive participation to the established programmes and policies. In particular, co-responsibility is included in the principles of the legislations of Colombia (Article 6.1), Panama (Article 5) and Venezuela (Article 18). Three countries explicitly refer to the participation of society, namely: Venezuela (Article 6), Nicaragua (Article 6) and Bolivia (Article 15). The latter also includes the requirement of social control on actions performed in violation of the law. Argentina introduces a similar concept referring to cooperation between institutions and civil society (Article 7).

For what concerns the definition of violence, besides reflecting the inclusion of physical, psychological and domestic violence, five legislative texts consider

more complex forms, significantly expanding the ambit of application suggested in the BdPC, referring to:

- *Symbolic violence*, intended as the transmission of messages, values, icons or signs reproducing relations of dominance, inequality and discrimination and presenting women subordination in society as natural, mentioned by: Argentina (Article 5); Bolivia (Article 7); El Salvador (Article 9); Panama (Article 4) and Venezuela (Article 15).
- *Violence in the field of health care or reproductive rights*, i.e. acts or omission limiting or preventing women from being informed, oriented and attended before, during and after the pregnancy and to have free access to contraception, addressed in the same articles of the Laws of Bolivia, Argentina, Panama and Venezuela.
- *Violence in the media*, intended as the transmission of undignified, discriminatory, stereotypical messages, included by the same four countries. Although Article 8.g BdPC suggests the use of media for campaigning and promoting women's rights, the intention of the national legislators is far broader.
- *Institutional violence and violence in the workplace*, covering the issue of equal opportunities, besides harassment, again considered by the same four countries.
- *Political violence*, i.e. violence against political involvement and activism, equal opportunities and access to political rights in general, introduced in the Laws of Panama and Bolivia. Notably, at Article 7.13 of Law 348, Bolivia establishes an explicit link with its Law 243 Against Harassment and Violence Against Women in Politics.

Costa Rica provides an interesting case to introduce a crucial problem inherent to several new provisions: the indeterminacy of some of the concepts and terminology introduced and the difficulties in constructing clear definitions. Costa Rica's Constitutional Court declared unconstitutional three articles of Law 8589, namely: Article 22 (Maltreatment), Article 25 (Emotional Violence) and Article 27 (Threat Against a Woman). The mentioned articles were

questioned on the basis of the lack of a rigid definition of the acts penalized, and the subsequent excess of discretionality left to the judiciary, possibly breaching the principle of legal certainty. Articles 22 and 25 have been re-introduced in 2011, after being reformed to meet the standards outlined by the Constitutional Court. The peculiarities of some countries' definition of the forms of violence and Costa Rica's case, suggest possible future difficulties in applying the new laws. Addressing these questions will require an analysis of the use of the new laws by national judicial systems, a task that we will develop in future stages of our research.

Generally, new legislations abandon the neutrality of the terms identifying the victim, although this does not imply necessarily a limitation of the subjects to women. El Salvador is an exception, restricting the scope of the law to women in Article 5. On the contrary, Bolivia explicitly considers other victims at Article 5.4 of Law 348: *"The provision of this law are applicable to any person that, being in a vulnerable situation, suffers any of the forms of violence sanctioned in this law, independently on gender"*.

On the other hand, neutrality is maintained for what concerns the perpetrator, although this raises doubts for what concerns the specific provision typifying the crime of *femicide*, included in the legislations of: Bolivia (Article 252 bis P.C.), Chile (Article 390 P.C.); Colombia (Article 134.e P.C.); Costa Rica (Article 21 of the Law); El Salvador (Articles 45, 46 and 48 of the Law, the latter refers to *suicidal femicide* for induction or help); Nicaragua (Article 9 of the Law); Guatemala (Article 6 of the Law); Honduras (Article 118A P.C.); Mexico (Article 325 P.C.); Nicaragua (Article 9 of the Law and Article 162 P.C.); Panama (Article 41 of the Draft Law) and Peru (Article 107 P.C.). Notably, Article 7 of Bolivia's Law 348 refers to *feminicide*, a term which refers to a broader concept elaborated by feminist Mexican scholar Lagarde, that includes all severe discriminatory violence perpetrated against women for being women, not necessarily resulting in their death. However the language of the provision seems to use it as a synonym for *femicide*. The origins and implications of the use of this concept in the Latin American region will be thoroughly addressed in the following Section of this research.

It is not within the scope of this research to address all the issues that the introduction of the crime of *femicide* might imply, i.e. the question on the

neutrality of law, the inherent difficulties of discerning a *femicide* from a homicide of a woman in difficult cases, and the problems in “translating” an essentially anthropological, sociological and political concept into a juridical category (Spinelli, 2008, p. 122-132). For what concerns the scope our analysis, as we will see, it is sufficient to register the adoption of the term by several national legislators, following the example set by of the IACrHR,¹⁰⁰ that endorsed the conceptual construction emerged in the regional debate (*Cotton field* case).

The current context of regional legislations on VAW shows an overall convergence towards a broad internalisation of the paradigm shift reproduced by the BdPC and progressively endorsed by Inter-American Institutions. As mentioned, indeed, this second generation of laws follows the first IACrHR’s ruling using the BdPC, a “coincidence” that will be analysed in the next Section of this research.

¹⁰⁰ The same request was presented by CEDAW in its 2006 Concluding Comments on Mexico.

Section III - Internalising BdPC understanding on VAW in the Inter-American System

Introduction

Based on the literature review on the origins of the paradigm shift reflected by the BdPC, in the First Section of this research we identified the minimum conditions that a human rights system adopting a Women's Convention should present, in order to guarantee the plausibility of their socio-legal transformative approach. We argued that the availability of such conditions allows drawing some preliminary conclusions for what concerns the expectations to place on the impact of such instruments. We then focused on the additional potentially favourable conditions that regional systems provide, with particular reference to their multi-level structure and complementarity with national legal systems, feasible for the specificities of the new paradigm's socio-legal approach. Building on these considerations, we drew some conclusions on the structural causes of CEDAW limited impact in guaranteeing national implementation of its provisions, and addressed the issue of the relative underutilization of the new protection mechanism provided by its Optional Protocol.

In the Second Section we presented a chronological review of Inter-American case law on VAW and of the content of national legislations on VAW since the adoption of the BdPC, in 1994. We now proceed to develop our analysis of the dynamic process through which the Inter-American System consolidated its experience with the BdPC, in order to assess to what extent the minimum conditions identified influenced it and single out other specific elements that had a positive or negative impact on the process. Our scope is to analyse the process of internalisation of the BdPC in the Inter-American System and its national implementation, in order to shape regionalised proposal for its enhancement. We will then determine whether our analysis allows us to

identify the features of a successful (exportable) method to respond to the challenges of the paradigm shift endorsed by the Women's Conventions.

In the present Section, therefore, we present our analysis of the Inter-American experience with the BdPC, using the conceptual tools presented in the First Section and on the basis of the approach and methodology adopted. We begin focusing on the type of enforcement mechanism provided by the BdPC, and analyse the issues concerning the contentious jurisdiction of the IACrTHR, which had to be officially clarified by the Court in 2006. We then continue with an analysis of the reviewed case law, focusing on the process through which Inter-American Institutions gradually internalised a gender perspective in their interpretation of VAW, the complexities emerging from intersectionality and the overcoming of the traditional public/private divide in international law, which previously prevented States' from acknowledging their positive obligations in eradicating VAW. In the third sub-section we analyse the evolution of national legislations on VAW, considering both the hierarchical status of international instruments of human rights in domestic legal systems and the contemporary evolution the analysed Inter-American jurisprudence on VAW. We identify a first and second generation of legislations, with distinctive features, and recognise a clear turning point in IACrTHR's 2006 ruling on a petition invoking the BdPC (*Castro-Castro*).

Although a direct causal link can be difficult to establish conclusively, for what concerns VAW we are able to provide significant evidence of a direct influence of the Inter-American System's structure and procedures on national implementation of BdPC provisions. Given the suitable conditions provided by the rules of procedure of Inter-American Institutions, a "multi-level coalition" of civil society actors and organisation contributed to facilitate the adoption of a gender perspective that such institutions had not yet internalised in their long experience in the region. This coalition directly influenced the process of internalisation of the new paradigm, contributing their understanding of gender-related violations and even providing the IACrTHR with a favourable occasion to clarify its, ambiguously defined, contentious jurisdiction on the BdPC. This interaction triggered a mutual alimentation process that, providing regional actors with authoritative precedents, created favourable conditions to enhance the likelihood of a regional convergence of national legislations on VAW. We argue that the IACrTHR represented a crucial engine to fill the

inherent incompleteness of a convention with the specificities of the BdPC, determining its full meaning on the basis of contextual and subjective concrete conditions and shaping regionally constructed principles and standards on women's rights, while guaranteeing their harmonisation with the current international consensus on the issue of VAW.

This analysis will then be used to set the basis for our next research objective, that we shall only briefly address in the present study: use our findings on the Inter-American experience for an *a priori* evaluation of the choices made with regards to the Istanbul Convention in the Council of Europe, in order to elaborate concrete proposals to improve its perspectives of effectiveness.

Contentious jurisdiction of the IACrthR on the BdPC

The ambiguity of Article 12 BdPC

Given IACrthR's function in interpreting Inter-American instruments and shaping of standards of protection, it is crucial to address the issue of its competence on instruments other than the ACHR. For several years after the adoption of the BdPC, the question was whether or not the IACrthR had been granted contentious jurisdiction on the convention, implying the power to consider cases regarding its infringement and, hence, to use it in the condemnatory part of the judgment.¹⁰¹

The problem requires a careful evaluation, since it affects the legitimacy of IACrthR's rulings, as well as the legitimacy of the institution itself. Differently from the issue of the Court's jurisgenerativity, implied when its role of interpreter is uncontroversial and inherent feature of the application of international conventions as living instruments (IACrthR, Advisory Opinion 16/99), this question refers to the interpretation of procedural provisions and to the fact that a supranational jurisdictional body cannot generate its own competences, that need to be based on judicial norms.

Before addressing the specific problem raised by the BdPC, we shall recall an early precedent of the Court that, although not concerned with its contentious jurisdiction, presents some important elements to understand the Court's perception of its public function, concerning the limits of its advisory function.

In 1982 Advisory Opinion on its advisory jurisdiction on "*Other Treaties*", the IACrthR made clear that "*to exclude, a priori, from its advisory jurisdiction international human rights treaties that are binding on American States would weaken the full guarantee of the rights proclaimed in those treaties and, in turn, conflict with the rules enunciated in Article 29 (b) of the Convention*" (IACrthR,

¹⁰¹ A recognition of the crucial function of the Court in shaping regional standards of protection of women's rights is included in the Concurring Opinion of ad hoc Judge Cadena Rámila, attached to *Las dos Erres Massacre* judgment: "*I am convinced that the Jurisprudence of the Inter-American Court of Human Rights should continue to set precedents in this direction. The importance of recognising the specific violations of women's human rights within the framework of the Inter-American system lies in the development of specific standards to protect women*" (para. 5).

Advisory Opinion 1/82, p. 42). The construction of its arguments suggests that the Court considers itself competent to use all human rights instruments signed by OAS Member States, even if not directly part of the Inter-American System of Human Rights protection.¹⁰²

Besides the ACHR, hence, the Court considers *interpretive sources* of the Inter-American System virtually any other international treaty imposing obligations related to human rights to OAS Member States. According to the Court, this is the meaning of Art. 29.d ACHR, which prohibits excluding or limiting the extent of any such obligation. The literature recognises a reference to multiple international sources in the Convention. In this sense, Bidart Campos maintains that the sources of the Inter-American System are the ACHR and “*any other convention, pact or treaty ratified by any State Party in the Inter-American system*” (Bidart Campos, 2000, p. 67-68), implying the competence of the IACrTHR to interpret the instrument creating that obligation, even if such instrument were not strictly referred to American States.

However, the issue is more controversial for what concerns the Court’s *contentious jurisdiction* on treaties other than the ACHR (Lixinski, 2010; Malarino, 2010; García Ramírez, 2005). As we will see, the question has been raised with particular concern in relation to judgments adopted under the presidency of Judges García Ramírez (2004-2007) and, previously, Cançado Trindade (1999-2004). To address the problem in relation to the BdPC, we shall first briefly recall the relevant norms that establish the protection mechanism provided by the Inter-American System. The IACommHR and the IACrTHR guarantee States’ abidance to the ACHR (Article 33 ACHR). The IACommHR is an OAS consultative organ and the first instance of the protection mechanism established. The initial phases of the procedure for the submission and consideration of petitions alleging violation of the ACHR is

¹⁰² Moyer describes the process through which the Court came to this conclusion (Moyer, 1986). He underlines that the *Amici curiae* briefs of the International Human Rights Law Group and the Inter-American Institute of Human Rights provided the Court with useful insights on the possibility to receive requests of Advisory Opinions regarding treaties other than the ACHR, resulting in Court’s recognition of its advisory competence on all treaties in which one or more OAS members are parties. Arguably, this is the first example of IACrTHR’s tendency to expand its public function by means of extending its interpretive competence. Notably, however, in this case the critical argument provided by the International Human Rights Law Group was that such “external” norms had to be considered as already taken into account when drafting the ACHR. This argument had to be further developed when the Court came to establish its competence on the BdPC.

regulated in Chapter VII, Section 3 of the Convention.

Article 44 ACHR establishes:

Any person or group of persons, or any nongovernmental entity legally recognised in one or more member states of the Organisation, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

The following Articles regulate the procedure to be followed for declaring the admissibility of a petition (Articles 46-47) and the actions the Commission shall take once a petition is admitted, such as conducting an investigation, prior consent of the State, to verify the facts and promoting the achievement of a friendly settlement (Article 48). In those cases in which a friendly settlement cannot be reached, the Commission shall write a Report stating its conclusions and transmit it to the parties concerned (Article 50). Following this Report, the Commission might set forth its considerations and recommendations, decide if the State has taken adequate measures to follow-up and whether to publish the Report, or submit the case to the IACrTHR, in case the State involved has accepted its contentious jurisdiction (Article 51). Hence, the Commission functions as a filter for the cases of violations of the ACHR to be submitted to IACrTHR's jurisdiction. Chapter VIII, Section 2 of the ACHR, regulate the jurisdiction and functions of the IACrTHR, that can receive cases submitted by State Parties or by the Commission, after the procedures before the Commission have been completed (Article 61), establish if the facts constitute a violation of the ACHR, adopt provisional measures if required by the gravity and urgency of the case (Article 63) and issue a judgement according to the procedure established In Chapter VIII, Section 3. The details of the judicial procedure are defined by the IACrTHR's Rules of Procedure.

However, following the adoption of the ACHR, the Inter-American System developed several additional instruments that, through varying formulas, grant the competence on monitoring or enforcement mechanisms to the same bodies. The increased complexity of the System has been, therefore, further regulated through instruments other than the original ACHR. Considering that the Commission constitutes the first stage of the protection mechanism, selecting those cases that will be submitted to the Court's jurisdiction, its

regulations concerning the admission and consideration of petitions referring to treaties different from the ACHR are particularly relevant to analyse IACrtHR's jurisdiction on the BdPC.

Article 23 of IACommHR's Rules of Procedure, regulating petitions' submission, establishes:¹⁰³

Any person or group of persons or nongovernmental entity legally recognised in one or more of the Member States of the OAS may submit petitions to the Commission, on their behalf or on behalf of third persons, concerning alleged violations of a human right recognised in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights "Pact of San José, Costa Rica", the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém do Pará", in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure. The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in a separate document.

The text of Article 23 refers to all currently existing Inter-American instruments. Notably, including those in force prior the adoption of the Rules of Procedure (Acosta Lopez, 2009). However, the same article clarifies that such submission has to be presented "*in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure*", suggesting that the actual competence of the Commission should be specifically established in each instrument and contemporarily guaranteed by the Commission's Statute. As we will see, in fact, the new Inter-American instruments present a wide variety of formulas regulating their monitoring and enforcement mechanisms. While the explicit listing of all existing Inter-American instruments defines the

¹⁰³ For an analysis of the problems that arise from Article 23 of the Commission's Rules of Procedure, refer to: Acosta Lopez, 2009.

boundaries of Commission's competences, requiring integration in case of adoption of an additional treaty, for what concerns the extent of such additional competences Article 23 represents an open provision, redefining the features of the protection mechanisms in case of modifications in any of them. However, in the practice, this rule created confusion, requiring occasional clarification when a treaty other than the ACHR established Institution's competences with non-univocal formulas. Given the fact that the Commission filters the cases submitted to the Court, and that the Court is not always explicitly mentioned in each instrument, this confusion occasionally affects Court's procedures on petitions invoking an instrument other than the ACHR.

Addressing the question of the Court's contentious jurisdiction on the BdPC, Judge García Ramírez expressed its concern on the lack of clarity about judicial procedures, complicated through the diversification of Inter-American instruments. His Concurring Opinion, attached to the final judgment on *Castro-Castro*, effectively summarizes the crucial issues at stake: *"The powers of a jurisdictional body derive, necessarily, of the norm that creates, organizes, and governs it. This link between a juridical norm, on one part, and jurisdiction, on the other –expression, in the jurisdictional order, of the principle of legality-, constitutes a precious guarantee for the defendants and a natural and necessary element of the State of Law. It would be inadmissible and extraordinarily dangerous for people that jurisdictional bodies intend to "construct", as of its will, the competence it considers convenient. This "voluntarism creator of jurisdiction" would put the body of rights and liberties of human beings in risk and would constitute a form of tyranny not less damaging than the one exercised by other bodies of the public power. It is possible that it be advisable to, pursuant to the evolution of the facts or the law, extend the jurisdictional realm of a body of this nature, so that it may better serve the satisfaction of social needs. But this extension must operate as of the normative reform and not simply from the voluntary - and essentially arbitrary - decision of the jurisdictional body"* (*Castro-Castro* case, Concurring Opinion, para. 15).

Article 12 BdPC establishes:

Any person or group of persons, or any nongovernmental entity legally recognised in one or more member states of the Organisation, may lodge petitions with the Inter-American Commission on Human Rights containing

denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.

Based on Article 12 BdPC and on Article 23 of its Rules of Procedure, the IACommHR admits petitions invoking Article 7 BdPC, and uses other BdPC as complementary tools for the interpretation of ACHR norms. Acosta Lopez notes that such decision is not always followed coherently, citing the case of the rejected admissibility of the petition *Marcia Barbosa de Sousa v. Brazil* (2007) invoking *inter alia*, Articles 3, 4, 5, and 7 BdPC.

However, we shall point out that our review of the cases signals a relevant element that explains this apparent incoherence. We found that the admissibility of petitions is always established considering both the ACHR and the BdPC. *Marcia Barbosa de Sousa v. Brazil* is found inadmissible for what concerns Article 2 ACHR and 3, 4 and 5 BdPC, therefore, we do not believe this case signals an incoherence for what concerns the BdPC. In fact, although from the joint reading of Article 23 of the Commission's Rules of Procedure and Article 12 BdPC, for what concerns Article 7 BdPC it could be argued that the Commission might also admit a case based only on a violation of that specific instrument, it does not seem likely that such a case would not contemporarily imply a violation of some provision of the ACHR, given the more general character of the latter. In other words, if a case is found inadmissible under ACHR provisions, it will also, by default, be inadmissible under the BdPC, since the latter specifies the content of the general norms to adapt them to the specificities of women's rights.

Therefore, the cases reviewed in this research do not provide evidence of incoherence in the Commission's admissions pattern, nor the rejections are explicitly based on the fact that the petition includes an invocation of articles of the BdPC other than Article 7 (which could have resulted, more likely, in the exclusion of those Articles from the evaluation of the Commission). From the pattern of admissibility, it emerges that the Commission considers Article 12 BdPC as establishing an interpretive link with the ACHR, given the specificity of the rights enshrined in the BdPC, hence providing the basis to consider provisions other than Article 7 BdPC as complementary interpretive tools,

adapting the content of the rights established by the ACHR to the specific necessities of a case.

We can now turn to the critical point of whether or not a case involving alleged breaches of the BdPC, once concluded the procedures before the Commission, might be considered by the IACrTHR on the basis of BdPC provisions. The question is controversial, given that Article 12 does not explicitly mention the Court and considering the *express jurisdiction* rule established by Article 62 ACHR, which states:

A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognises as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention. 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organisation, who shall transmit copies thereof to the other member states of the Organisation and to the Secretary of the Court. 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognise or have recognised such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

The occasion to address this question was provided by IACommHR's decision to refer to the Court the *Castro-Castro case*, in 2004. Incidentally we note, as we will see, that the Commission's application did not include a reference to BdPC provisions, which had been invoked by the petitioners. However, the particular features of the violations, and the information gathered during the hearings, led the Court to consider appropriate an evaluation of the facts which included the BdPC originally invoked, and forced the consideration of the issue of IACrTHR's contentious jurisdiction on the instrument.

Combining systematic and teleological interpretations, with regards to the application of the principle of effectiveness, the IACrTHR found the language in Article 12 BdPC sufficient to interpret it as implying its competence on the instrument. The question, however, raised several problems, which we will thoroughly address given that the enforcement mechanisms provided by

international instruments constitute a critical element influencing their effectiveness and the development of their content, and considering that the terms in which a contentious jurisdiction is granted to a judicial body influence its legitimacy and the authority of its decisions.

In his Concurring Opinion, Judge García Ramírez, President of the Court at the time of the *Castro-Castro* case, focused on the problem raised by the fact that the BdPC does not contain a norm explicitly granting contentious jurisdiction to the IACrTHR, whilst, at the same time, neither does it contain norms denying this possibility or granting jurisdiction to a different body (Concurring Opinion, para. 16).

The, *prima facie*, ambiguity of the formula used in Article 12 BdPC, required the Court's interpretation to uncover its meaning. Judge García Ramírez clarified: "*[...] I am not saying, of course, that [the Court] must "complete" the legal code and create, based on its will or imagination, a competence that is not included, at all, in the norm on the control of conventionality of State acts. Its power does not go so far: it must only untangle the sense of the obscure or elusive provision and establish, through that logical-juridical process, its sense and scope. This is what the Inter-American Court does with regard to the Convention of Belém do Pará and its application to the present [Castro-Castro] case*" (Concurring Opinion, para. 17).

In the following paragraphs, Judge García Ramírez reviewed the diversity of formulas presented by the American *corpus juris* to address States' international responsibility and to establish protection mechanisms, when there is a failure to comply with the duties assumed. He expressed the desirability of counting on instruments presenting unequivocal orders, to guarantee "*the transparency of the meaning of the norm, in favour of all those obliged or favoured by it, a transparency convenient at all levels of juridical regulation*" (Concurring Opinion, para. 18). Indeed, as mentioned, the Inter-American System includes treaties that allow processing individual petitions,¹⁰⁴ others that do not provide this possibility¹⁰⁵ and treaties that

¹⁰⁴These instruments are: Inter-American Convention to Prevent and Punish Torture (CIPST), the Inter-American Convention on Forced Disappearance of Persons (CIDFP) and, considering Court's interpretation of Article 12, the BdPC.

restrict it to certain rights,¹⁰⁶ a diversity that had often posed questions similar to that raised by the ambiguity of Article 12 BdPC.¹⁰⁷

We saw that the first phase of the protection mechanism provided by the Inter-American System consists in the admission and consideration of petitions by the Commission, which might refer a case to the Court. Article 45 of the Commission's Rules of Procedure further regulates this option:

If the State in question has accepted the jurisdiction of the Inter-American Court in accordance with Article 62 of the American Convention, and the Commission considers that the State has not complied with the recommendations of the report approved in accordance with Article 50 of the American Convention, it shall refer the case to the Court, unless there is a reasoned decision by an absolute majority of the members of the Commission to the contrary.

Judge García Ramírez referred to Article 45 to explain that, the fact that the Commission can receive petitions concerning Article 7 BdPC, implies the possibility of such cases being referred to the Court,¹⁰⁸ otherwise the ACHR mechanism of protection would be incomplete. Hence, the Court shares the same competence that Article 12 BdPC grants to the Commission in relation to Article 7 BdPC. Similarly, for what concerns evaluations of the facts under other BdPC provisions, they shall be used by the Court as complementary tools

¹⁰⁵ The Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities (CIETFPD) does not mention an individual petitions mechanism, while its Article VI establishes that a Committee for the Elimination of all Forms of Discrimination against Persons with Disabilities “*shall be the forum for assessment of progress made in the application of the Convention.*”

¹⁰⁶ The Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) restricts the jurisdiction for processing petitions *ratione materiae*. Its Article 19(6) permits the submission of petitions only with regard to the right to education and trade union rights.

¹⁰⁷ For cases sharing similar features with the question raised by the BdPC, see IACrTHR's reasoning concerning the complementary interpretation of CIPST provisions in: *Gómez Palomino v. Peru*. (para. 110); *Ticona Estrada et al. v. Bolivia* (para. 85); *Anzualdo Castro v. Peru* (para. 61).

¹⁰⁸ The mechanism of referral has changed with the 2001 reform of the Commission's Rules of Procedure. Whereas previously they required a majority vote *in favour* of referral, since 2001 the rule was reversed, requiring majority *to prevent* a case from being referred to the Court. Zuloaga found an increased tendency of the Commission to refer gender-sensitive cases to the Court since 2001 (Zuloaga, 2004). While we can agree on the fact that the reform made the procedure easier, we should not disregard that a number of other elements might have played a similar role in this change, not last petitioners' familiarity with the instrument and the generalized increasing international awareness on women's rights.

to interpret ACHR norms, when the specificity of the facts so requires. Incidentally, we note that the ACHR also allows States Party to submit a case to the Court, although this possibility has rarely been used.¹⁰⁹ In the current context it seems that this possibility cannot be used for what concerns breaches to the BdPC and that, if it could, it would probably create a further problem on the contentious jurisdiction of the IACrTHR on the BdPC, since it could not be based on its direct link with the Commission's competence established by Article 12 BdPC.

The *pro personae* principle allows the consideration of ACHR and BdPC as complementary instruments, with the specific content of the latter integrating the provision of the first, general one. In Judge García Ramírez' words, the BdPC is a type of specific Magna Charta on women's rights "*that constitutes a separate and substantial chapter in the complete corpus juris that makes up the statute of the contemporary human being, based on the double foundation offered by the worldwide human right's order and the continental version in the order of the same specialty [...]* The joint reading of the ACHR, with its catalogue of general rights and guarantees, and the BdP Convention, with its declaration of specific State duties, to which women's rights correspond, results both natural and obligatory for the application of both. The second determines, illustrates or complements the content of the first in what refers to women's rights that derive from the ACHR" (García Ramírez, Concurring Opinion, *Castro-Castro case*, 2006, para. 5 and 30).

The Court had already been presented with similar issues concerning its jurisdiction on international instruments other than the ACHR. In 2000, addressing Colombia's preliminary objections to *Las Palmeras* case, the Court maintained that other conventions, such as the Inter-American Convention on Forced Disappearance of Persons, granting competence to the IACrTHR or the Commission to hear violations of the rights protected, cannot be considered to be excluded from the procedure established by Articles 33, 44, 48.1 and 48 ACHR.¹¹⁰ Therefore, although these articles refer specifically to rights enshrined in the ACHR, other conventions establishing a similar mechanism,

¹⁰⁹ The first such case was *Viviana Gallardo et al.*, which Costa Rica presented against itself in 1981.

¹¹⁰ *Las Palmeras v. Colombia* (Preliminary Objections, para. 34). See also *Paniagua Morales* (para. 136) and *Villagrán Morales et al.* (para. 252), where the Court declared that the Inter-American Convention to Prevent and Punish Torture had been violated.

such as the Inter-American Convention to Prevent and Punish Torture, constitute exceptions to such requirement.¹¹¹

This decision of the Court provides another interesting element, if we consider that the BdPC was not in force in Peru, the State involved in the *Castro-Castro* case, at the time of the facts related in the petition. As we will see in the following sections, the Court overcame this apparent obstacle with a double motivation. On the one hand, the use of the BdPC as an interpretive tool for the ACHR, whose norms are considered to need the integration of a gender perspective, in order to guarantee their intended effect with substantially equal standards, does not violate Article 28 (Non-retroactivity of Treaties)¹¹² of the Vienna Convention on the Law of the Treaties (VCLT). On the other hand, the *continuous nature* of the violations of Articles 8 (due process) and 25 (effective remedy) ACHR implies that evaluating the lack of effective remedies in cases of VAW, covered by the BdPC, cannot be considered as retroactively binding the State in relation to a fact that ceased to exist before its ratification of the specific instrument.

The expansion of the IACrTHR's public function builds on its crucial 2003 Advisory Opinion n. 18, on the *Juridical Condition and Rights of Undocumented Migrants* (IACrTHR, Advisory Opinion 18/2003, par. 97-101). In this pioneering precedent the Court had recognised the principles of equality and non-discrimination as belonging to the domain of *jus cogens*, thus implying obligations *erga omnes*. In this sense, through Article 1.1 ACHR, the Court could count on a sufficient normative framework to justify the extension of its competence on the BdPC without implying arbitrariness. Indeed, the doctrine increasingly agrees on the need to adopt an axiological-substantial perspective when assessing the influence of human rights treaties, considering more the subject matter they regulate than their formal features, since it is because of their subject matter that they generate specific obligations (Ruggeri, 2008). As Acosta Lopez notes, the question is to what extent, for the good functioning of the Inter-American System, such substantial criterion should be also applied to

¹¹¹ Incidentally, we note that in *Las Palmeras v. Colombia* the IACrTHR excluded the Geneva Convention from its jurisdiction.

¹¹² Article 28 VCLT: *Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.*

procedural provisions. Advisory Opinion 18/2003 constitutes a critical precedent for what concerns the development of several doctrinal elaborations that had significant influence on the development of the protection of women's rights in the Inter-American System.

In the 2008 interpretation of its ruling on the *Castro-Castro* case, the IACrTHR explicitly refers to the reasoning developed in Advisory Opinion 18/2003: *"The States Parties to the American Convention have proclaimed and assumed the duty to acknowledge and guarantee these rights in favour of all people, without distinction, regardless of the fact that they are or not responsible for criminal acts. This is a fundamental principle of International Human Rights Law. The States themselves - that make up the collective guarantee in this matter - gave the Inter-American Court the sole and exclusive power to hear and decide on applications regarding facts, attributed to the States, that violate the rights and freedoms protected by that international treaty. That is its contentious jurisdiction. Not any other. When exercising the judicial protection of human rights, the Court must abide by the stipulations of the Convention, just as domestic courts must observe the regulations of the criminal system"* (para. 12).

In a later case, *Cotton field* (2008), the preliminary objection raised by the Mexican State, questioning IACrTHR's contentious jurisdiction on the BdPC, forced the Court to readdress the question. The arguments presented by Mexico provide an evidence of the delicate nature of the issue. Notwithstanding the decision adopted by the Court in *Castro-Castro*, and the lengthy supporting arguments provided in the Concurring Opinions attached to the judgment, Mexico claimed that the IACrTHR could only interpret and apply the ACHR and other instruments *explicitly* granting its jurisdiction. It followed that, for what concerned the BdPC, the Court might exercise its advisory function, as established by Article 11 BdPC, but it could not attribute to itself a contentious jurisdiction that had not been established in the BdPC and to which the State Parties had not expressed their consent.

Indeed, Article 11 grants the Court with the competence on adopting Advisory Opinions on the interpretation of the BdPC, including all its provisions. Notably, this provision is partially redundant, given that the advisory function of the Court had been already interpreted as including treaties other than the ACHR, since the mentioned 1982 Advisory Opinion. However, it introduces the

possibility of such a request being submitted by the Inter-American Commission of Women, which we interpret as a further attempt to increase the Inter-American System's gender-sensitiveness. However, this competence does not, *per se*, imply the possibility of exercising contentious jurisdiction. Implicitly recalling García Ramírez concerns, expressed in the mentioned Concurring Opinion to *Castro-Castro*, Mexico pointed at the principle of legal certainty, which guarantees the stability of the Inter-American System and "*the certainty of the State's obligations deriving from its submission to the international organs for the protection of human rights*" (Cotton Field, para. 35).

Article 11, explicitly referring to the Court's Advisory function in relation to the BdPC, might provide an additional argument, besides those presented by Mexico, to criticize the grounds on which the IACrTHR established its competence on the BdPC. This provision pertains to the same Chapter as the mentioned Article 12. Whereas, on the one hand, it can be considered an evidence of the intention of the drafters not to exclude the IACrTHR from the mechanism provided by the BdPC, on the other hand, one might argue, the fact that the Court has been explicitly mentioned in Article 11, but not in Article 12, might imply that it was not the intention of the drafters to grant to the IACrTHR the contentious jurisdiction on such instrument. However, as seen, the IACrTHR did not consider Article 11 as suggesting such possibility, and considered it overshadowed by the fact that no provision in the BdPC explicitly excludes its competence, while Article 12 *implies it* given that it provides the possibility to *start* the individual petitions procedure before the Commission and cannot, hence, be interpreted as to prevent it to be *concluded*, if appropriate, before the Court.¹¹³

Indeed, whereas arguably the terms in which the BdPC has been included in the competences of the IACrTHR abide to Article 31¹¹⁴ VCLT, strictly speaking,

¹¹³ In *Cotton Field*, the IACrTHR briefly addresses the issue of the drafter's intent in relation to the BdPC, concluding that the *travaux préparatoires* provide no evidence of an objection to its contentious jurisdiction. Nevertheless, the Court emphasises that, given the arguments provided in its lengthy systematic and teleological interpretation, subsidiary references to the preparatory work would not, in fact, be necessary (para. 72).

¹¹⁴ Article 31 (General Rule of Interpretation): 1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.* 2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b)*

States might consider it a forceful stretching of their consent¹¹⁵ to a BdPC, which, without doubt, does not explicitly refer to the IACrTHR. However, the grounds on which the Court establishes its competence on the BdPC, after a teleological and systematic interpretation and revising all the different formulas used in the specific instruments of the American *corpus juris*, diminishes the strength of these arguments in the case of the BdPC.

In discarding Mexico's arguments, the Court stated that *"it appears clear that the literal meaning of Article 12 of the Convention of Belém do Pará grants the Court jurisdiction, by not excepting from its application any of the procedural requirements for individual communications"* (para. 41), and further clarified that *"based on a systematic interpretation, there is nothing in Article 12 to indicate the possibility that the Inter-American Commission should apply Article 51 of the American Convention only partially. It is true that the Inter-American Commission can decide not to forward a case to the Court, but there is no provision, in the American Convention, or in Article 12 of the Convention of Belém do Pará that prohibits a case being forwarded to the Court if the Commission so decides. Article 51 is clear on this point"* (para. 54). Hence, once a case concerning breaches to the BdPC is referred to the Court, the latter *"cannot refrain from exercising jurisdiction (...), because this would be contrary to the principle of effectiveness"* (para. 63).¹¹⁶

Incidentally, we note that such attitude of the Court should not be misinterpreted as an excessive emphasis directed specifically on the BdPC. As mentioned, in *Las Palmeras* the IACrTHR had used the same argumentation to clarify the Commission's competence on the Inter-American Convention on

any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

¹¹⁵ For analyses of other cases in which the Court controversially "bypassed" the traditional concept of the explicit consent, refer to: Drnas de Clément, 2010 and to Judge Cançado Trindade's Concurring Opinion to *Caesar v. Trinidad y Tobago*, where he argues that the traditional concept of *consensualism* is "an issue of the past" and that the VCLT should be subtracted from the mere voluntarism of States (para. 3).

¹¹⁶ Refer to IACrTHR jurisprudence on the institutional integrity of the protection system enshrined in the ACHR: *Viviana Gallardo et al.* (paras. 12, 16, 20, 21 and 22), *Acevedo Jaramillo et al. v. Peru*, (para. 174).

Forced Disappearance of Persons, which Colombia had questioned on similar grounds.¹¹⁷ Moreover, in the relevant jurisprudence, we found evidence that, while the Court considers established its competence on the BdPC, it shows caution towards the abuse of references to such instrument. In *Ríos et al. v. Venezuela* (2009) and *Perozo v. Venezuela* (2009), the Court does not analyse the facts under the invoked BdPC provisions, given that the evidence provided by the representatives did not support the allegations that the attacks were especially directed against women, based on (or aggravated by) their condition of being women, or that the violations affected women in an different or disproportional manner. Moreover, no evidence had been provided to point at laws, regulations or practices sustaining the persistence and tolerance of violence against women.¹¹⁸

In *Cotton field*, the Court shows its self-restraint, clarifying the distinction between Article 7 and other BdPC provisions, excluding the latter as possible bases to initiate an individual petition procedure. While recalling the *pro personae* principle, which allows their use for complementary interpretation of the ACHR, the Court argues: “[...] *that the systematic and teleological criteria are insufficient to give them preference over what is clearly indicated by the literal meaning of Article 12 of the Convention of Belém do Pará, which establishes that the petition system shall relate exclusively to possible violations of Article 7 of the Convention. In this regard, the Court underscores that the principle of the most favourable interpretation cannot be used as a basis for an inexistent normative principle; in this case, the integration of Articles 8 and 9 into the literal meaning of Article 12. And this is despite the fact that the different Articles of the Convention of Belém do Pará may be used to interpret it and other pertinent*

¹¹⁷ The same line of argumentation, according to which Article 41.f ACHR allows to consider IACrTHR's contentious jurisdiction as implicitly granted when other instruments establish a petition mechanism to be initiated before the Commission, can be found in *Las Palmeras v. Colombia* (par. 34). In relation to the BdPC, in *Cotton Field* the Court maintains that Article 41.f ACHR “[...] *refers to a sphere in which the powers of both the Commission and the Court are streamlined at their respective moments*” (par. 55). Article XIII of the Inter-American Convention on Forced Disappearance of Persons is cleared than Article 12 BdPC, stating that: “*For the purposes of this Convention, the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights and to the Statue and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures*”.

¹¹⁸ *Ríos et al. v. Venezuela* (Preliminary Objections, para. 274-280); *Perozo et al. v. Venezuela* (para. 291-296).

Inter-American instruments” (para.79).¹¹⁹ Arguably, this self-restrain adds to the legitimacy of the Court’s previous argumentations.

Although the contentious jurisdiction of the IACrTHR appears to be currently consolidated, the “unfortunate” ambiguity of Article 12 did have the negative outcome of requiring the Court’s interpretation of its meaning, and the defence of its conclusions to confront, non spurious, objections. This is an undesirable and avoidable problem, exposing the Court to the risk of a negative influence on its legitimacy and on that of the BdPC itself. Furthermore, considering the way in which the occasion for clarifying the issue was provided, i.e. a Commission’s application to the Court that did not include references to the BdPC, we can further argue that this ambiguity might have influenced Commission’s previous decisions to limit to its competence the proceedings of possibly crucial cases, preventing their referral to the Court and, thus, actually delaying the full development of the BdPC as a justiciable instrument in the Inter-American System.

Reviewing the cases that ended in a Commission’s Report, we found grounds to support this claim. Indeed, submitting to the Court a path-breaking case such as *Maria da Penha v. Brazil* (2001), the first case concerning domestic violence in the new framework provided by the BdPC and CEDAW General Recommendation 19, would have been more appropriate, given the higher resonance and impact of IACrTHR’s judgments compared to Commission’s Reports. We believe that such argument finds grounds in the disappointment, expressed by Judge Cançado Trindade, former President of the IACrTHR, who goes as far as to question the desirability of the filter constituted by the Commission, praising petitioners and representatives’ increased ability in presenting the facts in the most appropriate manner (Concurring Opinion, *Castro-Castro*, paras. 38-39). We cannot but read in his statement an implicit disappointment for the late occasion provided to the Court to use the new instrument.

¹¹⁹ Therefore, whereas the Court clarified its compulsory jurisdiction to examine alleged violations of Article 7 BdPC, it does not do the same for what concerns Articles 8 and 9 BdPC, which, as the other conventional provisions, might only be used as interpretive tools for ACHR norms.

A matter of wording or neglect

Considering feminist legal scholars critiques on the shortcomings of international human rights law in protecting and promoting women's rights, it is interesting to analyse the question of the delayed use of the BdPC as a justiciable instrument in the Inter-American System taking into account feminist perspectives.

Zuloaga focuses her criticism on the IACrtHR, interpreting its behaviour after the adoption of the BdPC "negligent," given the increased international awareness on women's and compared to the Commission's performance.¹²⁰ This author argues that: *"The Commission's track record in the field of women's rights is better than the Court's, particularly with regards to the issue of violence against women; in addition to having established a Rapporteurship on the Rights of Women, the Commission has referred to the situation of women in country reports since 1995 (Haiti) and there are several cases that were resolved favourably for victims before the Commission. The element that is clearly lacking in its history is a will to refer women's rights complaints to the Court"* (Zuloaga, 2008). We shall argue that, on the basis of our considerations on the problem created by Article 12 ambiguity and considering the interpretive effort made by the Court to clarify its contentious jurisdiction on the BdPC, Zuloaga's arguments excessively underestimate the influence of technical factors that affected BdPC early life in the Inter-American System, which substantially overshadowed the role that the alleged Court's neglect might have played. On the contrary, we find that the Court's strong intervention in establishing its competence on the BdPC, when provided with the occasion to do so by the *Castro-Castro* case, constitutes an evidence of its open attitude towards the BdPC, notwithstanding the extreme caution recognisable in the Commission's behaviour. Nevertheless, as explained, the Court could have, *motu proprio*, used the BdPC as an interpretive tool for ACHR norms, even while its contentious jurisdiction was still uncertain. Although, as seen, in the first years after the adoption of the BdPC cases explicitly referred to facts of VAW concluded the procedures with Commission's decisions, it is possible that, reviewing the totality of the cases submitted to the Court after the entry into force of the

¹²⁰ As we will see in detail in the following paragraphs, the first case in which the petitioners (but not the Commission's application) invoke BdPC provisions, reaches the Court only in 2004 (*Castro-Castro*).

convention, one might individuate specific violations based on which a more gender-sensitive Court could have integrated the new perspective in the analyses. The likelihood of this possibility is suggested by a detail in Judge García Ramírez' Concurring Opinion to the *Castro-Castro* case, who argues that, although the Court addressed several cases in which there were women victims, none concerned "*directly and immediately (...) the victim's female condition*" (García Ramírez, Concurring Opinion, *Castro-Castro* case).¹²¹ We argue that we cannot completely overlook the possibility that, were such cases examined by an expert in gender studies, García Ramírez' statement might be proved inaccurate. However, as we will see, the internalisation of the paradigm shift endorsed by the BdPC took several years, even in the case of Commission's analyses of "easy" cases.

Let us evaluate Zuloaga's statement through a test: supposing to be able to single out one case in which the Court might have used *motu proprio* the BdPC as an additional tool of analysis, being able to argue its negligence would imply: a) that the Court considered its contentious jurisdiction uncontroversial or easily derivable as implied in Article 12 BdPC; b) that the Court had already developed its gender-sensitiveness to the point of being able to individuate "gendered-violations" in cases concerning completely different issues (and without it being suggested by the petitioners, the representatives, the Commission or in the *Amici Curiae* briefs), given that none of the petitions specifically concerning cases of VAW presented after the entry into force of the BdPC, was referred to the Court before the *Castro-Castro* case. The first hypothesis can be rejected considering the complex interpretation through which the Court came to establish its contentious jurisdiction on the BdPC, unclear given the non-univocal interpretation that the wording of Article 12 allowed. Moreover, the interpretation of the Court has been questioned on several grounds, providing evidence of the fact that the "implicit competence" issue was not easily solvable. The second hypothesis, considering that the "easy gendered-cases" had not been referred to the Court, constitutes an excessively high expectation, given the fact that feminist legal scholarship broadly agrees

¹²¹ Contrary to what argued by Zuloaga, we point out that, in the analysed case, the President of the Court does not argue "*that the case in hand was the first one to ever present the Court with women's rights issues*" (Zuloaga, 2008, p. 3). Somehow less controversially, the President states that no previous case was presented as concerning "*directly and immediately the victim's female condition*" (*Castro-Castro* case, Concurring Opinion, Judge García Ramírez, para.6).

on recognising an inherent gender bias in international institutions. Zuloaga's argument would require the IACrTHR to outshine in gender-sensitiveness, in a period in which both the universal and regional systems were just starting to deal with the transformational understanding of women's rights. Hence, we find this hypothesis partially acceptable, in the sense that we cannot reject the claim of lack of gender sensitiveness, since it would require a thorough review of the totality of the cases submitted to the Court after the entry into force of the BdPC providing evidence of the non-existence of a possibly gendered-violation overlooked by the Court. However, we do not find this conclusion sufficient to blame the Court of negligence in its use of the BdPC, or a particular lack of gender-sensitiveness in the Court. In fact, there are also cases before the adoption of the BdPC in which the Court satisfactorily addressed issues of gender equality (e.g. Advisory Opinion 4/84).

In conclusion, we shall add another interesting element that supports the influence of the technical obstacle in BdPC early history, and provides an acceptable justification for the long process that led to its full justiciability. Let us recall that the Commission did not include a reference to the BdPC provisions invoked by the petitioners when submitting the *Castro-Castro case* to the Court. However, analysing the documents of the proceedings in front of the Court, we found evidence of a clear adoption of a gender perspective in the Commission's argumentations. Moreover, after the competence issue had been settled, the Commission started to regularly submit to the Court cases involving breaches to the BdPC. We argue that the contradiction between, on the one hand, the exclusion of a reference to BdPC provision and, on the other hand, the keen gender-sensitiveness that the Commission showed during the proceedings in front of the Court, provides grounds to suggest that the Commission purposely avoided the technical obstacle, *in order to* allow the Court to clarify what established by Article 12 BdPC, given the strength of the evidence provided in support of the allegation that the violations were especially directed to women and affected women in a disproportionate manner. In this perspective, both Institutions appear to have worked in tandem to overcome the problem created by the ambiguity of Article 12 BdPC. Admittedly, this approach might seem too optimistic, but it deserved mentioning.

As seen in the reviewed cases, besides the delay in referring a case to the Court, and although the Commission waited for the petitioners to directly invoke the BdPC to inaugurate its use, the Commission soon showed an open attitude towards the new instrument, including it amongst its interpretive tools, besides the direct competence on Article 7 established by Article 12 BdPC. The procedures within the Commission often resulted in important advances for women's rights (Medina Quiroga, 1993, 2003), as in the crucial *Maria da Penha* (2001), the first case of domestic violence addressed. However, we share Zuloaga's concern about their minor symbolic meaning if compared to a judgement of the IACrTHR and, hence, their lower potential to extend their outcome beyond the limits of the concrete case. This shortcoming is partially counter-balanced by the political influence of the Commission in the OAS and the critical function it performs through the preparation of Country Reports and Thematic Reports, as we shall see further on in this research.

Zuloaga points out to the fact that Human Rights Instruments in the Inter-American System are (still) mainly created and developed by men. In particular, the author emphasises the gender imbalance in Inter-American Institutions, considering it one of the primary causes for the System's shortcomings in gender-related cases. In line with most feminist legal scholars (e. g. Charlesworth, 1995; Coomaraswamy, Kois, 1999), she argues that the gender-bias is inherent in the fact that international control is allowed through consent of Latin American States, characterized by patriarchal structures (Zuloaga, 2004)

Reviewing the historical composition of Inter-American Institution we found strong evidence of the gender imbalance argued by Zuloaga. Nevertheless, currently, four out of seven Commissioners of the IACrTHR are women¹²². This is not the result of some specific rule adopted to guarantee balanced representation of man and women, but a spontaneous sudden change, triggered by the raising international awareness, after years of severe women under-representation in the institution. From 1960 to 2011 only six out of fifty-seven commissioners were women. On the contrary, there is currently no women judge amongst the 7 of the IACrTHR and since its establishment only

¹²² We updated the data reviewed in Zuloaga's study to include the period 2007-2013. The chronology of Commission's composition can be consulted in the website of the Organization of American States at: www.oas.org/en/iachr/mandate/composition.asp

four out of thirty-three judges were women. No specific rule has been, to date, devised to increase female representation. Interestingly, the first woman was appointed to the bench in 1989, and served for the period 1989-1994, in direct coincidence with the raising international awareness on the structural discrimination experienced by women, both in the region, with the preparatory works for the Belém do Pará Convention, and internationally, with the increased efforts in promoting CEDAW implementation, that resulted in General Recommendation 19. Cecilia Medina Quiroga, who had previously served on the UN Human Rights Committee at the time of General Recommendation 28 and presented extensive previous experience in the field of women's rights, was appointed in 2004, ten years later, and served as President in 2008-2009. Again, although it would be excessive to recognise a direct link, we shall notice that her appointment follows another big step in the Universal System of protection of women's right, namely the adoption of the 2000 Option Protocol to CEDAW. At the same time, the issue of women's rights was at the centre of the human rights discourse in the Inter-American System, following the IACommHR's path-breaking 2001 *Maria da Penha* decision, which inaugurated BdPC use. The last two women judges served in the period 2007-2013, nominated and appointed while Judge Cecilia Medina Quiroga was President of the Court.

The gender imbalance in Inter-American Institutions reflects that recognised in all international institutions by feminist legal scholars, and gives rise to the same criticisms. Zuloaga stresses it as one of the main reasons of what she considers the early negligent attitude of the Inter-American Court towards VAW and the BdPC, disregarding the technical explanation previously analysed (Zuloaga, 2004). Notably, the author points at the fact that the crucial decision on the *Castro-Castro* case was taken when Cecilia Medina Quiroga was a Judge in the Court.¹²³

However, from our analysis of the documents of the case, we do not find evidence of a crucial contribution on her behalf, whereas, as noticed, the actual evolutionary content of the judgement can be directly attributed to the contributions of Judges García Ramírez and Cançado Trindade's mentioned

¹²³ For analysis on the influence of gender on the outcome of cases see: Phyllis Coontz, 2000 and Minow, 1990.

Concurring Opinions, both men. In addition, we underline that the occasion for this path-breaking decision was offered by the fact that the Commission, for the first time, had referred to the Court a case in which the petitioners, women's rights organisations, invoked the BdPC (although, we recall, without including these provisions in its application to the Court). Therefore, there is no way to establish that the decision would have been different if it were not for the presence of a woman judge on the bench, given that there are no similar previous experiences. Additionally, as the same author points out, when the *Aloeboetoe* case was decided, in 1993, before the adoption of the BdPC, a women Judge integrated the composition of the Court. In *Aloeboetoe*, a potentially gender-sensitive issue concerning reparations to spouses of victims in a context of polygamy, was not solved in a favourable way for what concerns women's rights.

On the contrary, one might argue that all events, i.e. Judge Cecilia Medina Quiroga's appointment, the petitioners reference to the BdPC and IACrTHR path-breaking ruling in *Castro-Castro*, should be read as an evidence of the effects of the international and regional efforts to disseminate and promote the recently emerged understanding on gender issues, evidenced by the mentioned turning points in the history of women's rights in international human rights law. While Zuloaga stresses the disappointing neglect of a gender-perspective in the IACrTHR, given the general raised concern on women's rights, we consider this changing context the *framework* in which the IACrTHR finds conclusive arguments to ground its (otherwise not univocally established) competence on the BdPC.

Notably, it was after a lengthy debate on the need to guarantee CEDAW effectiveness that the Optional Protocol was adopted in 2000, attributing to CEDAW Committee (previously only a monitoring body) the competence to receive and consider complaints from individuals or groups within the jurisdiction of the countries ratifying this additional instrument. Although the IACrTHR does not explicitly mention this change in Universal System amongst the arguments used to establish its competence, we are allowed to imagine that the debate on CEDAW justiciability, triggered by its disappointing impact on member countries (Merry, 2003, 2006), increased the urgency and legitimacy of the Court's final decision allowing BdPC justiciability in the Inter-American System.

Given the problem created by the ambiguous wording of Article 12 BdPC, capable of negatively influencing the legitimacy of the Court's on the basis of States Party's controversial consent, it would have been inappropriate for the IACrTHR to refer to a change in CEDAW enforcement mechanism as a further argument to ground its contentious jurisdiction on the BdPC. In fact, in no way could such an argument, on the grounds of the desirability of a judicial body with competence on the convention, overcome the problem represented by the possible criticisms based on the lack of an explicit consent. Indeed, a judicial body cannot extend its contentious jurisdiction on a treaty *because* it has been proven to be a more suitable solution to guarantee its effectiveness, since it would imply an unjustifiable arbitrariness. The point is self-evident, and made even clearer by the fact that, in order to give to CEDAW Committee the competence to receive complaints, the Universal System needed to adopt a further treaty, with its own ratification iter, to which CEDAW States Party can optionally consent. On the contrary, correctly, the IACrTHR derives its competence through the "implicit complete procedure" argumentation, and after a lengthy systematic and teleological interpretation, which legitimize its decision on consistent grounds. Zuloaga recognises the significance of this effort, although in a way that could be considered as actually diminishing its legitimacy, and contributing to the arguments of those who claim the IACrTHR tendency to judicial activism, since she defines it an act of "*considerable creativity and political bravery*" (Zuloaga, 2008, p. 56).

Considering that is up to the Commission to refer a case to the Court, a more conclusive analysis should focus on establishing if the gender bias in Commission's membership influenced its reluctance to refer to the Court petitions invoking the BdPC received before *Castro-Castro*, besides those ended with a friendly settlement. Arguably, for instance, the peculiar features of *Maria Da Penha*, the first case of domestic violence, should have encouraged the Commission to submit it to Court. However, the difficulty in establishing an uncontroversial causal relation, given the unavailability of separate individual positions such as those represented by the Concurring Opinions in IACrTHR's case law, might constitute an obstacle to such analysis. For instance, looking at the composition of the Commission at the time of the *Maria da Penha* petition, we find a woman Commissioner (the previous one dated back to 1984). The fact that the BdPC is invoked in the petitioners submission, diminishes its

relevance as a piece of evidence of a particular influence of the presence of women in Inter-American Institutions in triggering the use and development of the BdPC, since the documents of the case do not provide evidence of her role in the decision. A further assessment of the argued negative influence of the gender-bias on the status and effectiveness of women's right in international law might focus on the composition of OAS Assembly, during the voting of each proposed article of the BdPC draft text. In fact, the original version of Article 15 explicitly granted contentious jurisdiction to the IACrHR,¹²⁴ but it did not reach the required number of favourable votes to be adopted. A thorough review of the discussion and voting on Article 15, combined with a review of the composition of the Assembly, might provide some interesting elements to understand why that unambiguous wording was questioned, and highlight the factors that might have caused its discarding (amongst which, women underrepresentation might appear).

Although we do not believe that the elimination of gender imbalance would undoubtedly facilitate these Institutions' gender sensitiveness, we do share the view that a judge (or Commissioner) *"whose experiences and consequent perception of the world [allow] to appreciate the gender aspects of the cases"* (Zuloaga, 2008) would increase its likelihood. Admittedly, the probability of such experiences being in the background of a woman judge is higher. On this line, we signal that, although the Court has adopted no rule to eliminate gender-imbalance, it recently began to support specialized capacity-building studies by its lawyers.

In conclusion, and having considered several possible criticisms, the analysis of the process that led to BdPC justiciability in the Inter American System provides strong evidence of the crucial effect that the lack of clarity of Article 12 BdPC had on BdPC early history. In the following paragraphs we shall analyse the process through which the BdPC has been internalised in the Inter-

¹²⁴ In the draft version of the BdPC Article 15 stated: *"Any State Party may, at any time and in accordance with the norms and procedures stipulated in the American Convention on Human Rights, declare that it accepts as obligatory, automatically and without any special convention, the jurisdiction of the Inter-American Court of Human Rights over all the cases relating to the interpretation or application of the present Convention"*. The article obtained 16 votes in favour and 4 abstentions, not reaching the threshold of 18 votes in favour required to be included in the final text. This detail allowed the IACrHR to argue that, given the fact that the OAS is constituted by 22 countries, *"it is incorrect to say that a majority was not in favour of approving this Article; it was merely that it did not obtain a sufficient number of votes"* (Cotton Field, para. 72).

American System and implemented in the region.

Technical shortcomings through a gender perspective

Zuloaga considers the early shortcomings of Inter-American Institutions in using the BdPC a further prove of the undesirability of a specific separate convention, providing a catalogue of rights already included in the ACHR and, at the same time, not encompassing all the general norms. In her view, in line with the reviewed feminist literature, this choice carries the risk of excluding such rights from the general coverage provided by the ACHR.¹²⁵

The findings from our analysis on Inter-American case law on VAW do not support this view. On the contrary, there is extensive evidence of the crucial function performed by the BdPC as a tool to promote the progressive interpretation of ACHR norms by Inter-American Institutions.

In all cases in which Inter-American Institutions refer to Article 7 BdPC, such provision is read *in conjunction* with general ACHR provisions prohibiting discrimination. In particular, both the Commission and the Court establish a direct link with Article 1.1 ACHR (Obligation to Respect Rights) stating that *“The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social*

¹²⁵ Interestingly, considering the arguments provided by the Court when establishing its contentious jurisdiction on the BdPC, Zuloaga expresses concern about the possible negative outcome on the Court's *credibility*. However, she recognises that the arguments of the Court are not, *per se*, illegitimate. She considers this event as an evidence of the Court's continuous attempt to *“catch up to its contemporaries in the field of gender justice, and this type of situation generally creates a risk of overcompensation that could, in fact, be detrimental to the initial purpose”* (Zuloaga, 2008, p. 78). We can only partially agree with this view. While on the one hand we share the concern about the necessity of clearer rules on the competences of Inter-American Institutions, to avoid the risk of their actions to be perceived as arbitrarily exceeding their limits, on the other hand we do not consider the analysed issue as an evidence of the Court's delay compared to a more advanced general consensus, given that it was the first international body recognizing full justiciability to a specific convention on women's rights. Additionally, on the basis of our previous analysis of IACrTHR's systematic and teleological argumentation to clarify its competence, neither we find strong bases to consider it an act of overcompensation.

condition". The same link is explicitly argued in reference to Article 24 (Equal Protection) ACHR, and used in several cases, such as: *Maria da Penha v. Brazil*, *Marcela Andrea Valdés Díaz v. Chile* and the still pending *Maria Isabel Véliz Franco et al v. Guatemala*.

Given the critical role of States' positive obligations and due diligence for what concerns the right to effective judicial proceedings, and recognising impunity as a generalised structural pattern in cases of VAW, all reviewed cases are contemporarily evaluated under Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) ACHR. This link is assertively clarified in *Fernández-Ortega et al. v. Mexico* and *Rosendo-Cantú et al. v. Mexico*, where the IACrtHR argues that, in cases of VAW, Articles 8 and 25 ACHR are "*complemented and enhanced by the obligations arising for States parties from the specific obligations of the Inter-American treaty, the Convention of Belém do Pará. Article 7(b) of this Convention specifically obliges the States parties to apply due diligence to prevent, punish, and eradicate violence against women*", given "*society's obligation to reject violence against women and the State's obligation to eliminate it and to ensure that victims trust the State institutions there for their protection*" (*Fernández-Ortega*, para. 193, *Rosendo-Cantú*, para. 177).

These elements are of particular interest if we consider the concerns about the risk of marginalization of women's rights, implied in the adoption of a specialized instrument (e.g. Johnstone, 2006). The *praxis* of the Inter-American System effectively diminishes the likelihood of such possibility. The BdPC appears to be used, in fact, to integrate ACHR' shortcomings, due to its historical formation and the reasons for this choice have several dimensions. On the one hand, once established that VAW represents a manifestation of discrimination against women due to unequal relations of power, it appears uncontroversial that such human rights violations imply breaches of general non-discrimination provisions, uncontroversially implying States' responsibility when perpetrators are public agents. On the other hand, in more difficult cases of violations perpetrated by private individuals, given that States' responsibility emerges in case of proved failure to adopt positive measures or to guarantee the right to effective judicial proceedings, the critical link between the two conventions is established on the basis of the principle of *due diligence*. In the framework we can interpret the reference to Article 2

ACHR (Domestic Legal Effects) in *Marcela Andrea Valdés Díaz v. Chile* and *Cotton Field*.

The process through which the BdPC came to be included in the competences of the Court is another noteworthy element. The IACrTHR, as mentioned, was not explicitly granted competence on the instrument, but had to construct its arguments in order to ground an expansion of its own functions. Without recalling all the reasoning developed in the *Castro-Castro* case, analysed in the previous sub-section, we note that the crucial point to argue the legitimacy of Court's decision, clarified by Judge García Ramírez in his Concurring Opinion, was based on the *pro personae* criterion. On this grounds, he argued that the ACHR and the BdPC can be considered two complementary instruments, with the specific content of the latter integrating the provision of the first, general one: "*The joint reading of the ACHR, with its catalogue of general rights and guarantees, and the BdP Convention, with its declaration of specific State duties, to which women's rights correspond, results both natural and obligatory for the application of both. The second determines, illustrates or complements the content of the first in what refers to women's rights that derive from the ACHR*" (García Ramírez, Concurring Opinion, *Castro-Castro*, 2006, par. 30).

Such a strict interpretive connection has particular implications when established by an authoritative regional Court, which then comes to have interpretive and enforcement powers on both the ACHR and the BdPC. A similar connection exists between the UDHR and CEDAW, but can doubtfully be used with the same strength, lacking a unified judicial body with competence to enforce such treaties.

In *Cotton Field* and *Castro-Castro* the Court also refers to Article 4 (Right to life) ACHR and, in *Castro-Castro*, the reasoning is further developed on the basis of Article 5 (Right to Human Treatment) ACHR in relation to VAW, enriched by the direct reference to both BdPC and CEDAW, which the Court identifies as part of the *corpus juris* on the subject.¹²⁶

¹²⁶ Breaches to both articles are under consideration in the pending *Maria Isabel Véliz Franco et al v. Guatemala*.

In *Fernández-Ortega et al. v. Mexico* and *Rosendo-Cantú et al. v. Mexico* the Court considers the facts under, *inter alia*, Article 11 (Right to Privacy) ACHR, drawing on ECrtHR's jurisprudence to ground the broad interpretation of the concept of privacy, including private life,¹²⁷ sexual life,¹²⁸ the right to establish and develop relationships with other human beings¹²⁹ and the "*right to decide freely with whom to have intimate relations, causing her to lose complete control over this most personal and intimate decisions, and over her basic bodily functions*" (ECrtHR, *M.C. v. Bulgaria*, para. 150). Not counting on a specific convention in the European System, the ECrtHR largely relies on the expansion of the interpretation of Article 8 ECHR (Right to a Private Life), a solution that has directly challenged the issue of the public/private divide, particularly evident in the European Convention given the time of its adoption.¹³⁰

Although it does not refer to Latin American countries, focus of this research, the Commission's decision *Jessica Lenahan (Gonzales) et al. v. United States* provides the ultimate argument to conclusively drop the criticisms of the choice of a specialized instrument. Indeed, based on more than ten years of "training" in integrating a gender perspective in its evaluations, the Commission manages to develop a strongly gendered analysis although being allowed to refer only to provisions of the 1948 ADHR,¹³¹ due to the fact that United States ratified no legally-binding instrument, regional or universal, general or specific, nor recognised the competence of the IACrtHR. In our view, such a result could not have been obtained without the crucial influence of the BdPC in triggering a "learning process" that contributed to construct Inter-American Institutions' gender-sensitivity, beyond written provisions.

Although, as clarified, we do not share all the conclusions drawn from feminist legal theory, we included this brief review in the analysis given the interesting

¹²⁷ Refer to: *Ituango Massacres v. Colombia* (para. 193); *Tristán Donoso v. Panama* (para. 55); *Escher et al.* (para. 113).

¹²⁸ Refer to ECrtHR, *Dudgeon v. the United Kingdom* (para. 41); *X and Y v. the Netherlands*, (para. 22).

¹²⁹ Refer to ECrtHR, *Niemietz v. Germany* (para. 29); *Peck v. United Kingdom* (para. 57).

¹³⁰ Article 8: 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.* 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

¹³¹ The ADHR pre-dates the UDCH.

elements brought to the debate, usually overlooked in strictly technical juridical accounts. Notably, such arguments raise attention on a further element to consider, i.e. the *novelty* of the approach, and the initial lack of familiarity with the BdPC of both individuals and Institutions. This issue concerns the question of its *acceptability*, which, differently from the *legitimacy* issue, lays in the capacity of society (and Institutions) to accept its implications (Helfer, 2002). In the case of Women's Conventions, this dimension is particularly relevant, given the fact that their effectiveness rests on the acknowledgement of the need of a societal transformation. Such problem emerges from de fact that the recognition of a generalised context of structural discrimination in social relations concerns all social institutions, providing a framework of analysis which is, inherently, not yet internalised by societies to which they refer. As we saw in the First Section of this research, this approach has been shaped on the contributions of feminist legal scholarship and movements to the construction of the recent instruments of protection of women's rights.

Internalising the paradigm shift in the Inter-American System: How the IACommHR and the IACrTHR learnt to use the BdPC

The multi-level coalition

The participation of civil society and active academic communities often produced innovative strategies to make use of new international instruments (Nelson and Dorsey, 2006; Risse, Sikkink, 1999; Sikkink, 2003). For what concerns the BdPC, the development of principles and standards of protection emerged through a process of mutual alimentation between Inter-American Institutions and other actors, facilitated by structural and procedural conditions. MacDowell Santos argues that “multi-level coalitions” of local, regional and international organisations, can be credited for some of the most successful decisions in terms of social impact (MacDowell Santos, 2007). On the one hand, these actors often influenced public opinion and national governments, but they also contributed their expertise to the Court. On the other hand, the Court’s endorsement of external inputs let them come out of specific fields and enter that of law,¹³² presenting States with newly constructed shared understandings, and providing women’s human rights movements with material to set international judicial precedents, that could be held in front of national institutions (Pinto Coelho et al. 2008).

Analysing Inter-American jurisprudence on VAW, we identified external analytical contributions coming from a variety of sources. These documents are usually attached to petitions files, referred by petitioners’ representatives, or presented in *Amici Curiae* briefs.

Although neither the ACHR nor the Court’s Rules of Procedure originally mentioned *Amici Curiae* briefs, the IACrTHR began immediately to consider them implied by Article 34.1 of its Rules of Procedure. This rule allows the IACrTHR to rely on different sources to gather information and testimonies that would facilitate its adjudicatory function. Originally these briefs dealt mainly with legal issues, but through time the Court admitted briefs containing other

¹³² The strength of such process is about to be tested in the still pending *Véliz Franco v. Guatemala*.

types of relevant information, received from a wide variety of sources, ranging from NGOs to experts, scholars, prominent persons with special knowledge on the issue and advocacy groups.

The influence of *Amici Curiae* briefs in the Inter-American System has been often emphasised. As early as in 1985, IACrTHR's Judge Buerghental argued that contributors of *Amici Curiae* could have a crucial role in the proceedings, coordinating their efforts with the Commission, as representatives of the victims (Buerghental, 1985; see also Moyer, 1986). These briefs usually provide experts' analyses, extensive evidence and empirical research, or underline original elements to be considered by the Court, promoting dynamic interpretations based on specific contextual elements and, in some cases, grounding the legitimacy of Court's endorsement of transformative understandings.¹³³ Additionally, given that they generally support victims' interests in the case, they provide a significant tool to equalize their position vis-à-vis the State in a contentious case.

Amici Curiae briefs have been explicitly introduced in the IACrTHR's Rules of Procedure in 2009,¹³⁴ and Article 2.3 defines the term:

'amicus curiae' refers to the person who is unrelated to the case and to the proceeding and who submits to the Court a reasoning about the facts contained in the application or legal considerations over the subject-matter of the proceeding, by means of a document or an argument presented in the hearing.

Article 41 (Arguments of Amicus Curiae) regulates the submission of *Amici Curiae* briefs:

The brief of one who wishes to act as amicus curiae may be submitted to the Tribunal, together with its annexes, at any point during the contentious proceedings, but within the term of 15 days following the public hearing. If the

¹³³ Moyer underlines the critical function *Amici Curiae* played in the United States Supreme Court, when broad social problems such as racial discrimination or voting rights were discussed (Moyer, 1986).

¹³⁴ The first Rules of Procedure of the Court were approved in 1980, in the III Ordinary Period of Sessions. The Rules were then amended in the 1991 XXIII Ordinary Period of Sessions, in the 1996 XXXIV Ordinary Period of Sessions, in the 2000 XLIX Ordinary Period of Sessions, in the 2003 LXI Ordinary Period of Sessions and, finally, in the 2009 LXXXII Ordinary Period of Sessions.

Court does not hold a public hearing, amicus briefs must be submitted within the term of 15 days following the Resolution setting deadlines for the submission of final arguments and documentary evidence. Following consultation with the President, the amicus curiae brief and its annexes shall be immediately transmitted to the parties, for their information.

In the field of VAW, a wide variety of actors interacting with Inter-American Institutions played a crucial role in the elaboration of Inter-American standards of protection of women's rights, based on the BdPC and in the framework of the instruments and procedures established in the Universal System. Scholars and human rights organisations often performed a critical role in the cases, contributing needed specific expertise, both in directly representing victims of VAW and providing crucial evidence for their allegations, presenting context-based analyses. As we will see, our case law review provides evidence of this process, as well as of its incremental influence, which parallels regional actors' increased familiarity with the BdPC.

In *Raquel Martín de Mejía v. Peru* (1996), with the BdPC just entered into force, no previous experience with the instrument and in the absence of other international bodies' case law on a similar convention,¹³⁵ given the type of violation involved in the case, the Commission largely draws from international humanitarian law to consider sexual abuse in a case of armed conflict.¹³⁶ In particular, the reasoning refers to Article 27¹³⁷ and 147¹³⁸ of the 1949 Fourth Geneva Convention, Article 76¹³⁹ of Additional Protocol I and to Article 3,¹⁴⁰

¹³⁵ CEDAW Optional Protocol was adopted several years later.

¹³⁶ Citing the 1993 United Nations Secretary General Report considerations on establishing an international tribunal for the prosecutions of persons responsible for serious violations of International Humanitarian Law committed in the territory of the former Yugoslavia.

¹³⁷ Article 27: (...) Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats, thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular, against rape, enforced prostitution or any form of indecent assault (...).

¹³⁸ According to Article 147, serious offenses are those (...) committed against persons or property protected by the present Convention:(...) torture or inhuman treatment, including (...) wilfully fact of causing great suffering or serious injury to body or health (...).

¹³⁹ Article 76 (Protection of Women): 1. Women shall be afforded special respect and protected in particular against rape, forced prostitution and any other form of indecent assault (...).

¹⁴⁰ Article 3 establishes acts prohibited at any time and in any place: (...) a. Attacks against life and bodily integrity, especially homicide in all its forms, mutilations, cruel treatment, torture and ordeals; (...) c. Attacks against personal dignity (...)

common to the Geneva Conventions. Moreover, the Commission refers to Article 5 of the Statute of the International Criminal Tribunal for former Yugoslavia (ICTY), recognising rape practiced on a systematic and large scale as a crime against humanity. Adopting the extended interpretation elaborated by the ECtHR on the basis of Article 8 ECHR,¹⁴¹ the Commission further evaluates the facts under Article 11 ACHR.

Let us recall that, until the adoption of the BdPC, neither the Inter-American System, nor the European System presented a specific regional instrument on women's rights or VAW, thus, evaluations of cases such as that of *Raquel Martín de Mejía*, had to be carried out on the basis of the respective general conventions and existing additional instruments. Incidentally, as we will see, we note that this is still the case for what concerns the ECtHR.

Using external sources the Commission focuses on the dimension of sexual abuses that had been, at the time, extensively addressed and analysed with reference to contexts of conflict, i.e. the interpretation of rape as a form of torture used by public officials in emergency areas. The Commission refers to additional evidence provided by the 1992 United Nations Report of the Special Rapporteur against Torture and the 1993 specific analysis on Peru, several Amnesty International reports on sexual abuses against women in emergency areas, Human Rights Watch studies on the use of rape in counterinsurgency campaigns in Peru, and its own 1993 Report on human rights in Peru. The type of documentation used in the decision, and the normative framework set by the Commission, define the boundaries within which the evaluation is carried out.

Notwithstanding the paradigm shift on VAW already endorsed both at universal and regional level, the features of the case and the extensive documentation available on rapes in armed conflict, as opposed to the lack of analyses of concrete cases of VAW as a manifestation of unequal social relations, discourages a reference to the still largely unfamiliar and just adopted BdPC. Notably, the petitioners themselves do not refer to the new understanding of VAW. A gendered analysis would have captured the difference between the *occasion* of the violence, its *causes*, its *motivation* and its *form*. The IACommHR's reasoning completely revolves around the *form* of the violation,

¹⁴¹ Refer, *inter alia*, to ECtHR *X and Y vs. The Netherlands*.

rape. Based on the 1992 Report of the UN Special Rapporteur against Torture and on documentation provided by non-governmental bodies such as Amnesty International and Human Rights Watch, the Commission recognises rape as a common practice in areas under state of emergency in Peru, and as a form of intimidation and punishment against women belonging to groups suspected of collaborating with insurgent forces, which humiliates and degrades them. For what concerns rapes, disproportionately affecting women, no particular gender-sensitiveness is required to identify the sex of the victim as a determinant factor of the *form* violence used against “suspects”. The *occasion* for the violation is described in detail in Commission’s investigations and in the extended documentation attached to the case file. The facts occurred in areas under state of emergency in Peru, where military forces were not subjected to control. In this early case, the Commission does not consider the *causes* at the origin of that particular form of violence, nor it evaluates in depth its *motivation*, allegations of belonging to insurgent groups. The *Dianna Ortiz vs. Guatemala* (1996) decision presents similar features, being analysed in the framework of the pattern of repression of representatives of the Church working in indigenous communities. Again, none of the sources of information and documentation takes into account the gender of the victim in the evaluation of the facts, nor such a reference is made by the petitioners, or in *Amici curiae* briefs.

Ana, Beatriz, and Celia González Pérez v Mexico (2001) represents the first case in which a Commission’s reference to the BdPC would have been uncontroversial. The case did not present any particular obstacle to the application of the BdPC framework of analysis and, we argue, actually represented an “easy case”. Indeed, several of the problems we addressed in the First Section of this research do not concern this case: the violation is clearly identifiable as rape and torture and the perpetrators are public officials, which avoids problems in identifying State’s responsibility. Moreover, the facts had occurred in 1994, Mexico was Party to CEDAW since 1981 and, although it ratified the BdPC in 1998,¹⁴² the Commission could have referred to it given the *continuous nature* of the State’s violation of the right to a fair trial and the right to judicial protection, a concept thoroughly elaborated by the Inter-American

¹⁴² Mexico signed the BdPC on June 10, 1994, six days after the submission of the petition to the Commission, and deposited its instrument of ratification on November 12, 1998. Article 4 BdPC states that “every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments.”

Institutions in the cases of *desaparecidos* (see, for instance, the *Velazquez-Rodriguez* case). Given the lack of familiarity with the BdPC and the pending status of Mexico's ratification at the time of the petition's submission, the Centre for Justice and International Law (CEJIL), which represented the victims, did not invoke BdPC provisions. In evaluating the facts the Commission considered them also under Article 1.1 ACHR and Article 8 of the Inter-American Convention to Prevent and Punish Torture, which Mexico had ratified in 1987, which had not been invoked by the petitioners. The reasoning largely draws on ICTY¹⁴³ and ECtHR's¹⁴⁴ case law and on UN documents analysing rape as a form of torture, although showing and increased sensitivity to its psychological dimensions and to the problem of re-victimization in medical examinations and judicial proceedings.

Although the Commission briefly mentions the BdPC, it does not elaborate on its content and the analysis does not present any reference to the gendered nature of the violations. Notably, the Commission quotes in the footnotes a statement of the Special Rapporteur on VAW that, arguably, contained the essence of the paradigm shift on VAW, diminishing the reliance of the traditional "honour and humiliation" interpretation of rapes and pointing at their discriminatory nature: *"Perhaps more than the honour of the victim, it is the perceived honour of the enemy that is targeted in the perpetration of sexual violence against women; it is seen and often experienced as a means of humiliating the opposition. Sexual violence against women is meant to demonstrate victory over the men of the other group who have failed to protect their women. It is a message of castration and emasculation. It is a battle among men fought over the bodies of women"* (UN Special Rapporteur Report 1998, para. 13). As mentioned, the quote is placed in the footnotes of the decision, signalling the scarce consideration of its evolutionary content.

On the contrary, in 1998, CEJIL and the Latin American and Caribbean Committee for the Defence of Women's Rights (CLADEM) submitted the *Maria da Penha vs. Brazil* petition, directly invoking several provisions of the ACHR

¹⁴³ ICTY, *Prosecutor v. Anto Furudzija*, 1998 (para. 163); the decision was confirmed in 2000 by the ICTY Court of Appeals.

¹⁴⁴ ECtHR, *Aydin v. Turkey*, 1997 (para. 83).

and Article 4,¹⁴⁵ 5,¹⁴⁶ and 7 (Positive Obligations and Domestic Legal Effect) BdPC. Due to the peculiar features of the case, concerning domestic violence and impunity, and on the basis of the evidence provided by the victim's representatives, in this occasion the Commission considers the case under the new instrument. Although the facts had taken place several years before Brazil's ratification of the BdPC, the Commission grounds its competence pursuant the convention on the *continuous nature* of violations of the right to effective legal remedies, extensively documented by the victim's representatives. Notably, hence, victim's representatives were responsible of triggering the use of BdPC normative framework and the reference to the systematic and on-going Brazilian judicial system's generalised attitude of tolerance towards domestic violence.

Considering the complex issue constituted by the traditional public/private "dilemma" in international law, addressed in the First Section of this research, it might seem paradoxical that the path-breaking case in Inter-American analyses on VAW involves a case of domestic violence perpetrated by a private individual. However, it is indeed *because of* the attention attracted by the dilemma and the international awareness on the issue of domestic violence, raised by CEDAW Committee's General Recommendation 19, that the *Maria da Penha* case constituted, in fact, an "easier" case to experiment the new approach to VAW as a human rights violation and to States' positive obligations.

In *MZ v. Bolivia* (2001), the Oficina Jurídica para la Mujer, CLADEM and, again, CEJIL invoked Article 7 BdPC. In this case, another element provides evidence

¹⁴⁵ Article 4: *Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others: a. The right to have her life respected; b. The right to have her physical, mental and moral integrity respected; c. The right to personal liberty and security; d. The right not to be subjected to torture; e. The rights to have the inherent dignity of her person respected and her family protected; f. The right to equal protection before the law and of the law; g. The right to simple and prompt recourse to a competent court for protection against acts that violate her rights; h. The right to associate freely; i. The right of freedom to profess her religion and beliefs within the law; and j. The right to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making.*

¹⁴⁶ Article 5: *Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognise that violence against women prevents and nullifies the exercise of these rights.*

of the crucial role of organisations and advocacy networks in appropriately presenting the facts. The NGO Equality Now submitted an *Amicus Curiae* with an original analysis of the lack of effective judicial proceedings, contributing its specific expertise to the evaluation of the facts. The brief reports that, after MZ's sexual violation had been established in a proceeding that fully complied with the rights of the accused, reviewing courts "*rather than identifying legal defects, employed rape myths – a form of sex inequality through gender bias – to reverse that finding*" (p. 3).¹⁴⁷ The NGO argues the use of *rape-myths* in Appeal Courts' proceedings proving evidence of reasoning based on discriminatory assumptions, i.e. only *certain* women are raped, women resist sexual relations that they actually consent to, unwanted sexual relations imply forceful reactions, women routinely invent allegations of rape out of embarrassment or revenge. In the NGO's interpretation, endorsed by the Commission, the use of *rape-myths* not only prevents victims from obtaining justice, but also reproduces and promotes a conducive context for sexual abuses.¹⁴⁸ The quality of the analysis provides the Commission with an accurate gender-sensitive perspective, based on the specific experience on the issue of a women's rights organisation.

Further evidence of the influence of external actors in the development of Inter-American Institutions analytical tools emerges from the proceedings of the *Castro-Castro* case. Let us recall that, although the wording of Article 12 created ambiguity for what concerns the competence of the IACrTHR on the BdPC, the lack of clarity did not affect the competence of the Commission, explicitly allowed to receive petitions based on Article 7 BdPC. In *Castro-Castro*, the petitioners provide Inter-American Institutions the occasion to overcome the *impasse* created by the ambiguous wording of Article 12 BdPC. The petition invokes BdPC provisions, supporting allegations with documentation and testimonies provided by, *inter alia*, the Association of Relatives of Missing Political Inmates and Victims of Genocide. As seen previously in this research, it is in this case that the IACrTHR extends its competence, inaugurating BdPC

¹⁴⁷ The *Amicus curiae* is available on the NGO website at: www.equalitynow.org/sites/default/files/mz_en.pdf.

¹⁴⁸ In 2010 CEDAW Committee decided on similar case, *Vertido v. Philippines*, where the petitioner alleged the violation of her right to a fair trial arguing the use of *rape myths* by national courts. However, the Committee never mentioned the precedent with *MZ v. Bolivia*. Given the fact that the latter ended in a Friendly Settlement, it is unsurprising that it did not achieve resonance as an authoritative precedent.

full justiciability. Notably, the Commission did not include provisions of the BdPC in its application to the Court. As mentioned, this exclusion was arguably mainly due to the Commission's doubts on the competence of the Court on the instrument. Nevertheless, the extensive documentation provided by experts, psychologists, scholars and the Commission for Truth and Reconciliation, both during the hearings and in the documents attached to the case file, convinced the Court that *"women [...] were affected by the acts of violence differently than the men, that some acts of violence were directed specifically toward the women and others affected them in greater proportion than the men (...)"*(Castro-Castro case, 2006, par. 223), providing the occasion to interpret Article 12 BdPC as implying the Court's contentious jurisdiction.

Notably, in his Concurring Opinion, Judge Cançado Trindade explicitly referred to the crucial role played by the petitioners, and even questioned the role of the Commission as a representative of the victims: *"(...) Within the context of the present case of the Prison of Castro-Castro, the representation of the victims and their next of kin, through their common intervener (Mrs Mónica Feria Tinta), also a victim of this specific case, captured, besides the facts (cf. supra), the legal grounds applicable, with greater precision and success than the Commission, with regard to this specific matter. This may not go unnoticed and it constituted for me a encouraging fact, since, - as I have been insisting for years in the bosom of this Court and in my books,¹⁴⁹ - the true plaintiff before the Court are the petitioners (and not the Commission), who, as indicated in the present case, have reached a level of maturity considered sufficient to present their arguments and evidence in an autonomous manner, not only in factual matters, but also in juridical subjects (cf. supra), and in some cases - as is the present case - with greater precision and success than the Commission. Therefore, the paternalistic and anachronistic vision that in the past stated that the petitioners always needed a body such as the Commission to "represent them" has been completely overcome. Not always. The present case proves it beyond doubt"* (Concurring Opinion, par. 38-39).

The "level of maturity" to which Judge Cançado Trindade refers is, also, inherently dependent on the petitioners' familiarity with the new instrument and a specific framework of analysis. Let us underline, that in *Ana, Beatriz, and*

¹⁴⁹ See Cançado Trindade, 2001.

Celia González Pérez vs. Mexico CEJIL did not mention the BdPC, whereas, shortly afterwards, the same organisation and the Latin American and Caribbean Committee for the Defence of Women's Rights (CLADEM) invoked the convention when submitting the *Maria da Penha* petition. Although the two cases refer to very different facts, the *continuous nature* of the violation of the rights to effective legal remedies, on which the Commission bases the applicability of the BdPC, could have been similarly used in *Ana, Beatriz, and Celia González Pérez vs. Mexico*, both by the petitioners and by the Commission itself. In this sense, considering Judge Cançado Trindade's argument, we argue that, while the long experience of the Inter-American System led petitioners to reach a sufficient level of *maturity* to accurately present their arguments, possibly eliminating the need for an intermediate institution such as the Commission, such maturity is not, *per se*, sufficient when it comes to the capability to use new international instruments and specific frameworks of analysis, that also depend on petitioners' *familiarity* with evolutionary understandings and availability of specific expertise. Besides the obvious difference made by the fact that the *Maria da Penha* petition was submitted after *Ana, Beatriz, and Celia González Pérez vs. Mexico*, when the BdPC was two years older in the system, the crucial "shifting" contribution was provided by the direct involvement of a women's rights organisation with more than ten years experience on the issue: the Latin American and Caribbean Committee for the Defence of Women's Rights (CLADEM). These elements, and the Commission's discarding of BdPC provisions in referring the *Castro-Castro* case to the Court, provide the basis to recognise a crucial role of organisations and advocacy networks, with specific expertise, in signalling the path to Inter-American Institutions, presenting cases on the basis of the new instrument available and suggesting appropriate frameworks of analyses, when Inter-American Institutions could not count on previous endogenous or exogenous experiences of gendered analysis of concrete cases.

Following the increased *visibility* of the BdPC following *Castro-Castro*, and due to the incremented familiarity with women's rights instruments in the region, the Commission received several petitions presenting cases of VAW and invoking the BdPC. In *Las dos Erres Massacre v. Guatemala* (2009), the Court considers the facts under the BdPC, on the basis of the arguments provided in a brief by CEJIL and the Association of Relatives of the Detained-Disappeared of Guatemala. Eventually, referring *Fernández-Ortega et al. v. Mexico and Rosendo-*

Cantú et al. v. Mexico (2010) to the Court, the Commission itself, for the first time and on the basis of the provisions invoked by the petitioners, includes BdPC provisions in its application.

All case files provide evidence of the crucial role of civil society organisations, experts and women's rights advocacy groups, contributing contextual information and specific analyses, in developing Inter-American Institution's gender-perspective. Nevertheless, the previously mentioned bi-directional process of *mutual alimentation* is particularly evident for what concerns the use of the concept of *femicides*, analysing killings of women presenting specific features. In the *Cotton field* case, an actual coalition of experts, scholars and advocacy groups, provided the Court with a new conceptual tool of analysis. At the same time, the Court's endorsement of the concept of *femicide*, introducing an essentially anthropological and social conceptual elaboration in the legal discourse on women's human rights, enhancing its legitimacy and, as we will see further on in this research, providing an authoritative precedent to trigger regional convergence on the national reception of the new juridical category. In the following paragraphs we shall briefly describe the development of the concept in the Latin American and its content.

Originally (not often) used simply to indicate the homicide of women, in 1992 the term was adopted by Diana Russell to name the killing of females by males *because they are females*¹⁵⁰ (Radford, Russell, 1992). The term does not indicate solely the killings following sexual violence, but those generated by hatred, misogyny and discrimination in essentially patriarchal societies. In the following years, scholars and feminist movements throughout the Americas elaborated the concept, beginning precisely with Mexico. Feminist scholar Marcela Lagarde translated the term with the Spanish word *feminicidio* (*femicide*), and later extended its definition, based on the features of the killings in Ciudad Juárez. Incidentally, we note that the area of Ciudad Juárez is the location of the facts concerning *Cotton field*, and that Lagarde was one of the experts providing testimonies to the Court during the hearings of the case. This author added to the concept the issue of impunity, defining *feminicide* as "*a hate crime against women, a misogynous crime forged by the enormous social*

¹⁵⁰ Russel uses the term "female" intentionally, to underline the inclusion of young girls, children and older women.

and state tolerance of gender violence, fostered by impunity, by haphazard investigations and mishandled findings. Access to justice and fair trial have not become a reality because the authorities do not pay attention to the victims charges and seem to see women's lives as secondary or are biased against women, discrediting and blaming them. Silence, omission, negligence and the collusion of authorities responsible for preventing and eradicating crimes against women contribute to femicide" (in Spinelli, 2008).

Lagarde considers that patriarchal ideology plays a crucial role in the impunity that surrounds *femicides*, founded on a conception of women as expendable social subjects (Lagarde, 2006). De Miguel Alvarez observes that hegemonic ideologies, such as patriarchy, are so deeply anchored in people's understandings that they normalize VAW, even in the perception of women themselves (De Miguel Alvarez, 2005). In these views, patriarchal ideologies legitimate the punishment of women who resist violence, blaming them as the inciters of male violence (Lagarde, 2006). Social structures create conducive contexts for VAW and impunity; therefore, in order to eradicate the phenomenon, it is crucial to delegitimize a system founded upon women's assumed inferiority and their subordination to men. Notably, this framework of analysis is reflected in all Women's Conventions, reviewed in the First section of this research, and emerged from the dominance approach elaborated by feminist legal scholars. VAW presents specific forms of implicit legitimization, based on women's subjugated social position, which requires them to show respect and obedience. Therefore, as Torres Falcón argues, VAW does not have the same weight as the violence occurring between two equals. Because of women's discrimination, VAW ceases to be perceived as violence against human beings and becomes naturalized as a cultural expression, rendering legal equality an unaccomplished project (Torres Falcón, 2004). Referring to the Mexican case, Lagarde raises the traditional gender-bias criticism, pointing at it as an enhancing factor for the perpetuation of impunity, given that most members of the judiciary and media are men (Lagarde, 2006). Lagarde's main contribution to the development of the concept of *femi(ni)cide*, was to make it independent from the death of the woman. In this sense, *femicide*, refers to extreme (discriminatory) VAW, of which killings are the most dramatic outcome, violating women's rights in the public and private sphere and originating in structural misogyny and social impunity, which place women in

vulnerable social positions.¹⁵¹

Although Inter-American Institutions adopted the more restrictive concept of *femicide*, better suited to be translated into a juridical category, the choice comes as an endorsement of a particular framework of analysis, (regionally) elaborated in the field of gender studies and feminist movements.

Inter-American Institutions use the concept of *femicide* in *González et al. (Cotton Field) v. Mexico* (2009) and *Maria Isabel Véliz Franco et al v. Guatemala* (pending). In *Cotton Field* victims are represented by the Asociación Nacional de Abogados Democráticos, the Latin American and Caribbean Committee for the Defense of Women's Rights, the Red Ciudadana de No Violencia y por la Dignidad Humana and the Centro para el Desarrollo Integral of the Mujer, and *Amici Curiae* briefs were submitted by: CEJIL, the University of Toronto International Reproductive and Sexual Health, TRIAL-Track Impunity Always, the World Organisation against Torture, the Legal Research Institute of the Universidad Nacional Autónoma de Mexico, UNAM Postgraduate Department, Women's Link Worldwide, the Women's Network of Ciudad Juárez, Universidad de los Andes Global Justice and Human Rights Program, the Universidad Iberoamericana of Mexico Human Rights Program and Master's Program in Human Rights, Human Rights Watch, Horvitz and Levy,¹⁵² the

¹⁵¹ Refer to Puentes Aguilar, 2007. The author analyses femicides and feminicides in Mexico in the context of direct, structural and cultural violence. Building upon Lagarde's conceptualization (Lagarde, 2006), she distinguishes between femicides (murders of women) and feminicides (murders of women by men and because they are women). Her study rigorously analyses information on feminicides published in the written press and includes an analysis of homicides perpetrated by women against men (VAM), breaking new ground in its comparative analysis of VAW and VAM.

¹⁵² Notably, this brief was supported by an outstanding number of institutions and organizations, such as: Amnesty International, the Center for Gender and Refugee Studies, the Center for Justice and Accountability, the Human Rights Center of the Universidad Diego Portales, Columbia Law School Human Rights Clinic, Cornell Law School International Human Rights Clinic, the Domestic Violence and Civil Protection Order Clinic of the University of Cincinnati, the Human Rights and Genocide Clinic, Benjamin N. Cardozo School of Law, Human Rights Advocates, the Immigration Clinic at the University of Maryland School of Law, the Immigration Justice Clinic, IMPACT Personal Safety, the International Human Rights Clinic at Willamette University College of Law, the International Mental Disability Law Reform Project of New York Law School, the International Women's Human Rights Clinic at Georgetown Law School, Latinojustice PRLDEF, the Legal Services Clinic at Western New England College School of Law, the Leitner Center for International Law and Justice at Fordham Law School, the Allard K. Lowenstein International Human Rights Clinic, Yale Law School, the National Association of Women Lawyers, the Los Angeles Chapter of the National Lawyers Guild, the National Organisation for Women, Seton Hall University School of Law Center for Social Justice, the Urban Morgan Institute for Human Rights, the U.S. Human Rights Network,

International Commission of Jurists, Amnesty International, the Essex University Human Rights Centre and the International Center for Transitional Justice. Moreover, the IACrTHR received testimonial evidence of witnesses and experts from twenty-nine individuals. Notably, as mentioned, Mexican Feminist scholar Marcela Lagarde appears in the list of the submitted expert statements.

The evidence found in our analysis of case files, signals the crucial role that civil society and an active academic community played in the Inter-American experience with the BdPC, with particular reference to its early stage. On the one hand, the maturity reached by victims' representatives in framing their analyses in the language of Inter-American Institutions, and the familiarity of women's rights organisation with gendered-violations, allowed them to appropriately present cases on the basis of previously unavailable provisions, such as the *Maria da Penha* case. On the other hand, the specific expertise provided to Institutions with a general mandate, and no previous experience in gendered analyses, triggered a learning process that contributed to the construction of gender-specific standards of protection. Notably, victims' representatives even successfully overcame Commission's filtering, such as in *Castro-Castro* and *Las dos Erres Massacre*, creating the conditions to solve the *impasse* on IACrTHR's contentious jurisdiction on the BdPC. On the other hand, the quality of their gender-sensitive analyses contributed valuable additional conceptual tools to Inter-American Institutions, as happened with the documented insight on *rape myths* presented in *M.Z. vs. Bolivia*, and the reference to the concept of *femicide* in *Cotton field*.

The permeability to external contributions coming from civil society actors and scholars strengthens Latin American societies' perception of the System's accessibility, while also providing Inter-American Institutions with relevant perspectives on specific issues, such as the discriminatory nature of VAW, in absence of consolidated previous experience. At the same time, Institutions' endorsement of elaborations coming from specific fields strengthened their legitimacy, translating them in the language of human rights law, and providing lawyers, advocacy groups and public officials with authoritative precedents to

the Women's Law Project, the Women Lawyers Association of Los Angeles, and the World Organisation for Human Rights USA.

trigger reforms in national legal systems and public policies (Pinto Coelho et al. 2008; Zuloaga, 2004), enhancing the impact of BdPC and Inter-American case law at national level, as we will see analysing national legislations on VAW. This mutual alimentation process provides a valuable support for the development, regionalisation and effectiveness of the BdPC and the new paradigm offered to interpret and promote women's rights. In this sense, a Court with procedural rules such as those of the IACrTHR, which allow to consider a wide-variety of sources of relevant information, and competence on interpreting and enforcing the BdPC in a multilevel system of human rights protection, constitutes a favourable institutional precondition for the development of standards of protection of women's rights at regional and national level.

In reviewing case law on VAW, we found evidence of the incremental use of Commission's Reports, besides external contributions, in Commission's decisions and in IACrTHR's judgements¹⁵³. In its Second Report on the Situation of Human Rights in Peru (2000) and in the Report on the Rights of Women in Chile: Equality in the Family, Labour and Political Spheres (2009), the IACommHR grounded on empirical research the understanding of VAW as manifestation of gender-based discrimination. In Situation of the Rights of Women in Ciudad Juárez (2003), it evidenced the features of a specific context in which generalised patterns of VAW represent a constant risk as a human security, social and public health problem.¹⁵⁴ In Violence and Discrimination against Women in the Colombian Armed Conflict (2006), the Commission provided information on the impact of VAW on the full enjoyment of other fundamental rights (para. 29). Country Reports have proven crucial when assessing States' due diligence with respect to VAW, in identifying appropriate overarching measures of prevention (see the 2003 Report on Ciudad Juárez, paras. 154-155) and necessary legislative reforms (see 2009 Report on Chile, para. 42). In Violence and Discrimination against Women in the Armed Conflict

¹⁵³ Let us recall that the IACommHR participates as a representative to all cases heard by the Court (Article 57 ACHR).

¹⁵⁴ The Report states: *"It has been accorded priority in the region as such, with the conviction that its eradication is essential to ensure that women may fully and equally participate in all spheres of national life. Violence against women is a problem that affects men, women and children; it distorts family life and the fabric of society, with consequences that cross generations. Studies have documented that having been exposed to violence within the family during youth is a risk factor for perpetrating such violence as an adult. It is a human security problem, a social problem and a public health problem"* (para. 122).

in Colombia (2006), the Commission analysed the State's responsibility in a context of conflict and observed that: "*Within the armed conflict, all the circumstances that have historically exposed women to discrimination and to receive an inferior treatment – above all their bodily differences and their reproductive capacity, as well as the civil, political, economic and social consequences of this situation of disadvantage – are exploited and manipulated by the actors of the armed conflict in their struggle to control territory and economic resources*" (para. 46).

The outcome of such interaction is exemplified in the proceedings of the case *Maria Isabel Véliz Franco et al v. Guatemala*, currently pending before the Court, in which the mother of the victim is assisted by the Centre for Justice and International Law (CEJIL) and the *Red de No Violencia Contra Mujeres en Guatemala*. To ground its Report, the Commission uses its own Fifth Report on the Situation of Human Rights in Guatemala, the 2007 Report on Access to Justice for Women Victims of Violence in the Americas, the 2004 Report of the Special Rapporteur on the effectiveness of the rights of women in Guatemala and the testimony of Amnesty International, identifying a context conducive to VAW in which killings are largely tolerated by society and discriminatory practices operate in the practice of the conduct of investigations. In identifying a context of impunity, the Commission refers to the definition supported by CEDAW Committee and General Recommendation 19, its own precedents *Maria Da Penha Fernandes v. Brazil*, *María Eugenia Morales de Sierra vs. Guatemala* and *Jessica Lenahan (Gonzales) et al. v. United States*, and IACrHR's *Cotton Field*. To argue the special connotations of due diligence in cases of VAW, the Commission refers to Resolution 2003/45 of the United Nations Commission on Human Rights and ECtHR's case law in *Opuz v. Turkey* (2009).

External sources and Commission's reports contribute providing the specific documentation necessary to construct Inter-American Institutions' understanding on the origins and features of VAW in local contexts. Notably, in these documents the Commission draws on a variety of sources, including the United Nations, Amnesty International, scholars, NGOs and civil society organisations that identify, describe, and document the contextual and subjective features of VAW in concrete contexts. The increasing production of Commission's thematic and country reports, represents a significant

opportunity to organize and structure the collection of relevant evidence, beyond the contingent efforts of different actors in each given case.

Grasping intersectionality

We argued that the Inter-American System provides a suitable context for dialogue between regional institutions and several actors in Latin American societies. During the long and successful experience of the Inter-American multilevel protection system, NGOs, civil society movements, advocacy networks, scholars and legal practitioners, reached a level of maturity and familiarity with regional instruments that enabled them to autonomously and appropriately present arguments and evidence to support victim's allegations. For what concerns the jurisprudence on VAW, we found evidence of their critical role in compensating Inter-American Institutions' lack of previous experience with the BdPC and specific expertise on gendered-analyses, and triggering BdPC full justiciability. We also noticed the significant contribution that organisations and scholars with specific experience on women's rights and gender studies brought to the development of Inter-American Institutions' gender-sensitivity in evaluating cases of VAW. If we consider the criticisms raised by feminist legal scholar on the inherent gender-blindness of international human rights law, on the one hand, due to the male-bias of "neutral" general norms, and international institutions, on the other hand, given women's overall underrepresentation, we can argue that the availability of a specific instrument complementing general norms and the permeability of Inter-American Institutions to external sources, constitute significant elements compensating such shortcomings and developing the System's capability to address appropriately gendered violations.

In the following paragraphs, we shall consider the implications of a further analytical tool developed by feminist legal scholars, the concept of intersectionality, analysed in the First Section of this research. Although Inter-American performance in evaluating intersectional factors influencing VAW is still largely unsatisfactory, we argue that the same mutual alimentation process previously described can successfully overcome current shortcomings. As it was the case when gender had yet to be included as a relevant factor in the evaluation of specific cases, we consider the scarce sensitivity to intersectional

factors largely due to, on the one hand, the obvious increased complexity of multi-factorial analyses, on the other hand, the inherent unlikeliness (current and future) to be able to count on Institutions with the appropriate level of expertise, or previous experience, on an enormous amount of specific issues, necessary to grasp interconnections in any given context at any given time. Intersectionality appears to be one of the biggest challenges in increasingly complex societies, constituting an element that, on the one hand, cannot be overlooked, given the current evolved understanding of human rights and, on the other hand, seems to “ask too much” to human-made institutions.

Not only intersectional perspectives require multi-factorial analyses able to address, at the same level of elaboration, issues belonging to completely different fields, but the additional element of cultural diversity might also occasionally imply clashes of fundamental rights for which appropriate (or acceptable) solutions still need elaboration. For what concerns the object of this research, let us consider, for instance, the conflicts that might emerge between women’s rights and cultural or religious rights in concrete cases, and the further complexity introduced by Article 8 BdPC and Article 5(a) CEDAW (unsurprisingly one of those CEDAW provisions collecting the highest number of reservations), transformative provisions that require States to *change* socio-cultural patterns and traditional practices that reproduce unequal relations of power between the sexes. The complexity of intersectional analyses is two fold: on the one hand, as mentioned, it requires multiple sensitivities and expertise, on the other hand, intersectionality impedes standardisation, since the multiplicity of relevant factors, and their relative influence (or “weight”), varies in each concrete case, depending on subjective and context-related features.

To guarantee the adoption of a gender perspective, feminist legal scholars have often called for increased women representation in international institutions. Beyond the “add women and stir”¹⁵⁵ issue, there is wide consensus on the fact that a woman would be more likely to hold useful experience to facilitate gendered analyses. If such partial solution does not present particular

¹⁵⁵ The “add women and stir approach” is an unsatisfactory response to national and international institutions’ gender bias. The wording underlines that the emphasis on increasing the number of women in public decision processes should not overshadow the *hows* and *whys* of balanced representation, since it cannot be considered to guarantee, *per se*, the internalisation of a gendered approach. For general reference see Tint, 2004, whereas for a perspective on the feasibility of such approach to address intersectional see Motmans, Woodward, 2009.

obstacles to be implemented, other than the will to promote women's participation, it is hardly a viable option to ensure intersectional perspectives, since it would imply being able to design institution's compositions representing all possible subjective identities. Intersectionality is a more complex problem, requiring more complex solutions.

On the basis of our previous considerations, in our view, the Inter-American System provides a suitable context to develop a method to overcome such complexity. On the one hand, the Inter-American System includes States with a certain degree of socio-cultural homogeneity and developed an extreme familiarity with national contexts and local specificities. On the other hand, as seen, Inter-American Institutions provide appropriate institutional and procedural preconditions to encourage a dialogue with a wide range of societal actors, which "inform" the cases contributing specific expertise and support to the development of context-related analyses. As we saw in the case of VAW, this is a successful *praxis* in the System, already experienced on several other specific issues, such as collective property rights of indigenous communities, where it enabled the IACrTHR to construct evolutionary interpretations.¹⁵⁶ We argue that, while the issue of intersectionality is inherently unsuitable to be standardised in a norm or solved "once and for all," at procedural level it is possible to provide a coherent solution to its complexity. An increased focus on coordinating different expertise in a "multi-level coalition," as it happens in the case of the elaboration of Commission's Reports on VAW, can prove useful in providing Inter-American Institutions with the appropriate tools to consistently evaluate concrete cases, in which several subjective and contextual factors concur to determine the facts.

In the following paragraphs, we shall analyse the performance of Inter-American Institutions in considering the influence of multiple factors in cases of VAW. From the analysis of relevant jurisprudence, we find that the need to develop intersectional analyses has been largely overshadowed by the, somehow propaedeutic, efforts to provide Inter-American Institutions with the appropriate tools to develop a gender-perspective. However, such restrictive focus presents conceptual limitations that should not be underestimated, given

¹⁵⁶ For an extensive in-depth study of the contribution of Inter American case law on the subject of indigenous rights refer to: Oliva-Martínez, 2012.

the transformative approach of the BdPC and its Article 8. As we saw in the First Section of this research, the critique raised by feminist legal scholars concerned with the issue of cultural relativism and the implicit grounding on white/Western female experiences of the doctrinal conceptualisation of sex-discrimination, provides relevant elements to contribute developing an adequate theory and praxis to address the problem of intersectionality in the Inter-American System. The critical element lies in coherently using the conceptual tool provided by the dominance approach, and endorsed in BdPC and CEDAW with the recognition of the women's structural social discrimination. The origins of this approach, and its reception in international instruments on women's rights, promoted its use to ground the new understanding of women's discrimination, however, limiting its scope to the analysis of women's unequal position in societies, is bound to prove insufficient to consistently address complex concrete social contexts. Women, as man, have multiple identities, constructed by the contemporary interaction between class, culture, religion and other ideological institutions and frameworks (Mohanty, 1988). Brazilian scholar Carneiro argues that racism is a constitutive element of Latin American societies and determines gender hierarchies (Carneiro, 2001). A contextualised analysis should, therefore, be able to consider how (and if) gender and other societal structures contribute to place in a subjugated position a particular woman in a concrete context.

In his Concurring Opinion to the pioneering Advisory Opinion 18/2003, Judge Cançado Trindade, who was President of the Court at that time, argues the shortcomings of single-factor analyses in providing informative basis for the eradication of discriminatory social structures: “ [...] *despite the search, by international doctrine and case-law, of the identification of illegitimate bases of discrimination, this does not appear sufficient to me; one ought to go beyond that, as discrimination hardly occurs on the basis of a sole element (e.g., race, national or social origin, religion, sex, among others), being rather a complex mixture of several of them (and there also being cases of discrimination de jure). Moreover, when the clauses of non-discrimination of the international instruments of human rights contain a list of the illegitimate bases referred to, what they really aim at thereby is to eliminate a whole discriminatory social structure, having in mind the distinct component elements. It is perfectly possible, besides being desirable, to turn the attentions to all the areas of discriminatory human behaviour, including those which have so far been ignored or neglected at*

international level (e.g., inter alia, social status, income, medical state, age, sexual orientation, among others) [...]" (Concurring Opinion, Cançado Trindade, para. 62-63).

The BdPC internalises this problem, explicitly mentioning it at Article 9, Chapter III (Duties of the States):

With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socio-economically disadvantaged, affected by armed conflict or deprived of their freedom.

The article refers to the duty of States to consider intersectionality when defining appropriate measures to eradicate women's discrimination and VAW. This provision implies that Inter-American Institutions should also be able to do so, when evaluating the origins of a violation and assessing States' due diligence. However, the convention does not explain how, and it could hardly do so. The multiplicity of possible cases cannot be addressed unambiguously by a written text, such as a convention, which requires a high level of standardisation and can only suggest the need for an interpretation based on multiple factors. The crucial interpretive function, to guarantee the *effect utile* of a specialized convention in the broader framework of multiple international human rights instruments, needs to be performed by a judicial body, able to articulate a decision once crucial additional information has been added to a case. While, in some cases, sex (or gender) is the determinant element for a specific form of violence, in others it might be the interaction between sex/gender, race, class, political activities or some other factor to cause and determine the form of women's rights violations (Byrnes, 2010).

Article 9 BdPC recognises that discrimination and violence do not always affect women in the same measure. However, Inter-American Institutions' case law, although increasingly evolutionary in terms of integrating a gender perspective, presents evident shortcomings for what concerns intersectionality. Arguably, as we will see, there have been cases in which their

analyses implicitly legitimized other structural inequalities affecting women's social position.

Women and (real or alleged) political activism: transgressing roles

After the adoption of the BdPC in the Inter-American System, *Raquel Martín de Mejía v. Peru* (1996) and *Diana Ortiz v. Guatemala* (1996) are the first cases in which the Commission could have mentioned the interaction of gender with other factors in originating the violations alleged. In neither occasion, as previously argued, the Commission effectively applies a gender perspective in the analysis, hence, it is not surprising that the decisions perform poorly for what concerns the consideration of intersectionality. However, we take them into account as suitable cases for experimenting such a multi-factorial perspective.

In *Raquel Martín de Mejía*, the victim had been repeatedly raped and tortured by members of the army, who were accusing her and her husband (a lawyer and political activist, who was murdered in the same occasion) of being members of the *Movimiento Revolucionario Tupac Amará*. As mentioned, although the Commission recognises the crime perpetrated as “an attack against human dignity” with long-term psychological effects, the decision cannot be considered an example of gendered-analysis. In pointing at the victim's public humiliation and society's attitude towards victims of sexual abuse in general, the Commission does not add a mention to the discriminatory nature of such patterns, while they are considered aggravating circumstances of the fact. Although the sex of the victim is related to the cause of the violation, the Commission considers it only to the extent that it influenced the *form* that the violation took. As Byrnes notices for what concerns general tendencies in international institutions, the gender dimension was not systematically analysed, nor was the violation seen as (potentially) significantly different from similar violations inflicted on men (Byrnes, 1992). The Commission fails to consider that, although alleged subversive activities gave the occasion for both the killing of the victim's husband and her rape, the *cause* of her “punishment” might be interpreted as originating in the failure to respect the socially defined role of a woman. In this case, an analysis taking into account the intersection between gender and the political factor could uncover crucial features of this violation. In a later analysis proposed by the common intervener in the *Castro-Castro case*, women accused of subversion suffer violations caused

by the perception of their *double transgression*: that of the political *status quo*, which they share with men, and that of their *role*, determined by the social construction of their gender. In this perspective, following our example, Raquel Martín de Mejía's sex determines the specific *form* of her punishment but, as opposed to men in the same situation, she is punished for two reasons, one of which uncovers the discriminatory features of the acts. We do not mean to assume that such an evaluation would have necessarily led the Commission to adopt different conclusions, or to actually endorse the *double discrimination*¹⁵⁷ analysis, but to signal how the facts of the case could have allowed an intersectional analysis

Dianna Ortiz v. Guatemala (1996) represents another unsatisfactory example, both for what concerns the integration of the gender-factor in the analysis and for the failure to address any possible influence of the intersection of multiple factors influencing and causing the violation. The Commission fails to give the appropriate weight to some statements of public agents, which arguably constituted evidence of the acts being a manifestation of discrimination, and misused the possibly critical information provided by the fact the victim was a Catholic nun working in indigenous communities. Let us recall that, in an attempt to disprove the victim's allegations, the hence Minister of Defence stated that: "*Sister Ortiz had invented her story to cover up her involvement in a 'lesbian tryst'. He suggested that her facial injuries resulted from a love affair*" (para. 43). The Commission refers to this element as an aggravation of the violation perpetrated since, being the victim a nun, it hindered her reputation. A multidimensional analysis would have taken into consideration the possibility that, again, such statements might suggest her double transgression, one related to her religious function, since it is possible that she was targeted because her activity was considered inappropriate to her religious role, which was indeed considered by the Commission as a breach of her right to freedom of religion, and one related to the transgression of her gender role, possibly hinted by her alleged lesbianism. We stress that we do not have sufficient information to argue that this was, in fact, a more appropriate analysis. Our objective here is to provide concrete examples of the complexity of an intersectional analysis.

¹⁵⁷ To discuss this point we are adopting the framework of analysis presented by the petitioners in the later *Castro-Castro* case, although it was not fully endorsed by the IACrHR.

As mentioned, in neither of these two cases we found evidence of the adoption of a gender perspective. Therefore, it is somehow unsurprising the absence of further elements of complexity. However, the gradual improvement in Inter-American Institutions' internalisation of the new understanding of VAW, brings about parallel progresses in their identification of the interrelations between gender and (real or alleged) political activities.

It is in the path-breaking *Castro-Castro* case that we find the first example of an analysis taking into consideration the possible intersections between gender and other factors. During the hearings of the case, the common intervener presents a complex interpretation of the facts, contributing to provide the Court with the opportunity to establish its competence on the BdPC and, for the first time, include a gender perspective in its reasoning.¹⁵⁸ The intervener points at the gendered nature of the violations and introduces the previously mentioned notion of *double transgression*, according to which the female political prisoners had been punished for their transgression to the norms of society and the *status quo*, common to the male political prisoners, *and* to the transgression of the role assigned to women in Peruvian society, i.e. their "loss of femininity" due to political activism. However, while developing a gendered analysis, the IACrTHR does not consider this suggestions with the same attention that, on the contrary, directs towards other symbolic features of the violations, such as the particular choice of Mother's day to perpetrate them.

Gender and indigenous communities

In *Ana, Beatriz, and Celia González Pérez v Mexico* (2001), the Commission considers cases of sexual abuses of indigenous women by members of the military, for their alleged participation in a dissident group. Although this case represents an attempt to consider the influence of sex, political issues and ethnic origins on the violations suffered, we argue that the absence of a structured method to address intersectionality created the conditions for incoherencies in the Commission's conclusions. As in the previous cases, the Commission considers the sex of the victims as a determinant of the *form* of the

¹⁵⁸ However, the interpretation of the facts presents some shortcomings. As discussed in the First Section of this research, from a feminist perspective, the Court's emphasis on the victims' role of mothers when interpreting the symbolic meaning of the violations suffered, might be interpreted as reproducing the traditional division of roles in the family.

violations, and takes into account the political factor only in grounding the interpretation of the facts as torture. While we found no evidence of particular gender sensitivity, the indigenous origins of the victims are explicitly singled out as aggravating the State's responsibility. This particular gravity is established on two grounds: a) because the abuses "*led [the victims] to flee their community in a situation of fear, shame, and humiliation*" (para. 52), given the *ostracism* experienced in their communities of origin because of their rape and b) given the State's obligation to respect indigenous cultures. Let us point at the conceptual error in the grounding of such conclusions. The Commission applies the traditional analysis of rape, recognised as a form of torture when intentional, oriented to a purpose and perpetrated by a public agent, without taking into account the social context originating it, i.e. the unequal position of women and indigenous people in society. As mentioned, it is not until *Maria da Penha* that, in evaluations of cases of VAW, the Commission starts applying the innovative understanding of the BdPC. In *Ana, Beatriz, and Celia González Pérez*, the victims' social context and indigenous origins are used as informative elements when establishing the gravity of the consequences of the violations, rather than to analyse the causes of the violation itself. This restrictive consideration signals the absence of an approach based on the discriminatory causes of human rights violations suffered by indigenous women. From a feminist perspective, the Commission attributes a particular gravity to rape given its disruptive consequences on the community of origin of the victim, implying a minor gravity in absence of this element (e.g. Charlesworth, 1999; Chesterman 1997).

Additionally, the arguments used to establish the aggravating circumstances uncover a substantial conceptual error. While the Commission argues that the victims' rejection by their communities aggravates the consequences of the sexual abuses, it fails to recognise that the *ostracism* constitutes a *second* violence they suffer, presenting an autonomous nature, perpetrated by their communities of origin. Furthermore, the Commission considers State's responsibility particularly grave *given* its obligation to respect indigenous cultures. In this argumentation lays the crucial conceptual error, which implicitly justifies (and even legitimises) the discriminatory nature of the *ostracism* suffered. Although, as previously see, the BdPC is not mentioned in this reasoning, we can use its framework of analysis to understand the shortcomings of the Commission's decisions: on the one hand, there is no

reference to unequal power relations originating discrimination and causing VAW, on the other hand, the emphasis on respecting indigenous cultures overshadows the requirement to modify social and cultural patterns, customs, prejudices or traditions based on the idea of the inferiority of women or on stereotyped roles for women and men which legitimize or exacerbate VAW, *in all its forms*. This positive obligation implies the need for a complex evaluation of social structures discriminating women, in national societies as well as in specific communities. Such judgments carry the risk of incurring in clashes of fundamental rights, as it is occasionally the case for what concerns cultural and women's rights. While such clashes can be settled singling out the predominant interest to safeguard, there might be more controversial cases.¹⁵⁹ This problem has been largely bypassed in the international discourse on women's rights, which traditionally focused on particular culture-specific harmful practices, such as Female Genital Mutilation, considered unacceptable beyond any cultural right. Notably, for what concerns the Universal System, the high number of reservations on Article 5(a) CEDAW and the absence, until recently, of a judicial body with competence on deciding concrete cases, decreased the occasions of such controversies. However, in the case of the Inter-American System, with a supranational Court granted contentious jurisdiction on the BdPC, ratified with no reservations, an incremental improvement in Institutions' ability to develop intersectional multi-factorial analyses is bound to multiply the occasions to uncover fundamental clashes. In order to be able to address this challenges, without incurring in contradictions, such Institutions need to develop appropriate methods to provide balanced coherent solutions to complex problems. Shaping an acceptable and legitimate method is essential in order to be able to produce a constructive debate on the substance and scope of the transformational approach to women's rights, avoiding the risk of being opposed and rejected as an expression of ethnocentrism, paternalism or Western ideology.

In *Rosendo-Cantú et al. v. Mexico* (2010) and *Fernández-Ortega et al. v. Mexico* (2010), we found the first explicit reference to intersectionality. In the first case, the IACrtHR recognised that the victim's "*condition as an indigenous girl child in a situation of poverty* [makes] *her a victim at an intersection of*

¹⁵⁹ As we will see further on in this Section, complexities arise in those countries where the recognition of indigenous jurisdiction creates a context of legal pluralism within the State, i.e. Bolivia and Colombia.

discrimination” (Rosendo-Cantú, para. 82). In the second case, the IACrTHR defines rape as an extreme form of discrimination owing to the victim’s “condition as an indigenous person and owing to her condition as a woman” (Fernández-Ortega, para. 92). These rulings constitute examples of a more complex analysis, considering multiple forms of discrimination and violence suffered by indigenous women because of their subjugated social role, due to their sex, race, ethnicity, and economic position. As opposed to the previous Commission’s reasoning in *Ana, Beatriz, and Celia González Pérez v Mexico*, nine years later the IACrTHR considers the victims’ indigenous identity as a factor aggravating their subjugated position in the national societal structure. In particular, the IACrTHR considers that both gender and ethnicity constituted obstacles to their access to justice, requiring the State to adopt protection measures taking into account victim’s particularities, economic and social characteristics, situation of special vulnerability, customs and values. Although the Court does not get involved into an evaluation of the social position of women *within* their indigenous communities, it correctly addresses indigenous women’s social position in the Mexican society. These two cases present evidence of a significant development of Inter-American Institution’s ability to articulate multidimensional analysis and avoid conceptual errors and inconsistencies.

Let us clarify the implications of the different focuses presented in the reviewed cases: while on the one hand, both gender and race (and possibly other factors) determine the position of the victim in a given society at a given time, on the other hand, only gender (and possibly other factors, but not racism) intervenes in defining an indigenous women’s social position in her community, since her ethnic identity is shared with the male members of the same community. In this sense, while cases of *ostracism* suffered by victims of rape undoubtedly increase their suffering and are a symptom of women’s vulnerable position in a given community, this manifest discrimination cannot be used to argue States’ aggravated responsibility due to their obligation to respect indigenous cultures without incurring in a conceptual error against the substance and scope of Women’s Conventions. Therefore, evaluations of the first and second violence suffered should be kept carefully distinguished. In *Ana, Beatriz, and Celia González Pérez*, victims suffered a double discrimination: the sexual abuses originate in their subjugated social position as indigenous *and* women, whilst *ostracism* manifests their unequal social

position as women in their communities of origin. In this perspective, the responsibility of the State emerges from its omissions related to the need to modify discriminatory social structures and practices in the general society *and* for those related to the failure to adopt effective measures to promote changes in culture-specific traditional practices, that further victimize women who suffered a sexual abuse, e.g. education programmes. The paradigm shift on VAW, endorsed by Women's Conventions, extended States' positive obligations beyond the range of measures normally suggested as appropriate in cases involving infringements of the right to physical integrity (Byrnes, 2010). Provisions such as Article 8 BdPC, or 5(a) CEDAW, are inherently incomplete norms, needing to be informed with contextualised analyses in order to be implemented at national level and ensured by a supranational judicial body.

Social structures and cultural patterns, as well as the understanding of the content of human rights norms, are historically and culturally determined, thus, dynamically adaptable. Recognising this limitation does not imply delegitimizing attempts to provide remedies to human rights violations, but it does require further efforts to develop multi-dimensional complex approaches to construct acceptable balanced solutions. Furthermore, it requires assuming such attempts as inherently fallible, a work in progress that needs to be elaborated through localized informed experimental solutions to concrete cases.¹⁶⁰ Until recently, international institutions have not treated systematically issues of sex, gender and culture (Byrnes, 2010). Nevertheless, in the reviewed case law, we found elements suggesting a progressive attempt of Inter-American Institutions to develop multi-factorial analyses, although with controversial outcomes. Improvements ran parallel to increasing availability of specific documental evidence presented by petitioners, representatives, advocacy groups, experts and inter-governmental institutions, which progressively enables the gradual construction of complex analyses.

¹⁶⁰ Through General Recommendations 12 and 19, CEDAW Committee used Article 5 to give substance to States Party's positive obligations to guarantee women's substantive equality. In this perspective, appropriate measures include those needed to protect general rights, shared without distinction by men and women, and those related directly or exclusively to the condition of women of their holders. This second dimension is covered introducing special measures, re-establishing or actively promoting equality between men and women, in contexts of unequal social relations. The international consensus on the issue recognises that the principle of equality and non-discrimination implies that inequality, marginalization and vulnerability should be compensated through policies that *generate* equal conditions (including *affirmative actions*).

We previously identified Commission's Rapporteurship as an opportunity to coordinate thematic contributions of external sources with specific expertise. When preparing reports, as in the case of those focused on specific countries or circumscribed contexts, the Commission engages in an active and fruitful dialogue with local and international stake-holders, collects experts' opinions, interacts international political and technical bodies, and national public officials ultimately responsible for generating relevant policies. In *Access to Justice for Women Victims of Violence in the Americas* (2007), for instance, the Commission presents a regional evaluation of social customs that perpetuate women's subordinate position in societies (para. 26).¹⁶¹ Such thematic reports, covering topics of regional interest, have enormous potential to set standards and principles and to address situations involving collective or structural problems that may not be adequately reflected in individual cases. Articulating and extending the issues covered is one of the primary instruments to inform and enable intersectional analyses, both for what concerns issues of gender-based violence and for a generalised improvement of the System's analytical tools when addressing other problems. Indeed, the current socio-legal approach of the BdPC demands interdisciplinary approaches and context-based analyses, that should not depend on the occasional availability of specific evidence and data, in contingent cases, nor solely rely on documentation and analyses provided by the petitioners. Indeed, as seen, while in several cases the petitioners proposed appropriate innovative approaches and offered Inter-American Institutions the occasion to articulate evolutionary interpretations, on the other hand, the lack of institutional "self-sufficiency" could create the conditions for a slower progress in the construction of a consistent method to address complex cases.

During their long experience, Inter-American Institutions proved to be able to adapt the content of human rights norms to the particular situation of specific vulnerable groups, such as afro-descendants, concerning generalised patterns of racial discrimination (Arias, Yamada, Tejerina, 2004), and indigenous communities, in relation to collective property rights. The challenge is to construct an approach capable of holding together the analytical tools already developed by the Court, complementing them with those emerging from new international instruments. The dominance approach, elaborated by feminist

¹⁶¹ See also, IACommHR's *Report on Haiti*, 2009 (para. 44).

legal scholars in relation to sex discrimination, provides a suitable framework to construct a complex analytical method able to encompass multiple factors influencing social relations of power. Nevertheless, such method cannot be developed on purely theoretical or abstract grounds, but needs to be shaped through the practice in adjudicating complex violations originating in discrimination. Therefore, research efforts and a structured regional dialogue with scholars and movements, harmonised with the evolving international understanding of discrimination, are crucial to provide adequate procedural conditions to appropriately construct a generalizable method.

States' positive obligations and due diligence

Inter-American Institutions overcame the public/private dilemma both elaborating standards on States' positive obligations in relation to the adoption of measures to prevent VAW, eradicating its discriminatory causes, and applying the due diligence principle when evaluating States' responsibility in guaranteeing equal access to effective legal remedies to occurred violations.

The regional debate on States' responsibility in cases of human rights violations perpetrated by private individuals dates back to the '70s, when the issue was at the forefront of the discussion in comparative doctrine and case law (Zamudio, 1988). The regional approach to the issue developed through phases (Mijangos, González, 2008; Massolo, 2012), reflecting the evolution of the doctrine in international human rights law, which extended the concept States' positive obligations to guarantee the enjoyment of fundamental rights, overcoming the traditional limitations to their intervention on the basis of the *erga omnes* nature of the principles of equality and non-discrimination. Institutions' reasoning came to focus on the substance of the violation, instead of on the perpetrator, (Cançado Trindade, 1999; Mijangos, González, 2008), interpreting conventional duties as implying *erga omnes* obligations. In the view of Judge Cançado Trindade, this evolution represents "*the overcoming of a pattern of conduct erected on the alleged autonomy of the will of the State, from which International Law itself sought gradually to liberate itself in giving expression to the concept of jus cogens*" (Advisory Opinion 18/03, Concurring Opinion, para. 80).

In *Velásquez Rodríguez* (1988), the first contentious case presented to the Court, and *Godínez Cruz* (1989), both addressing cases of *desaparecidos*, the IACrtHR articulated the effects of the ACHR in relation to third parties, interpreting Article 1.1 ACHR as entailing a double obligation to respect fundamental rights and guarantee their enjoyment, so that “*any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State*” (*Velásquez Rodríguez*, para. 164). The Court maintained: “*in principle, any violation of rights recognised by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, or all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention*” (*Velásquez Rodríguez*, para. 172 and *Godínez Cruz*, paras. 181, 182 and 187).

While fundamental rights were still interpreted as limits to States’ intervention, their responsibility emerges when omissions imply impunity for violations, hence, both in cases of violations perpetrated by public agents and in case of violations by private individuals.

For what concerns the effects of Inter-American doctrinal elaborations on cases involving VAW, this conceptualisation of States’ duties grounds both petitioners’ claims and Commission’s reasoning in *Maria da Penha Maia Fernandes vs. Brazil* (2001). The negligence of the State in providing access to effective judicial remedies in a case of reiterated domestic violence, with irreversible consequences, is recognised as implying State’s tolerance of a situation of impunity, providing the Commission with the arguments to establish its competence to hear the case pursuant the BdPC on the basis of the continuous nature of the violation of the right to effective legal procedures (*Maria da Penha*, par. 27). However, the boundaries of State’s responsibility are clarified by the Commission’s reference to *Velásquez Rodríguez* doctrinal

construction, reiterating that State's responsibility does not emerge *"because of the act itself, but because of the lack of due diligence to prevent the violation or respond to it as the Convention requires"* (para. 55). State's due diligence is evaluated on the basis of documentation providing evidence of Brazil's omissions for what concerns the right to effective legal remedies, on the basis of Articles 1.1, 8 and 25 ACHR. While there is no mention to Article 11 (Right to Privacy) ACHR, on the basis of the normative framework provided by BdPC, the Commission elaborates its interpretation of the *nature and meaning* of such omissions, identifying a discriminatory pattern in the judicial system's tolerance of VAW, which perpetuates *"the psychological, social, and historical roots and factors that sustain and encourage violence against women"* (para. 55) and reproduces *"a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts"* (para. 56). Omissions, hence, cause discrimination in guaranteeing access to effective legal remedies and reproduce a generalised normalization on the social perception of VAW.

States' duty to guarantee equal access to effective legal remedies is crucial in cases of VAW, since, to abide to the BdPC, it is imperative to reinforce societies' condemnation of the phenomenon and to maintain women's confidence in authorities' ability to protect them from the threat of violence. On this issue, in the mentioned 2007 Report, the Commission clarified: *"the influence exerted by discriminatory socio-cultural patterns may cause a victim's credibility to be questioned in cases involving violence, or lead to a tacit assumption that she is somehow to blame for what happened, whether because of her manner of dress, her occupation, her sexual conduct, relationship or kinship to the assailant and so on. The result is that prosecutors, police and judges fail to take action on complaints of violence. These biased discriminatory patterns can also exert a negative influence on the investigation of such cases and the subsequent weighing of the evidence, where stereotypes about how women should conduct themselves in interpersonal relations can become a factor"* (para. 155).

Notwithstanding the significance of *Maria da Penha Maia Fernandes vs. Brazil* in developing the understanding of women's human rights in the region, the restricted interpretation of State's positive obligations limited Commission's recommendations to public measures to enact for improving judicial response to VAW, which established the need to: *"continue and expand the reform process*

that will put an end to the condoning by the State of domestic violence against women in Brazil and discrimination in the handling thereof. In particular, the Commission recommends: a. Measures to train and raise the awareness of officials of the judiciary and specialized police so that they may understand the importance of not condoning domestic violence; b. The simplification of criminal judicial proceedings so that the time taken for proceedings can be reduced, without affecting the rights and guarantees related to due process; c. The establishment of mechanisms that serve as alternatives to judicial mechanisms, which resolve domestic conflict in a prompt and effective manner and create awareness regarding its serious nature and associated criminal consequences; d. An increase in the number of special police stations to address the rights of women and to provide them with the special resources needed for the effective processing and investigation of all complaints related to domestic violence, as well as resources and assistance from the Office of the Public Prosecutor in preparing their judicial reports; e. The inclusion in teaching curriculums of units aimed at providing an understanding of the importance of respecting women and their rights recognised in the Convention of Belém do Pará, as well as the handling of domestic conflict; f. The provision of information to the Inter-American Commission on Human Rights within sixty days of transmission of this report to the State, and of a report on steps taken to implement these recommendations, for the purposes set forth in Article 51 (1) of the American Convention” (Recommendations, point 4).

The influence of the regional and international understanding of States’ *erga omnes* obligations, and the impact of the path-breaking *Castro-Castro* case for what concerns BdPC full justiciability, can be identified in successive case law.

As seen, VAW perpetrated by public officials does not cause theoretical problems in establishing States’ responsibility, if the violation contravenes established human rights guarantees, then the State will be liable for having violated them. Nevertheless, the changed understanding on positive obligations with respect to women’s rights can be singled out also in cases in which States’ responsibility emerges from the perpetrator being a public agent (e.g. *Castro-Castro*, *Fernández-Ortega et al. v. Mexico* and *Rosendo-Cantú et al. v. Mexico*). Indeed, progressively, States’ responsibility comes to be established on the basis of its omissions to guarantee equal access to effective legal remedies and, eventually, on its failure to adopt all appropriate measures to

eradicate the discriminatory causes of VAW, regardless of the perpetrator, considering unequal social relations between men and women a complex structural problem constituting, *per se*, represents a violation of women's right to equally enjoy fundamental rights.

This structural understanding is explicitly argued in the Concurring Opinion of *ad hoc* Judge Cadena Rámila to *Las Dos Erres Massacre*, who underlines the necessity to design broad appropriate measures to guarantee *non-repetition* of acts of gender-based violence, analysing artificially constructed inequities and considering the specificities of adequate protection of vulnerable individuals and groups. This approach extends the range of measures that can be required to a State to ensure effective protection of vulnerable groups and, in this case, of women. Evaluating States' responsibilities in cases of VAW comprehends, therefore, assessing the State's performance in fulfilling its positive duties for what concerns modifying unequal relations of power between sexes in the general context of national society, without limiting recommendations to the facts of a given case (*Las Dos Erres Massacre*, Concurring Opinion, *ad hoc* Judge Cadena Rámila, point 2).

Advisory Opinion 18/2003 on *the Juridical Condition and Rights of Undocumented Migrants* represents a crucial advancement in the doctrinal construction of States' positive obligations in the Inter-American System, can be The Court's reasoning is based on the *Drittwirkung* doctrine, consolidated by the German Federal Constitutional Court in the *Lüth* case of 1958 (Massolo, 2012). In its Advisory Opinion, the IACrHR argued that the rights enshrined in the ACHR entail *erga omnes obligations*, imposed not only in relation to States but also to the actions of third party individuals.¹⁶² In Judge Cançado Trindade's words, this evolution affects the vertical dimension of the general obligation set forth in Article 1.1 ACHR, generating *erga omnes* effects, which encompass the relations of the individual both with the public (State) power as well as with other individuals (Advisory Opinion 18/2003, Cançado Trindade,

¹⁶² In the European context, the ECtHR recognised that, although the object of Article 8 (Right to private and family life) is essentially that of protecting the individual against State's arbitrary interference, in addition to the obligation to abstain "*there are positive obligations inherent in effective respect for private or family life that may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals among themselves*" (*X and Y v. The Netherlands*, para. 23).

Concurring Opinion, par. 1; Cançado Trindade, 1997).¹⁶³ On the basis of this approach the IACrTHR came to require States to adopt provisional measures to protect members of particular communities or detained persons, and persons that provide services to them, from threats of death and harm to personal safety from public officials or third parties.¹⁶⁴ The evolution reflects the developments at the universal level, recalled in Advisory Opinion 18/2003. Indeed, the United Nations Committee on Human Rights had interpreted the right to freedom and personal safety, embodied in article 9 of the International Covenant on Civil and Political Rights, as imposing on the State the obligation to adopt adequate measures to ensure the protection of individuals threatened with death. Consequently, ignoring threats against the life of individuals within their jurisdiction would violate the guarantees established in the Covenant of any effectiveness, implying States' responsibility.¹⁶⁵

Concerning the principles of equality and non-discrimination, Advisory Opinion 18/2003 represents a crucial contribution with respect to the object of this research. In arguing States' positive obligations *erga omnes* as affecting the relations between States and individuals subject to their jurisdiction as well as the relations between individuals themselves, the Court recalls the interpretation elaborated by the United Nations Committee on Human Rights in its 1990 General Comments 18 and 20 on non-discrimination as well as Article 7 of the International Covenant on Civil and Political Rights. The Committee established that States parties must punish public officials and private individuals, who carry out torture and cruel, inhuman or degrading treatments, and should also "*take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant*" (General Comment 18, para. 10). Furthermore, in a decision on the obligation to investigate acts of racial discrimination, the Committee for the Elimination of Racial Discrimination indicated that "*when threats of racial violence are made, and especially when they are made in public and by a group, it*

¹⁶³ With the horizontal dimension identifying obligations *erga omnes partes*. In this sense see also *Peace Community of San José de Apartadó*, (Provisional measures, 2002, Concurring Opinion, Judge Cançado Trindade, para. 3).

¹⁶⁴ Refer to the provisional measures ordered by the IACrTHR in the cases *Peace Community of San José de Apartadó*; *Communities of the Jiguamiandó* and *the Curbaradó*; *Urso Branco Prison*.

¹⁶⁵ Refer to UN Human Rights Committee, *Delgado Páez v. Colombia*, para. 5.5.

is incumbent upon the State to investigate with due diligence and expedition” (L.K. v. The Netherlands, Communication 4/1991, paras. 6.3 and 6.6).¹⁶⁶

Although Advisory Opinion 18/2003 concerns private employment relationships, under which the employer must respect workers’ human rights, it holds direct implications for what concerns women’s rights and international responses to VAW. The IACrTHR interprets *erga omnes* States’ obligations as arising from their power in determining the laws that regulate relations between individuals. Therefore, States must also ensure that human rights are respected in private relationships between third parties. The Commission’s reasoning in *María Eugenia Morales de Sierra v. Guatemala* is based on the same approach. Its decision establishes that the disputed articles of the Guatemalan Civil Code had “*a continuous and direct effect on the victim in this case, in contravening her right to equal protection and to be free from discrimination, in failing to provide protections to ensure that her rights and responsibilities in marriage are equal to and balanced with those of her spouse, and in failing to uphold her right to respect for her dignity and private life*” (par. 52). Therefore, although in this case the husband of the victim does not make use such provisions, the mere fact that he might do so implies a discrimination that “*has consequences from the point of view of her position in Guatemalan society, and reinforces cultural habits (...) This situation has a harmful effect on public opinion in Guatemala, and on María Eugenia Morales de Sierra’s position and status within her family, community and society*” (paras. 50 and 52).

Considering the Commission’s interpretation of the *meaning* and broader implications of State’s negligence as a manifestation of a pattern of discrimination and reproducing a conducive climate for VAW, IACrTHR’s reasoning in Advisory Opinion 18/2003 allows further articulations of such interpretation. Indeed, reading the two argumentations in conjunction, we deduce that States’ omissions, as well as laws, contribute to determining relations between individuals. States’ omissions perpetuate the psychological, social, and historical patterns that sustain and encourage VAW, thus giving rise to State’s international responsibility also “*because of the act itself.*” This perspective is argued by Judge Cançado Trindade in his Concurring Opinions

¹⁶⁶ Besides CEDAW, see International Convention on the Elimination of All Forms of Racial Discrimination; Convention No. 111 concerning Discrimination in respect of Employment and Occupation of the International Labor Organisation (ILO).

attached to a later case: “just as the existence of a law that is manifestly incompatible with the American Convention entails per se a violation of said Convention (under the general duty of its Article 2, to harmonise domestic legal provisions with the Convention), the lack of positive protection measures –and even preventive ones - by the State, in a situation that reveals a consistent pattern of violent and flagrant and grave human rights violations, entails per se a violation of the American Convention (under the general duty to guarantee rights, set forth in Article 1(1), that is, to respect and insure respect for the rights protected) [...] this Court [...] has in fact acknowledged the broad and autonomous meaning of the general duties set forth in Articles 1(1) and 2 of the American Convention, whose abridgment, rather than being subsumed in individual violations of specific rights under the convention, instead is added to said violations.” (*Mapiripán Massacre*, Judge Cançado Trindade, Concurring Opinion, par. 6 and 7). Article 2 ACHR establishes the general obligation of States Party to adapt their domestic legal systems in order to abide to conventional provisions and ensure the rights therein embodied, i.e. States must guarantee the *effect utile* of the convention, adopting all appropriate measures to introduce adequate norms, eliminating practices of any nature that entail the violation of enshrined guarantees and enacting policies leading to the effective observance of the said guarantees. In this respect, the Court often emphasised that such obligation to guarantee conventional effectiveness constitutes a customary rule of international law.¹⁶⁷

In Advisory Opinion 18/03 the IACrTHR reiterates States’ obligation to comply with every international instrument applicable to them (par. 171), adapting both national legislation and State *practices* to their requirements. Consequently, States may not subordinate or condition the observance of the principle of equality before the law and non-discrimination to achieving public policies goals, whatever these may be (para. 172). The implications of such a perspective have a significant influence in identifying States’ positive obligations for what concerns the transformative approach reflected in Article 8 BdPC (and Article 5(a) CEDAW).

In its conclusions in Advisory Opinion 18/03, the IACrTHR summarises the

¹⁶⁷ See also: *Five Pensioners* (para. 164); *The Last Temptation of Christ* (para. 87); *Baena Ricardo et al.* (para. 179); *Durand and Ugarte* (para. 136).

consensus reached in relation to States' *erga omnes* obligations, stating that a) States' general obligation to respect and ensure the enjoyment of fundamental rights on equal basis comprehends negative and positive duties, including *affirmative actions* to reach substantive equality; b) non-compliance with this general obligation gives rise to international responsibility; c) the fundamental principle of equality and non-discrimination entered the domain of *jus cogens* and its peremptory nature entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals; and d) States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be.

In the mentioned Concurring Opinion, Judge Cançado Trindade argues that this evolved understanding emanates from the *opinio juris communis*, and requires States to secure the prevalence of the fundamental principle of equality and non-discrimination in relations between State and private individuals and in those between private individuals themselves (para. 87). The positive duty to prevent is designed as an obligation of means, not of results, and encompasses all means of legal, political, administrative and cultural nature that promote human rights protection, ensure the punishment of those responsible and respect the obligation to indemnify the victims and guarantee non-repetition. For what concerns VAW, Article 7 and 8 BdPC set the normative framework to determine States' obligations, overarching a comprehensive range of preventive duties: constitutional guarantees on the equality of women; the existence of national laws and administrative sanctions that issue adequate compensation to women victims of violence; policies or plans of action that concentrate on the question of violence against women; making the criminal justice system and police more aware of gender issues; access to and availability of support services; the promotion of awareness and a modification of discriminatory policies in the sphere of education and the media, and the collection of data and publication of statistics on violence against women.¹⁶⁸

¹⁶⁸ For what concerns prevention, detailed guidelines on the measures that States should take to fulfil their international obligations of due diligence have been defined in the Reports of the UN Special Rapporteurs on VAW.

The conceptualisation of positive obligations *erga omnes* has been developed in IACrHR's case law on several matters.¹⁶⁹ In the *Mapiripán Massacre* case (2005), the IACrHR further developed its interpretation of the *Drittwirkung* doctrine. In that occasion, Judge Cançado Trindade argued that a State's failure to respect and ensure the enjoyment of the fundamental rights enshrined in the ACHR, omitting to comply with its *erga omnes* obligations to prevent and protect, constitutes a *continued violation*¹⁷⁰ of Article 1.1. The on-going character of this violation "*can entail additional abridgments of the Convention, added on to the original abridgments. Article 1(1), thus, has a broad scope. It refers to a permanent duty of the States, non-fulfilment of which can generate new victims, causing per se additional violations, without the need for them to be related to the rights that were breached originally [...] To deny the broad scope of the duty of protection under Articles 1(1) and 2 of the Convention – or to minimize them by means of a dispersed and disintegrated interpretation of said duties- would amount to depriving the Convention of its effect utile.*" (*Mapiripán Massacre*, Judge Cançado Trindade, Concurring Opinion, par. 3 and 5).¹⁷¹

However, in *Massacre of Pueblo Bello* (2006) the Court clarified that a "*the erga omnes nature of a State party's obligations to ensure the rights protected under the American Convention does not imply that it bears limitless responsibility for any act of private individuals. [Its responsibility] depends on whether it had knowledge of a real and present danger to a particular individual or group of individuals, and whether it had any reasonable chance of preventing or avoiding that danger. [...] The circumstances of each particular case have to be considered, as do the measures taken so that those obligations to ensure are fulfilled*" (*Massacre of Pueblo Bello*, para. 123). To determine States' responsibility for acts committed by private individuals the IACrHR referred to the *Osman test*, elaborated by the ECtHR in *Osman v. U.K.* (1998), arguing: "*Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and*

¹⁶⁹ Refer to the Concurring Opinion of Judge Cançado Trindade in *Blake v. Guatemala* (para. 28) and *Las Palmeras*.

¹⁷⁰ In analogy with the *continuous nature* of the violations of the right to effective legal proceedings.

¹⁷¹ In his Dissenting Opinion to *Caballero Delgado y Santana v. Colombia*, Judge Cançado Trindade insisted on an hermeneutic of Article 1.1 and 2 ACHR, which maximizes protection of human rights under the Convention. The position was then endorsed by the IACrHR in *Suárez Rosero v. Ecuador* and in subsequent judgements (e.g. *Castillo Petruzzi et al. v. Peru*; *Baena Ricardo et al. v. Panama*; *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, *Five Pensioners v. Peru*; *Girls Yean and Bosico v. the Dominican Republic*).

resources, the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk” (para. 116).

The interpretation adopted by Inter-American Institutions covers cases in which it can be proved that the State should have had knowledge of a situation of risk or threat or had the means to know, without necessarily requiring this knowledge to be effective. This is the approach adopted in *Cotton Field* (2009),¹⁷² where the Mexico was found responsible for the killings (*femicides*) of three women, given the documented pattern of violence existing in Ciudad Juárez that the State should have addressed, and given the State’ failure to protect the victims’ right to life, omitting to investigate their disappearance, although it had been duly reported to the police. State’s responsibility emerges, on the one hand, from its omissions for what concerns adopting measures to counter the dramatic context of Ciudad Juárez, constituting a continuous and immediate risk for women and, on the other hand, from its lack of due diligence in guaranteeing effective investigations on the facts.

The critical difficulty in cases of VAW, when they do not involve the infringement of women’s rights by public officials, is to evaluate States’ inability or unwillingness to prevent the violation and ensure effective mechanisms of accountability (Pinheiro, 2002). Given that States’ responsibility essentially emerges from omissions, its evaluation becomes an extremely delicate issue in cases in which acts of VAW occur in a context in which the State has, indeed, enacted a number of measures to prevent and punish such acts. These cases require complex evaluations, assessing the type of measures adopted and their appropriateness, and their number is bound to increase given that, as we will see further on in this research, Latin American

¹⁷² And in the currently pending *Maria Isabel Véliz Franco et al v. Guatemala*.

countries have started to abide to their obligations under the BdPC. Commission's application to the IACrHR concerning *Maria Isabel Véliz Franco et al v. Guatemala*, sharing several features with the *Cotton Field* case and still pending, provides an example of this type of reasoning. The Commission considered the implemented measures unsatisfactory, highlighting the lack of coordination and funding reported by several institutions working in the field of VAW¹⁷³ and its own Rapporteur on VAW. Additionally, the Commission emphasised that such measures had not been adopted at the time of the events of the case. In order to prove their abidance to Article 7 BdPC, hence, in order not to incur in Institutions' sanction, States must provide evidence of the measures taken to eliminate the discriminatory causes of VAW in general (*Maria Da Penha*, para. 57) *as well as* in relation to the facts of the concrete case (*Maria Da Penha*, para. 57-58).

In order to develop such analyses, Inter-American Institutions need to gather an enormous amount of information to assess whether systematic patterns can be recognised in States' response to VAW, expressing a generalised tolerance of such acts in detriment of the victim *as well as* of others belonging to the same (subordinated) social group. This approach requires a re-conceptualisation of remedies, since recommendations are not limited to occurred violations, but are expected to reverse systematic patterns or overcome institutional deficiencies, preventing reiteration¹⁷⁴ (Abramovich, 2009). States' duties extend beyond a concrete case presented to Inter-American Institutions, hence, Institutions' requirements include changes in public policies, legislation and judicial and administrative procedures (e.g. *Cotton field*).

In this phase, and for what concerns BdPC effectiveness, the Inter-American System moved beyond the compensation of victims, seeking to establish principles and standards influencing States' structural dynamics. This evolution is grounded on the regional system's subsidiary function, relying on States' implementation to *prevent* violations. As Abramovich argues, in this phase Inter-American Institutions' recognise the limitations of international

¹⁷³ See, for instance, the 2006 Report of the High Commissioner for Human Rights on the situation of Human Rights in Guatemala (para. 22) and Special Rapporteur Yakin Ertürk's Addendum to the 2005 Report on the Mission to Guatemala.

¹⁷⁴ On the competing interests to balance when reconceptualising remedies to address structural deficiencies see, *inter alia*, Sabel and Simon, 2004; Gauri and Brinks, 2008; Abramovich, 2009.

institutions' intervention, while maintaining the necessary degree of autonomy from national political processes, to attain higher levels of efficacy and observance of human rights (Abramovich, 2009). In other words, the Inter-American System provides checks and balances to promote national implementation, while controlling its "quality" and suggesting its direction. In this view, Inter-American case law needs not only to be systematised, in order to provide regional guidelines on measures to address VAW, but it also needs to rely on extensive structured reports, allowing Institutions to rely on adequate knowledge of the specificities of national contexts. In determining and developing the content of States' positive obligations under the BdPC, and evaluate their due diligence, Inter-American Institutions need context-specific information, in order to coherently and consistently apply an inherently incomplete international instrument. In the following years, further research should be focused on the enforcement mechanisms of Inter-American decisions on VAW and on the analysis of their national implementation.¹⁷⁵

¹⁷⁵ The monitoring of national implementation mechanisms is crucial and requires a structured coordination between supranational institutions and governmental agencies. On the subject refer to: Margarell and Filippini, 2006; Gargarella, 2008.

Internalising the paradigm shift in national legislations on VAW: the road to convergence

Constitutional substance and dynamic nature of human rights instruments

International instruments and institutions, in general, “*are subject to fundamental limitations in the influence they can exert on developments at the national level*” (Rao, 1995), constituting a significant challenge in the case of Women’s Conventions which, recognising the structural of gender inequalities, require systemic solutions to modify national societies.

In the case of CEDAW, transformational provisions such as Article 5(a), received the highest number of reservations (Merry, 2003, 2006), although the 1979 instrument only provided for a monitoring body to ensure States’ implementation, i.e. CEDAW Committee. Arguably, this issue constituted the biggest obstacle to its effectiveness, representing States’ limited political will to endorse the new paradigm on women’s rights addressing VAW as a human rights violation and a manifestation of unequal relations of power (Evatt, 2002). The Option Protocol, which admits no reservations, was adopted in 2000 to address the problem of the limited impact of the convention on national systems (Evatt, 2002; Merry, 2003), allowing CEDAW Committee to receive and consider individual and group petitions. However, this mechanism is available only for petitioners within the jurisdiction of countries that have ratified both treaties, and reservations to CEDAW persist, constituting a significant limitation to Committee’s activities.

As opposed to CEDAW, BdPC provisions did not receive any reservation from States Party. Additionally the BdPC establishes a strong protection mechanism providing the possibility to submit petitions to the Commission, initiating a procedure that may lead to a judgement delivered by the IACrTHR. This element of difference between the two systems established to ensure women’s rights at universal and regional level, *inter alia*, constitutes a significant factor influencing the different outcomes that the adoption of BdPC, on the one hand, and of CEDAW, on the other hand, had on States Party. As opposed to the

limited impact of CEDAW, the adoption of the BdPC exercised a significant influence on national legislations in the Latin American region

The Inter-American System constitutes a multilevel system of human rights protection in which, States Party to the ACHR, commit to adapt their national legal orders to guarantee its effectiveness (Article 2 ACHR). Notably, the *margin of appreciation* doctrine in the Inter-American System is not as comprehensive as in the European System, which enjoys a higher cultural homogeneity, hence, in general, national solutions to common problems in Latin American countries tend to vary to a lesser degree compared to the Council of Europe Member States (Acosta-Alvarado, Núñez-Poblete, 2012).

On the basis of our comparative review of the relevant laws implemented in Latin American countries following the adoption of the BdPC, we could identify two phases of national reception and adaptation to BdPC provisions. The first phase follows directly the adoption of the new instrument in the Inter-American System, with a *first generation* of laws characterized by their focus on domestic violence. In the second phase, such laws were broadly reformed, integrated or complemented by additional legislations with a wider scope, presenting a holistic approach to women's rights and constituting a *second generation* of laws, explicitly recognising VAW as a manifestation of unequal relations of power and discrimination against women. As we will see, the beginning of this second phase chronologically coincides with the path-breaking *Castro-Castro* judgment of the IACrTHR and the *second generation* legislations largely reflect Inter-American Institutions' interpretation of BdPC provisions.

There is an increasing consensus in legal literature in recognising a *constitutional substance* (Cassese, 2006; Tsagourias, 2007) to international human rights instruments, reconceptualising the basic principles of constitutionalism (Pizzolo, 2013) and emancipating them from the traditional understanding of the principle of national self-determination. With the 1948 Universal Declaration of Human Rights (UDHR), the subject of fundamental rights shifted from citizens to individuals and their protection and promotion left the realm of proclamations, emerging as a positive obligation (Bobbio, 1992). As seen previously in this research, the gradual reconceptualization of States' positive duties overcame the traditional public/private divide,

recognised as one of the most influential factors for the effectiveness of the principles of (substantial) equality and non-discrimination. Some scholars argue that in this process human rights became *self-evident* (Mezzetti, 2010), turning the international community into a community of people, as opposed to a community of States, in the framework of a *constitutional theory of international law* (Kelsen, 1966). In this view, like constitutional texts in national orders, human rights instruments define the competences and entitlements of the State, overarching their negative and positive obligations, and performing an actual foundational function (Borsari, 2007). In this view, the UDHR, with the *core international human rights instruments*, came to constitute the *constitutional block of international constitutional law*.¹⁷⁶

Overlapping national and international instruments extended human rights protection, while increasing the complexity of pluralist legal contexts. The interaction between orders is a structural feature of multilevel (Pernice, 2002; Gambino 2008), or polycentric (Morrone, 2011), systems of protection of human rights, framed in the Universal System but regionally established. Regional human rights systems are based on the subsidiarity of national and supra-national instruments and on complex, and often dynamic, hierarchical structures.

Formally, depending on the mechanism adopted to incorporate conventional instruments in national legal systems, international norms acquire a different domestic status, namely: supra-constitutional, constitutional, sub-constitutional/supra-legislative or legislative (De Vergottini, 2010). However, the dynamicity of hierarchical structures due to the interaction between orders through national and supra-national Courts, often overcomes strictly formal criteria, creating favourable conditions for the convergence of national disciplines.

Formal status of human rights instruments in Latin American national constitutional structures

¹⁷⁶ For a punctual and commented collection of all international instruments integrating such *international constitutional block*, refer to Mezzetti, 2010 (pp. 40-41).

Article 2 ACHR binds States Party to adapt their national legal systems to guarantee effectiveness to conventional provisions, regardless of the formal domestic status of international human rights instruments. Nevertheless, formality still governs relations between national and international law, although increasingly counterbalanced by a tendency to refer to material criteria when it comes to determine the status of human rights law (Ruggeri, 2008).

In order to identify the factors that influence BdPC national implementation, determining the structural preconditions for its effectiveness, we present an overview of the status of international human rights instruments in Latin American countries constitutional systems. It is not within the scope of this research to engage in the unsettled debate on dualist and monist approaches to international law, originated in the theories of Kelsen and Triepel. Our limited scope in the following paragraphs is not to analyse the solutions adopted by ACHR States Party, rather to describe them, in order to identify the features of the multi-level system of human rights protection in which the BdPC has been adopted and exercised its influence.

Most Latin American constitutions are currently opened to international human rights law (De Vergottini, 2010) presenting, in some cases, explicit provisions to guarantee the effect of IACrHR's jurisprudence (Pinto Bastos, 2007). Through a comparative constitutional review, we found that different but functionally equivalent solutions¹⁷⁷ provided effective mechanisms of enforcement of international human rights law, particularly for what concerns Inter-American instruments and case law.

The majority of countries explicitly assign a constitutional (or, arguably, supra-constitutional) status to human rights treaties. This is the case of: Argentina (Cost. 1994, Art. 31); Bolivia (Const. 2009, Art. 13-14); Brazil (Const. 1988, Art. 4, 78); Chile (Const. 1980, through a broad interpretation of art. 5); Colombia (Cost. 1991, Art. 93, and C-400/98 Constitutional Court ruling); Dominican Republic (Const. 2010, Art. 74); Ecuador (Const. 2008, Arts. 3, 10-11, 424-425); Guatemala (Const. 1993, Art. 46); Honduras (Const. 1982, Art. 16-17); Nicaragua (Const. 1987, Art. 46); Panama (Const. 1972, Art. 129); Venezuela

¹⁷⁷ The European System presents a similar context; see Stone-Sweet, Keller, 2008.

(Cost. 1999, Art. 23). The previous Mexican Constitution did not contain a specific provision establishing the status of human rights instruments. While the Supreme Court recognized their sub-constitutional status in 2007 (Case 120/2002), this position remained a *“tesis aislada”* (isolated thesis). Since the constitutional reform of 2011, Article 1 establishes the highest rank for human rights instruments according to the principle of the *maximum standard of protection*.

In three countries the hierarchical position of human rights instruments is set below the constitution and above national legislation (supra-legislative status): Costa Rica (Const. 1949, Art. 7); El Salvador (Const. 1983, Art. 144) and Paraguay (Const. 1992, Arts. 137, 141).

Others are less explicit, such as in the case of Peru, with Article 55 of the 1993 Constitution defining human rights treaties as *“part of national law”*, without further specification, and Article 56 providing for a special procedure to ratify treaties on constitutional matter, thus suggesting a constitutional status of human rights law, and Uruguay, where the 1997 Constitution does not explicitly refer to the rank of international instruments, but their legislative status can be inferred on the basis of Article 46, referring to national legislation and international conventions as instruments to fight social problems (the terminology used is *“vicios sociales”*).

The IACrHR endorses the supra-constitutional/constitutional perspective, having repeatedly stated that the ACHR and *“other treaties on human rights, are inspired to shared superior values (...) define obligations of objective character, and have a special nature compared to other treaties (...)”* (Ivcher Bronstein Case, 1999, par. 42). This perspective has been maintained since Court’s first rulings, such as Advisory Opinion 2/1982, where it argued that *“modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for*

*the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction” (para. 29).*¹⁷⁸

Article 2 ACHR establishes:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

The IACrTHR performs an actual *control of conventionality*¹⁷⁹ when called to judge on the compatibility of national legislation with respect to conventional provisions. At times, this function went as far as triggering a constitutional reform (*The Last Temptation of Christ* case). Formally, ACHR norms and Court’s jurisprudence do not have *direct effect* in domestic legal systems;¹⁸⁰ however, the *praxis* has increasingly been to guarantee to them *ex tunc* and *erga omnes* effects (De Vergottini, 2010).

Given the complementarity recognised to BdPC provisions, interpretive tools that integrate ACHR norms, the influence of Article 2 ACHR extends to this separate instrument, implying the commitment to adopt legislative (or other) measures to guarantee effectiveness to ACHR provisions read in conjunction with BdP norms.

¹⁷⁸ In *Austria v. Italy* (1961), the European Commission on Human Rights (ECommHR) had stated that: “the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realize the aims and ideals of the Council of Europe...and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideas, freedom and the rule of law. (...) [T]he obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves” (paras. 138-140).

¹⁷⁹ For IACrTHR’s jurisprudence on the control of conventionality refer to: *Myrna Mack Chang v. Guatemala*; *Trabajadores Cesados del Congreso (Aguardo Alfaro et al.) v. Peru*; *Suarez Rosero v. Ecuador*; *Castillo Petruzzi v. Peru*.

¹⁸⁰ Nevertheless, there are cases of constitutional provisions guaranteeing direct effect to IACrTHR’s jurisprudence, such as Article 11.3 of the Ecuadorian Constitution.

Nevertheless, the BdPC contains its own specific provision referring to States' obligations for what concerns guaranteeing its *effect utile*, establishing at, Article 7:

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: a) refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation; b) apply due diligence to prevent, investigate and impose penalties for violence against women; c) include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary; d) adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property; e) take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women; f) establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures; g) establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and h) adopt such legislative or other measures as may be necessary to give effect to this Convention.

Let us recall that several Latin American countries joined the Inter-American System during their democratic transitions, seeking a supranational framework to support their institutional consolidation. During their long successful experience, Inter-American Institutions acquired significant legitimacy in the region, performing a crucial role in accompanying the reconstruction of democratic constitutional orders. The constitutional status guaranteed to international human rights law, with particular reference to Inter-American instruments, and the *auctoritas* of Inter-American Institutions, offer favourable preconditions to guarantee BdPC national implementation and regional convergence towards shared principles and standards on women's rights protection. In order to understand the crucial influence that the multi-

level regional structure in which the BdPC was adopted had in promoting States' compliance, we shall now describe how Latin American countries perform for what concerns CEDAW as an international human rights instrument adopted at universal level.

By 1985 most Latin American countries had ratified CEDAW,¹⁸¹ the “late-comers” were: Costa Rica (1986); Paraguay (1987); Chile (1989) and, finally, Bolivia (1990). Four Countries (Argentina, Brazil, El Salvador and Venezuela) apposed reservations on Article 29.1, which grants the International Court of Justice the competence to arbitrate States Party’s disputes on the interpretation of CEDAW. Additionally, Mexico declared that its national legislation agreed in “all essentials” with CEDAW provisions, that *“will be applied in Mexico in accordance with the modalities and procedures prescribed by Mexican legislation and that the granting of material benefits in pursuance of the Convention will be as generous as the resources available to the Mexican State permit.”* This declaration manifests the will of the State to underline its national sovereignty, putting boundaries to CEDAW Committee’s free evaluation of the appropriateness of the Mexican legal system for what concerns its abidance to the convention. On the other hand, Chile clarified that some of the provisions of the convention were not entirely compatible with Chilean legislation, and stressed that, for what concerned its civil code, a national commission had been established to evaluate proposals of amendment to those provisions found not fully consistent with CEDAW normative framework. Brazil is a noteworthy case, expressing its reservation on Article 29.1, as well as on Articles 15.4 and 16.1, establishing:¹⁸²

Article 15.4

States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16.1

¹⁸¹ Chronologically: in 1981, El Salvador, Ecuador, Nicaragua, Mexico, Panama, Uruguay; in 1982 Peru, Colombia, Dominican Republic, Guatemala, Peru; in 1983 Honduras, Venezuela; in 1984 Brazil; in 1985 Argentina.

¹⁸² Objected by Netherlands, Germany and Sweden.

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (c), The same rights and responsibilities during marriage and at its dissolution; (g) he same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; and (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

It shall be noticed that these reservations can be considered as against the *spirit* of the convention itself, representing a strong limitation to the understanding of the principles of equality and non discrimination, particularly in relation to Article 15.4, and a tendency to protect a particular concept of marriage determined by socio-cultural patterns, thus influencing the interpretation of the scope of Article 5(a) CEDAW. Interestingly, Brazil withdrew these substantial reservations in 1994, the same year in which the Inter-American System adopted the BdPC, which the State ratified in 1995.

For what concerns the Optional Protocol to CEDAW, by 2002 most countries had ratified this additional instrument. Argentina and Colombia joined in 2007, with the latter opting out from Article 8 (Inquiry Procedure), allowing CEDAW Committee to initiate a confidential investigation by one of its members, when receiving reliable information of grave and systematic violations of the convention by a State Party, and Article 9, establishing a follow-up mechanism for the Inquiry Procedure. Colombia also declared its own interpretation of the meaning of Article 5 of the Optional Protocol, as precluding "*a determination on admissibility or on the merits of the communication*" (Article 5.2), and requiring any measure involving the enjoyment of economic, social and cultural rights to be applied according to the progressive nature of these rights. Additionally, somehow redundantly, the State clarified that no provision of the Optional Protocol, or CEDAW Committee's Recommendation, may be interpreted as requiring Colombia to decriminalize offences against life or personal integrity. Chile and El Salvador signed but did not ratify the Optional Protocol, whilst Honduras and Nicaragua have not signed it yet.

On the basis of our comparative analysis of national legislations on VAW, we shall now evaluate the role that the Inter-American System played in influencing BdPC implementation in the region. As we will see, although a direct causal link can be difficult to establish conclusively, for what concerns national responses to VAW, on the basis of our findings we are able to provide significant evidence of a direct influence of the structural and institutional specificities of the Inter-American System in promoting States' abidance to BdPC provisions.

Evolution of national legislations on VAW: the road to convergence

The first generation of laws

As seen in the Second Section of this research, our comparative chronological review led us to identify two generations of laws addressing the problem of VAW, with evident distinctive features for what concerns their respective focus and scope.

The legislations belonging to the first generation have been enacted in the '90, following directly the adoption of the BdPC in the region. This almost immediate effect is largely explained by the structural specificities of the Inter-American multilevel system of human rights protection, which offers an extremely convenient framework to ensure a certain degree of effectiveness to international instruments adopted by States Party. The laws enacted in the '90 are focused on domestic violence and maintain a restricted scope, establishing mainly reactive measures to address the problem of VAW, e.g. provisions directed to guarantee the punishment of the perpetrator and protect the victim once the violation has already occurred. However, the significant change in the understanding of women's rights that these legislations represent should not be underestimated.

Some contextual element will prove useful to understand its meaning. As seen in the First Section of this research, the drafting and adoption of the BdPC paralleled the international process through which international human rights law was coming to terms with the shortcomings of the early approach to

equality and discrimination. The traditional public/private divide, characterizing the understanding international human rights law as a restricting States' intervention in private matters, with an emphasis of their negative obligations, had been challenged with particular strength by feminist legal scholars, pointing at its inherent shortcomings for what concerned the promotion and protection of women's rights, mainly violated in ambits left out of the scope of international law. VAW and, particularly, domestic violence, occurring by definition in the intimate (private) sphere and perpetrated by private individuals, could not but be a primary concern of these criticisms, which emphasised the invisibility of the phenomenon and its intrinsically discriminatory nature, affecting disproportionately women.

Although domestic violence had not been included in 1979 CEDAW, later evolutions at universal level raised international awareness on its critical features. Following a series of UN Resolutions, CEDAW Committee adopted General Recommendation 12, requiring States to submit periodical reports on VAW, and the 1990 Resolution 45/114 of the UN General Assembly called for a public and criminal response to domestic violence. In 1992, CEDAW Committee General Recommendation 19 shifted the traditional paradigm, defining VAW in the public and private sphere as a human rights violation affecting disproportionately women, manifesting discriminatory conducive contexts in which violence is directed against women *because* they are women.

Through the analysis of domestic violence women were identified as a vulnerable group as not in terms of differences given by their sex, but on the basis of the structural difference in power relations between the two genders. As feminist scholars pointed out, domestic violence was one of those violations that men did not experience and could not be addressed with a "neutral" norm. Research provided evidence that domestic violence affected women disproportionately, while cases of women's violence against men proved to have mainly reactive motivations, i.e. self-defence (e.g. Bacon and Lansdowne, 1982; Saunders, 1986; O'Donovan, 1991), as well as a completely different nature (Choudhry, Herring, 2006), differing in frequency, intention, intensity, physical injury and emotional impact (Dobash, Dobash, 2004). Such, mainly reactive, acts were rarely repeated and did not generally cause injury or fear in male victims (Fields, Kirchner, 1978), since women did not use intimidating or coercive forms of controlling behaviour. VAW had more serious effects and

varied in forms, ranging from physical to economical or psychological violence, originating in male dominant social position in relation to his female partner (Dobash, Dobash, 2004).

The paradigm shift required States to intervene on the discriminatory bases of VAW and the 1994 UNGA Declaration on the Elimination of Violence Against Women explicitly indicated the *due diligence* principle, reflected in Article 7.b BdPC, adopted in the same year, as the standard to evaluate prevention and protection measures, addressing the problem both when perpetrated by public agents and private individuals (Articles 1 and 3 BdPC).

Overall, national legal systems did not present any specific norm or measure to address the problem of domestic violence. As seen in the Second Section of this research, the first legal reforms were focused on introducing such acts as a punishable crime, reflecting the emerged international consensus and encouraging its reporting. Notably, filling a legislative gap was also a relatively easy choice to suggest national political will to comply with the commitments undertaken with the BdPC. In this sense, the new laws constituted a measure of significant symbolic meaning, through which States were willing to prove their will to comply with the BdPC and signal to their societies a change in the perception of a wide-spread phenomenon.

Violence *per se* was, obviously, already covered by criminal codes, nevertheless, through codifying domestic violence, new legislations challenged the pattern of tolerance that normalized VAW in the domestic sphere. Due to the features of a strictly criminal approach, although some of the laws contain an explicit reference to women or gender, the definition of the criminal act remained gender neutral, both in relation to the victim and the perpetrator. Nevertheless, the definition of violence was extended to include the specific forms of VAW identified in academic research and originating in women's subjugation, such as psychological violence, introduced in all new laws, and patrimonial violence, mentioned in Costa Rica's law. New precautionary measures represent a crucial element to evaluate the efforts on preventions. However, in this early phase, such measures fall short from a holistic approach directed to eradicate VAW, while they primarily constitute remedies once the violation has already occurred, or has been threatened, to protect victims and avoid reiteration. A few legislations directly referred to the BdPC, such as those

of El Salvador, Guatemala, Honduras, Panama, Peru and Venezuela. Nevertheless, reviewing all relevant national legislation, we found that even those including provisions similar or reproducing Article 9 BdPC,¹⁸³ did not follow up in devising measures to: (...) *Modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women.*

From a feminist perspective, the focus on domestic violence, leaving uncovered other forms of VAW, could lead to a conceptual error. Indeed, new legislations present a bias towards the preservation of the *sphere* in which VAW is perpetrated, protecting the family unit more than its members' rights "*to live free from violence and discrimination.*" This approach might be interpreted as the reproduction of a culturally determined understanding, although a significant improvement in the process of adaptation to the new paradigm. It holds together the normative bases provided by Article 17 ACHR, recognising the *family* as the fundamental element of society, an Article 2.a BdPC, which focuses on the problem of violence "*that occurs in the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman (...)*,"¹⁸⁴ a framework reflected, for instance, in the constitutional texts of Brazil, Colombia, El Salvador and Guatemala.

Abiding to the BdPC and General Recommendation 19, several legislations adopted a broad definition of the family nucleus,¹⁸⁵ sometimes including relatives and unrelated people living in the same household, besides spouses and partners, on the basis of the prevalent socio-demographic characteristics of Latin American countries (Ariza, De Oliveira, 2004). Such new laws broadened their scope encompassing the concrete complex structure of social relations between related people (Wainerman, 2002), but also the relations of

¹⁸³ Those of Bolivia, Costa Rica, Guatemala, Honduras, Mexico, Venezuela, Panama.

¹⁸⁴ In Advisory Opinion 17/02, on the juridical status and human rights of the child, the Court had already adopted a broad definition of the family unit.

¹⁸⁵ For an extensive study on the history of the family refer to Burguiere et al. 1998. For an analysis directed to determine a functional definition of the family see Badinter, 1991.

power arising between unrelated people sharing the same home. Nevertheless, their approach to VAW manifests the challenges to guarantee effectiveness to transformational provisions such as Article 5(a) CEDAW and Article 8 BdPC. Whereas the public/private dilemma is successfully overcome, we did not find significant elements, besides occasional mentioning, suggesting the internalisation of the need to modify unequal social relations.

States Party to the Inter-American System had ratified CEDAW before the adoption of the BdPC, most of them as early as 10 years before. Therefore, the regional wave of legislations of the '90s should be interpreted on the basis of two concurring elements: on the one hand, given the structural preconditions of the multilevel Inter-American System of human rights protection, the timing of these legislations suggests a direct link with the adoption of the BdPC, which "regionalised" the paradigm shift in the Universal System, facilitating national reception by integrating it in a familiar and more accessible system of protection with a favourable structure to promote convergence. On the other hand, the specific focus on domestic violence emerged from the joint contributions of BdPC provisions, CEDAW Committee's General Recommendation 19 and the international context of raised awareness on the issue. The features of these legislations, and their shortcomings, highlight the complexity of fulfilling, and fully internalising, the paradigm shift endorsed by Women's Conventions, tackling the discriminatory nature of VAW.

Nevertheless, the first generation of laws represents States' significant adaptive effort, "to the extent of their possibilities," to give the BdPC a meaning, although, to a large extent, still embedded in their socio-cultural contexts at a given time. Social change is an incremental process, in which each step is a precondition for the next one, and as such needs to be evaluated.

The second generation of laws

The second generation of national legislations on VAW, identified in the Second Section of this research, presents distinctive features. The beginning of this second regional wave coincides with the years of the *Castro-Castro* case, when the IACrTHR established its contentious jurisdiction on the BdPC through a lengthy systematic and teleological interpretation. Since *Castro-Castro*, not only

the BdPC acquires official full justiciability in the Inter-American System, but the Court also sends a message of significant symbolic meaning. It grounds its arguments on the “implicit complete procedure” established by Article 12 BdPC and, more importantly, on the *jus cogens* nature of the principles of equality and non-discrimination which, through Article 1.1 ACHR, implies the complementarity of ACHR and BdPC, with the specific content of the latter integrating the general catalogue of rights and guarantees.

As seen, if in the years following the adoption of the BdPC, the formal structure of the multilevel Inter-American System provided favourable conditions to trigger the first wave of national legislations adapting domestic legal systems to the new understanding of women’s rights, the second generation of laws reflects the crucial role of Inter-American Institutions in developing, through interpretation, the regional interpretation of the meaning and scope of the new instrument. The path-breaking *Castro-Castro* case follows a series of petitions invoking the BdPC that, although not submitted to the Court, had given the region occasions to experiment the new instrument on concrete cases.

Let us recall that the primary objective of a regional system is to establish a body of principles and standards that national systems commit to guarantee to prevent human rights violations. Victims’ compensation is, hence, not an objective *per se*, while the crucial function of regional Institutions is to develop and implement conventional norms, setting and actualising standards and principles through dynamic processes (Abramovich, 2009). This objective is inherent in the subsidiary character of international protection mechanisms, which complement national systems’ guarantees, intervening only once domestic remedies have been exhausted. This procedural rule gives States Party the opportunity to consider, solve and remedy violations before Inter-American Institutions’ intervention.

On the other hand, Inter-American Institutions maintain a high degree of autonomy to attain higher levels of efficacy and compliance with conventional provisions. Some scholars underline that, while technical follow up mechanisms for Inter-American rulings still present some deficiencies, the Inter-American System’ structure created the conditions for a, somehow, “spontaneous” generalised implementation of the set standards of protection (Abramovich, 2009). Based on our comparative review of national legislations

on VAW, we argue that the generalised adoption of standards elaborated by Inter-American institutions on the basis of the BdPC, harmonised with those at universal level, provides evidence of an attitude of national deference, facilitated by the favourable procedural conditions provided by the Inter-American System, i.e. the mutual-alimentation process previously analysed, and by the legitimacy that the IACommHR and the IACrTHR gained on the basis of their crucial role in supporting Latin American countries transitions to democracy.

The second generation of laws manifests regional convergence towards the holistic understanding emerged in the universal framework and reflected and developed in the Inter-American convention on women's rights. Considering the regional tendency to guarantee *ex tunc* and *erga omnes* effects to Court's rulings (De Vergottini, 2010), the timing and features of the second wave of national legislations on VAW identifies a direct link with IACrTHR's first rulings on the BdPC.

Our case law review, since the adoption of the BdPC, shows an evolution of the interpretation of the principles of equality and non-discrimination. Inter-American Institutions overcome the traditional conceptualisation, which mainly required the elimination of arbitrary differences in the treatment of women and men, and endorse a substantial approach, which implies enacting measures to *produce* women's equality and their enjoyment of fundamental rights on equal bases. Recognising women's structural discrimination, in the framework of the BdPC and CEDAW, Inter-American Institutions' elaborated on the concept of States' positive obligations and due diligence, not only for what concerns providing measures to address the problem of VAW or guarantee effective legal remedies, but also requiring them to adopt appropriate measures to identify systemic patterns of discrimination against women and eradicate their causes.

Following the interpretations provided since IACommHR's *Maria da Penha* and IACrTHR's *Castro-Castro*, new legislations on VAW explicitly recognised discrimination against women as the structural cause of VAW, introducing inter-disciplinary programmes and policies for prevention, reflecting the international emphasis on eradication. Some countries included references to cultural and social patterns reproducing discrimination (Argentina, Bolivia, El

Salvador, Guatemala, Mexico, Nicaragua and Venezuela), or articulated the understanding of shared responsibility, as the need for proactive participation and support of all societal sectors to design the policies to eradicate VAW (Colombia, Panama, Venezuela, Nicaragua and Bolivia).

New legislations internalise the “double foundation” (García Ramírez, Concurring Opinion, *Castro-Castro case*, 2006) of human rights, generally abandoning gender-neutrality when identifying women as the target of discriminatory violence. The right of women to a life free from violence is recognised in both the public and private sphere, overcoming the restrictive focus on domestic violence.¹⁸⁶ Three countries go as far as contemporarily including in their new constitutions specific provisions: Bolivia (2009) refers to the enjoyment of this right both in the *family as in society*, Ecuador (2008) refers to the *public and private sphere* and explicitly binds the State to adopt all necessary measures to prevent, eliminate and sanction VAW, the same commitment is expressed by Dominican Republic (2010), referring to any form of violence *in the family or based on gender*.

As seen, scholars, NGOs and activists had a significant influence in the development of Inter-American analyses and conceptual elaborations of regional standards of protection and contributed enhancing their resonance at regional and national level. We defined it a process of mutual alimentation, in which Inter-American Institutions synthesize the outcome of a dialogue with different sources contributing elaborations, while occasionally strengthening the legitimacy of specific instances endorsing their perspectives in its discourse and transforming them in juridical categories. As Pinto Coelho argues, this process provided women and women’s rights movements and lawyers, with material to set international judicial precedents (Pinto Coelho et al. 2008). Due to the high degree of regional homogeneity for what concerns several problems affecting Latin American societies, Inter-American Institutions’ rulings offered civil society’s organisations, national judges and legal practitioners, authoritative precedents to hold in front of national institutions, regardless of the State involved in the case, increasing the influence of Inter-American jurisprudence region-wide (Zuloaga, 2008). We

¹⁸⁶ Exceptions are three countries that focus on a reform of their penal codes, without adopting a law of broader scope, namely: Chile, Peru and Costa Rica

found critical evidence of this process in the broad reception in national legislations and penal codes of the concept of *femicide*, referring to killings of women *because they are women*.

This element acquires a particular meaning when analysing the role of a regional Court in guaranteeing the effectiveness of an international instrument of peculiar features such as those presented by the BdPC, which needs to be translated into policies and legislations reflecting specific regional and national contexts. We analysed the process of mutual alimentation through which the IACrTHR came to use the concept of *femicide* in *Cotton Field* (2009); the term emerged as essentially anthropological, sociological and political, elaborated by feminist scholars to conceptualise the specific features of a widespread phenomenon in the region. The word gained momentum nationally, regionally and, eventually, internationally through the campaigning of transnational advocacy networks and institutions. However, it is when Intern-American Institutions officially endorse the concept, with the Court's final ruling in *Cotton field*, that it turns into a juridical category. Notably, in deciding the case, the IACrTHR also largely drew on CEDAW Committee inquiry into the case of women's disappearing and killings in Ciudad Juárez. Ten countries, thereafter, introduced the crime of *femicide* in their penal codes: Costa Rica (2007) and Guatemala (2008), when the *Cotton field* case was still pending and, after the ruling, Bolivia (2013), Chile (2010), El Salvador (2012), Nicaragua (2012), Honduras (2012), Mexico (2012), Panama (2011) and Peru (2011).

Brazil represents an apparent exception, with its 2006 Law 11340, focused only on domestic violence. However, the peculiar features of its experience make Brazil's case a non-exception in the recognised pattern of Inter-American Institutions' influence on national legislations. Let us recall that Brazil had "skipped" the first generation phase by introducing the BdPC as a national law in 1995, without counting on a legal framework to guarantee its effectiveness. The 2006 law, hence, fills a vacuum that other countries in the region had already recognised. However, what makes Brazil a non-exception in terms of deference to Inter-American Institutions' interpretations, is that the law represents a follow-up to IACommHR's *Maria da Penha v. Brazil* Report, even

named after the women who submitted the first case of domestic violence to the Commission.¹⁸⁷

¹⁸⁷ In 2005 Brazil repelled inappropriate language from its penal code, such as the expression “decent woman” in norms referred to sexual violence.

Conclusions

Inter-American Institutions' influence on the internalisation of the BdPC paradigm shift on VAW in national legislations

Although a direct causal link between the Inter-American System and legislative or policy reforms at national level might be difficult to establish conclusively, for what concerns VAW, we argue that the generalised convergence towards the adoption of legislations substantially reflecting standards elaborated by Inter-American Institutions on the basis of the BdPC, as well as its timing, cannot be considered coincidental.

From our comparative review of national legislations on VAW enacted in the region since the adoption of the BdPC, we conclude that both the ratification of the instrument itself and the role on Inter-American Institutions, clarifying the content of the new paradigm and the broader scope of the regional instrument, had a crucial influence in promoting national implementation. The evolution of national compliance, for what concerns adapting and reforming national legal orders, rests on the procedural and structural preconditions provided by the Inter-American multilevel system of protection of human rights, further strengthened by the generalised consensus on VAW reached at universal level. The first generation of laws represents an immediate response of States willing to show their compliance to the BdPC, facilitated by the constitutional structures of Latin American countries, which generally guarantee constitutional status to international human rights law and, in particular, to Inter-American instruments. However, the specific focus on domestic violence shared by all the laws of the '90s is largely explained by the raising international awareness on the specific issue, which gained momentum in 1992, with CEDAW Committee's adoption of General Recommendation 19. The second generation of laws, with its timing and broader scope, provides evidence of the critical function of Institutions that had achieved a strong legitimacy in the region. Through these laws, States provided national solutions designed on the basis of the wider scope of the BdPC, as interpreted by the IACrHR and the IACommHR.

SECTION IV – Discussion of results and overall conclusions

Introduction

In the first part of this Section, on the basis of the findings of our analysis on the process of internalisation of the BdPC in the Inter-American System, we identify the features of a method to respond to the challenges posed by the socio-legal approach endorsed in Women's Conventions. Drawing on our previous considerations, we shall also propose guidelines to address persisting shortcomings. In particular, we suggest a reform of the IACommHR's role in the protection mechanism, overcoming its function as a filter of the cases to be referred to the IACrtHR and extending and better organizing its Rapporteurships. This role better suits a currently mature regional context and provides the means for responding to the increased need for contextual and thematic analyses, required to guarantee coherence in increasingly complex multi-factorial analyses. In this perspective, we present and discuss an analytical method, able to consistently and conclusively hold together the challenges emerging from clashes of fundamental rights, arising from intersectionality and cultural diversity. To develop and justify our proposal we use the facts of a case decided by the IACommHR in 2001, *Ana, Beatriz, and Celia González Pérez v Mexico*, providing an explanatory example of how our proposal allows shaping acceptable coherent solutions.

In the second part of this Section, on the basis of the high degree of similarity between the Inter-American and European Systems, we follow up to our secondary objective, developing a brief *a priori* assessment of the perspectives of effectiveness of the Istanbul Convention, i.e. its *plausibility*. We describe a workable outline for our future research focus, in which we will evaluate to what extent the conclusions drawn from the Inter-American experience are

“exportable,” whether and how they can be adapted to a different context, and single out specific features of the European System that might provide further tools to enhance the effectiveness of the new instrument, once it will come into force. Based on CoE analytical studies on Member States’ national legislations on VAW, we provide evidence of the overall disappointing response of the European context compared to the Latin American region. We then briefly analyse how, in absence of a specific convention in the CoE, the ECtHR addressed cases of domestic violence, highlighting the normative framework used for its interpretations. As we will see, the ECtHR rarely mentions discrimination when analysing cases of domestic violence, while it usually refers to breaches to the Right to a Private Life (Article 8 ECHR), and persists in an extensive use of the *margin of appreciation* doctrine. Drawing some preliminary conclusions, we argue that both ECtHR’s case law and CoE Member States’ legislations on VAW appear to be at an early stage in the process of internalisation of the international paradigm shift on VAW, if compared to the analysed context of the Inter-American System.

We shall focus on one significant element of difference between the BdPC and the Istanbul Convention, i.e. the enforcement mechanism established. While the IACtHR holds contentious jurisdiction on the BdPC, the Istanbul Convention never mentions the ECtHR, neither explicitly nor implicitly. On the basis of the findings of our research, and recalling the debate in feminist legal literature, we argue that this choice might imply a limited prospective influence of the instrument in the region, resulting in a missed opportunity with a negative impact on the legitimacy of the instrument itself. Given the high degree of comparability between the two systems, and in the light of our considerations with respect to ECtHR case law and overall unsatisfactory development of national legislations on VAW, we shall develop our arguments on the need to reconsider ECtHR’s role with respect to the Istanbul Convention and suggest concrete solutions to guarantee the feasibility of granting contentious jurisdiction to the ECtHR.

Identifying a method to internalise the paradigm shift on VAW in a regional multi-level system of human rights protection

The normative framework provided by the Vienna Convention on the Law of the Treaties (VCLT) cannot ensure, *per se*, the effectiveness of an international instrument in States Party, while its likelihood is enhanced establishing strong enforcement mechanisms.

As seen, the literature largely agrees in pointing at 1979 CEDAW weak enforcement mechanism (Charlesworth et al., 2001; Keck, Sikkink, 1998; Merry, 2003), and at the high number of substantial reservations (Johnstone, 2006; Chinkin, 1995), as the main reasons that relegated it to a “second-class instrument” (Meron, 1990). After a ten years long debate, in 2000 the Universal System addressed the problem with an additional treaty, the Optional Protocol, with its own iter of ratification.

On the other hand, the BdPC was adopted in 1994, and by 1996 most Inter-American States Party had ratified the new instrument with no reservations.¹⁸⁸ The events in the Inter-American System took place at the same time as the United Nations, including Latin American countries, were addressing the CEDAW poor implementation. Let us underline, as mentioned in the First Section of this research, that the Inter-American Institute of Human Rights was amongst the most active promoters of the introduction of a petition procedure to strengthen the protection mechanism provided by CEDAW.

As seen, while Article 11 BdPC grants the IACrTHR the competence to elaborate Advisory Opinions on the convention if requested by the Inter-American Commission of Women, Article 12 established a petition mechanism similar to that provided by the ACHR, but explicitly mentioned only the IACommHR, creating a troublesome ambiguity. On the one hand, in the *travaux*

¹⁸⁸ Bahamas is not a member to the ACHR and, when ratifying the BdPC in 1995 submitted a declaration: “Article 7(g) of the Convention imports no obligation upon the Government of the Commonwealth of The Bahamas to provide any form of compensation from public funds to any woman who has been subjected to violence in circumstances in which liability would not normally have been incurred under existing Bahamian law.” As mentioned, currently only Canada and United States, amongst all OAS member States, have not ratified the BdPC (nor the ACHR).

préparatoires of the BdPC we could not find any evidence allowing us to establish beyond doubts if the intent of the drafters was that of excluding the possibility of granting the IACrTHR contentious jurisdiction, nor we can evaluate whether a more explicit provision would have discouraged States' ratification. On the other hand, given the contemporary international debate on the need for an enforcement mechanism to CEDAW and the *praxis* of Inter-American Institutions' with treaties other than the ACHR, we can conclude that, at least for what concerns its possibility to use the BdPC as an interpretive tool for ACHR provisions, the competence of the Court was, indeed, uncontroversial.

However, although the IACommHR admitted its first petition invoking, *inter alia*, BdPC provisions in 1998 (*Maria Da Penha*), a similar occasion was presented to the Court only in 2004, with the path-breaking *Castro-Castro* case. Our analysis of the features of the process suggests that the ambiguity of Article 12 BdPC influenced this delay, creating the conditions for the Commission's excessive "filtering" of petitions invoking the BdPC, which, at an early stage, ended their *iter* with Commission's decisions. It should be noted, additionally, that most relevant cases ended in friendly settlements, a possibility that prevents the referral to the Court (Article 48.1.f and 49 ACHR).

The IACrTHR clarified its competence in the *Castro-Castro* case. Although the IACommHR had excluded BdPC provisions, invoked by the petitioners, from its application to the Court, the analysis of the facts presented by victims' representatives gave the Court the occasion to unravel the ambiguity created by Article 12 BdPC. The Court developed a lengthy teleological and systematic interpretation, further extended in the Concurring Opinions of Judges Cançado Trindade and García Ramírez. The arguments rested on two grounds: a) the principle of effectiveness, since no BdPC provision explicitly excluded IACrTHR' competence, whereas both Article 51 ACHR and Commission's Rules of Procedure implied the possibility of the Court to receive a case submitted to the Commission and b) the *jus cogens* nature of the principle of equality and non-discrimination and the *pro personae* principle, which implied a compulsory joint reading of the BdPC and the ACHR, given that specific provisions clarifying the duties of States' for what concerns women's rights complement the general catalogue provided by the ACHR. However, as seen, the IACrTHR had to further justify its decision in the later *Cotton field* case,

confronting Mexico's preliminary objections, where the State pointed at the alleged arbitrariness of its conclusion on the basis of the rule of *express jurisdiction* established by Article 62 ACHR and the normative framework provided by the VCLT. Although the contentious jurisdiction of the Court on the BdPC is now consolidated, we found that the ambiguity of Article 12 probably influenced the delay in referring petitions invoking the BdPC to the IACrHR and forced the Court to construct its interpretation of a procedural provision. This problem carried the risk to affect not only the legitimacy of its conclusions for what concerns the BdPC, but the legitimacy of the Court itself, since the expansion of its public function might have been perceived as arbitrary, providing arguments to those pointing at its excessive judicial activism.

Through our analysis of Inter-American case law and national legislations on VAW, we argued that BdPC full justiciability, on the one hand, provided a strong protection mechanism to guarantee reparation and non repetition of occurred violations, leveraging on the certainty of sanctions as a deterrent and, on the other hand, carried a high *symbolic meaning*, sending a message to States Party and reinforcing BdPC legally binding nature, encouraging domestic implementation.

As argued, in the case of a convention presenting transformative provisions, this choice acquires a particular meaning. The role of norms, whether national or international, in triggering social change has been questioned on several grounds. In Merry's words: "*we are left to struggle about how to set an agenda about justice in the 1990s post-Foucauldian, post-Marxian world of discursive power and decentred subjectivities in which no group is authorized to construct for others a vision of a socially just world*" (Merry, 1995, p. 13). However, feminist legal scholarship currently agrees in considering them as valuable complementary instruments for social transformation and cultural redefinition (Fellmeth, 2000; Rhode, 1990; Villmoare, 1985; Merry, 1995, 2006).

BdPC justiciability enhanced the integration of a gender perspective in Inter-American Institutions' analyses. Recognising the male-bias of both international law and International Institutions (Charlesworth et al. 1991; Koskemmeini, 1995; MacKinnon, 1987, 1989; Smart, 1989; Coomaraswamy, 1997; Zuloaga, 2008), implied the need for specific instruments to elaborate the content of general human rights norms, clarifying their meaning with

respect to women. In this sense, as argued, the BdPC provided the normative framework to “catch-up” on the evolved international consensus on women’s rights (Fellmeth, 2000).

The adoption of Women Conventions exercises on International bodies, as social Institutions, the same transformative influence that its national implementation is expected to exercise on States. Our findings allowed us to conclude that the adoption of the BdPC triggered a process in which Inter-American Institutions gradually internalised the new understanding on VAW and learnt to use the convention as an additional instrument of analysis.

As opposed to CEDAW Committee, Inter-American Institutions pre-exist the BdPC and there is no reason to expect that the adoption of the BdPC, *per se*, could directly imply Inter-American Institutions’ ability to recognise the gendered nature of violations. Indeed, as noticed in our analysis, it took several years and the crucial effort of civil society organisations with specific experience, for the Commission to move beyond stressing the link between the sex of the victims and the form in which violations occurred and effectively consider discrimination as the cause of VAW. Notably, even in the path-breaking *Maria da Penha*, the first case in which the shifted paradigm materializes its impact on VAW perpetrated by private individuals, the Commission only considers discrimination as the cause of the violation of the victim’s right to effective legal proceedings, preventing redress and generating a conducive context for domestic violence. Although this choice is technically justified considering that, at the time of the facts, Brazil had not ratified the BdPC, allowing to establish its international responsibility on the basis of the continuous nature of the violation of the right to effective judicial proceedings, arguably this limitation should have not, *per se*, prevented the Commission from identifying the discriminatory nature of VAW, as coherently done in successive cases. We recognised a similar gradual process in the Court’s neglect of the *double transgression* interpretation presented by the petitioners in the *Castro-Castro* case, and the later increased sensitivity to gender-specific analyses recognised, for instance, in the endorsement of the concept of *femicide* in *Cotton field*. In this crucial case, not only the Court focuses on the discriminatory nature of the generalised impunity of the killings of women in Mexico, but also the discriminatory nature of the violations themselves, regardless of the perpetrator being a public agent or a private individual.

We argue that, although the non-specific nature of Inter-American Institutions required a few years for the understanding provided by the BdPC to be fully internalised in their decisions, the choice of using already established Institutions to enforce its provisions carried a high value added, compared to that provided by the apparently more suitable instruments constituted by a body with specific expertise and mandate, such as CEDAW Committee. Relying on legitimate Institutions with consolidated experience and a broad mandate minimize the risk of marginalization of women's rights and better responds to the critique to objectivity and neutrality of human rights law raised by feminist legal scholarship. Both the IACommHR and the IACrtHR guarantee the effectiveness of several specific instruments *and* the ACHR, increasing the likelihood of a crossed use of conventional provisions, and providing the opportunity to consider BdPC norms when the features of the facts so require, even if not invoked by the petitioners, as it already happens in the case of other Inter-American Instruments.¹⁸⁹ Moreover, the understanding of the BdPC as a complementary interpretive tool on the basis of the *pro personae* principle and the double foundation of human rights, and the *praxis* of interpreting general and specific norms in conjunction, identified in our case law analysis, overcomes the problem of the gender-bias of general norms, allowing dynamic interpretations to "catch-up" with evolving understandings.

The gradual internalisation of the new paradigm parallels the international elaborations on the concept due diligence and its implications for what concerns States' positive obligations *vis-à-vis* VAW. Inter-American Institutions start recognising States' responsibility for omissions in providing effective remedies (*Raquel de Mejia*; *Dianna Ortiz*; *Ana, Beatriz, and Celia González Pérez*), then begin analysing such omissions as originating in discrimination against women (*Maria da Penha*; *MZ v. Bolivia*) and, eventually, come to determine the structural discriminatory nature of States' omissions in protecting and ensuring women's rights against violations perpetrated by private (or unknown) individuals, in contexts of foreseeable risk (*Cotton field*), recognising the crucial role of appropriate measures to guarantee prevention and non-repetition of acts of VAW and eradicate artificially construed

¹⁸⁹ See, for instance, the Commission's decision to include a consideration of the facts under Article 8 of the Inter-American Convention to Prevent and Punish Torture in *Ana, Beatriz, and Celia González Pérez v Mexico* (2001).

inequities, beyond the concrete case (e.g. *Las Dos Erres Massacre*, Concurring Opinion of *ad hoc* Judge Cadena Rámila). In the currently pending *Véliz Franco et al. v. Guatemala*, which shares several similarities with the *Cotton field* case, although the State declared to have adopted several measures to eradicate VAW, the Commission referred the case to the Court not only because such measures are successive to the facts of the case, but also considering them unsatisfactory given the lack of coordination and funding. Through this process, Inter-American Institutions came to extend their recommendations including measures directed to trigger structural changes in States' Party societies, assessing systematic socio-cultural patterns in detriment of the victim *as well as* of other individuals belonging to the same (subordinated) social group.

As seen in the Third Section of this research, the incremental internalisation of the new understanding on VAW took place through a process of mutual alimentation between Inter-American Institutions and a multi-level coalition of civil society actors, which contributed to provide the expertise on gendered violations that such Institutions did not have. The conditions for this process were allowed by the consolidated *praxis*, currently formalized in the Institutions' Rules of Procedure, of admitting a wide variety of sources when gathering information on the cases under consideration. As noticed, in fact, crucial contributions were provided in *Amici Curiae* briefs and experts' statements. On the other hand, as argued, the increased production of thematic and country Reports elaborated by the Commission, with a specific focus on VAW and reflecting the contributions of national and international actors, contributes to construct Inter-American Institutions "self-sufficiency" for what concerns counting on the contextual information necessary for developing the type of analysis required by the BdPC. The extensive documentation available provides the basis for the re-conceptualisation of remedies in cases that require the eradication of systematic patterns, overcoming structural deficiencies, allowing to shape standards and principles that extend beyond the concrete cases (Abramovich, 2009). In this perspective, the gender-sensitive interpretation of ADHR general provisions developed by the Commission in *Jessica Lenahan (Gonzales) et al. v. United States* (2011), constitutes evidence of the successful influence the learning process triggered by the adoption of a specific instrument to protect women's rights in the Inter-American System.

Therefore, in our view, the criticisms raised by feminist legal scholars on the appropriateness of a specific instrument to ensure women's rights, which has long affected CEDAW legitimacy (Charlesworth et al. 1991; Johnstone, 2006), do not apply to the case of a regional instrument enforced by Institutions with a broad mandate, such as the BdPC in the Inter-American System, provided that such choice might imply, as it did, a period of institutional adaptation. On the other hand, our findings do not allow us to conclusively exclude that the extreme under representation of women in Inter-American Institutions contributed to the relatively slow path of BdPC internalisation, as argued by Zuloaga (Zuloaga, 2008). However, in the files of the cases decided when a woman integrated the composition of either the Commission or the Court, we did not find evidence of a particular contribution on her behalf. On the contrary, crucial elaborations frequently came from men Judges, such as García Ramírez and Cançado Trindade (Concurring Opinions, *Castro-Castro* case), or *ad hoc* Judge Cadena Rámila (Concurring Opinion, *Las Dos Erres Massacre*). The first two Judges served several years as Presidents of the Court, which arguably provides grounds to consider them "*la crème*" of a bench already selected "*among jurists of the highest moral authority and of recognised competence in the field of human rights*" (Article 52 ACHR). Cançado Trindade, in particular, often provided evolutionary perspectives on crucial cases concerning equality and non-discrimination, through his habit to attach separate opinions to final judgements, and his doctrinal production often influenced Inter-American interpretive choices and the regional debate on institutional and procedural reforms. Let us recall that, for instance, in *Castro-Castro* on the basis of Commission's limited use of the BdPC, Cançado Trindade came to question the need for a "filtering" Institution *vis-à-vis* the reached maturity of petitioners in appropriately presenting their cases. On the other hand, Judge Cadena Rámila had been appointed *ad hoc* Judge on the basis of his Guatemalan nationality and of his long experience in armed conflicts, post-conflict issues, violence and social conflicts, which provided him with a specific sensitivity and expertise on the facts of *Las Dos Erres Massacre v. Guatemala*.

The previous considerations bring us to a conclusion: on the one hand, notwithstanding the consensus on the need to guarantee women's participation to public life on equal bases, the appointment of women in international bodies does not, *per se*, necessarily ensure Institutions' increased gender sensitivity; on the other hand, the fact that important contributions

were provided by men Judges, does not exclude that the gender-bias of Institutions' membership could, in general, slow down the process of adoption of a gender-perspective, since the Judges previously mentioned presented peculiar characteristics. Indeed, this fact might suggest that experience and subjective characteristics have a stronger influence than sex in enabling complex analyses encompassing specific sensitivities. Nevertheless, we argue that, whether in the long run expertise makes the difference, we share the conclusion that, at early stages, balanced sex-representation constitutes a favourable condition for the adoption of a gender perspective, given that it is hardly controversial that appropriate, professional or personal, experience is more likely to be found in women Judges than in men Judges. In our view, although we cannot conclude that women underrepresentation slowed the process of Inter-American Institutions' internalisation of the BdPC approach, this possibility should have been ruled out beyond doubts, with a greater effort in guaranteeing their gender balance, as a crucial condition to enhance the plausibility of the paradigm shift on women's rights, signalled by feminist legal scholars.

Inter-American Institutions' consolidated open attitude towards other international sources is another crucial element in their development of doctrinal elaborations on gender-based violence. Our case law analysis signals an extensive use of references to elaborations produced in the Universal System and to ECtHR's jurisprudence on domestic violence. In the early case *Raquel Martín de Mejía v. Peru* (1996), with the BdPC just entered into force, no previous experience with the instrument, nor being able to count on other international bodies' case law on a similar convention (CEDAW Optional Protocol was adopted several years later), the Commission largely draws on international humanitarian law on sexual abuses in cases of armed conflict. In particular, in recognising rape as a form of torture, the Commission referred to the Geneva Conventions and the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY). Additionally, the facts are considered under Article 11 ACHR (Right to a Private Life), adopting ECtHR's extended interpretation of Article 8 ECHR in *X and Y vs. The Netherlands* (1980). In *Ana, Beatriz, and Celia González Pérez v. Mexico* (2001) the Commission mentions ICTY's *Prosecutor v. Anto Furudzija* (1998) and to ECtHR's *Aydin v. Turkey* (1997). On the basis of the 1998 Statement of Radhika Coomaraswamy, as UN Special Rapporteur on VAW, the Commission elaborates on the concept of re-victimization of sexually

abused women and the principles of effective investigation and documentation of torture and other cruel, inhuman or degrading treatments. References to ECtHR's extended interpretation of the Right to a Private Life can be also found in *Fernández-Ortega et al. v. Mexico* and *Rosendo-Cantú et al. v. Mexico*, where the IACrTHR mentions several judgements of its European homologous and, in particular for what concerns VAW, *M.C. v. Bulgaria* (2003).

In *Maria da Penha*, where the Commission applies the BdPC for the first time, external references are used to corroborate its arguments on the continuous nature of the violation of the right to effective judicial proceedings, mentioning the consensus in ECtHR's case law as well as in the First Optional Protocol of the UN International Covenant on Civil and Political Rights, and using ECtHR's guidelines to determine whether the time period within which proceedings take place is reasonable, depending on the complexity of the case, the procedural activity of the interested party and the conduct of the judicial authorities.

External references are also extensively used in the pioneering Advisory Opinion 18/03. Although this decision does not address gender-related issues, concerning the *jus cogens* nature of the principle of equality and non-discrimination its conclusions have a crucial role in the evolution of Inter-American case law on VAW, developing the concept of States' positive obligations *erga omnes*. To argue States' positive obligations as encompassing the relations between the State and the individuals subject to its jurisdiction as well as the relations between individuals, the Court cites: the *Drittwirkung* doctrine, elaborated by the German Federal Constitutional Court in the 1958 *Lüth* case; General Comments 18 and 20 of the UN High Commissioner on Human Rights and Article 7 of the International Covenant on Civil and Political Rights.

Interpreting Article 5 ACHR (Right to Humane Treatment) in *Castro-Castro*, the IACrTHR refers to both BdPC and CEDAW as part of the *corpus juris* on women's rights. In *Pueblo Bello Massacre*, determining State's responsibility for acts committed by private individuals, the IACrTHR referred to the *Osman test*, elaborated by the ECtHR in *Osman v. United Kingdom*, further extending it to include responsibilities for omitted interventions in situation of foreseeable risk of which the State *ought* to have knowledge. In *Maria Isabel Véliz Franco et al v. Guatemala*, concerning *femicides*, the Commission refers to the definition of impunity elaborated by CEDAW Committee, while the special connotations

of *due diligence* in cases of VAW are argued citing Resolution 2003/45 of UN High Commissioner on Human Rights and ECtHR's *Opuz v. Turkey* (2009).

It is worth noting that Inter-American case law on VAW runs parallel to the advancements in the Universal System and ECtHR's case law. In this sense, Inter-American Institutions' understanding develops with the crucial support of other authoritative international sources, strengthening the legitimacy of its evolutionary interpretations, when it was not yet possible to refer to consolidated experiences. As we will see in the second part of this last Section, on this subject we can identify a close bi-directional interaction, with the ECtHR increasingly referring to the BdPC and Inter-American jurisprudence on VAW. Let us recall that the Istanbul Convention has been adopted in 2011, it has not entered into force yet, and the ECtHR has not been granted competence on the instrument.

The Inter-American experience with the BdPC provides evidence of the first dimension of that bi-focused perspective of regional institutions signalled by Garlicki, through which regional institutions harmonise their case law with concepts and solutions elaborated at universal level (Garlicki, 2012) and, we add, by comparable regional systems.

For what concerns the accessibility of the protection mechanism established, we shall recall the framework in which BdPC justiciability develops. By 2002 most Inter-American countries had ratified CEDAW Optional Protocol. However, none of the 11 cases on VAW decided to date by CEDAW Committee concerns a Latin American country,¹⁹⁰ and only two decisions involve States not Party to the European System (Philippines and Canada). This pattern is explainable on the basis of the higher familiarity of Latin American societies with the Inter-American System and its long-proven effectiveness in providing remedies and compensation for victims (Abregú, Espinoza, 2006), which make the regional mechanism of protection more accessible and generally preferable to seek protection from human rights abuses. At the time of the entry into force of the Optional Protocol, the IACommHR had already received several petitions invoking the BdPC, including the crucial *Maria da Penha* case (2001), which

¹⁹⁰ With the exception of CEDAW Committee's 2005 Inquiry on the *femicides* in Ciudad Juárez, which was used as an additional source of reference by the IACrHR when evaluating the facts in *Cotton field*.

had gained great resonance in the region. Moreover, the timing of the first petitions admitted by CEDAW Committee coincides with the submission of *Castro-Castro* to the IACrHR.

As previously argued, these elements largely overshadowed the new protection mechanism offered by CEDAW Optional Protocol. Familiarity with the human rights discourse and with supranational mechanism of protection largely explains the high number of CoE States involved in CEDAW Committee's case law, as opposed to a generalised early underutilization of the new procedure in societies within the jurisdiction of countries not-belonging to regional systems. Indeed, until 2011, the CoE had not adopted a specific instrument on women's rights and individual petitions concerning VAW almost evenly distributed between the ECtHR and CEDAW Committee. Similarly, familiarity with the specific mechanisms provided in the Inter-American System, counting with the BdPC since 1994, explains the relative lack of interest of Latin American petitioners in the mechanism provided by the Optional Protocol, considering that the two mechanisms are mutually exclusive. Additionally, Inter-American System's multilevel structure and the familiarity of Inter-American Institutions with national contexts, are more suitable to promote the structural reforms required by the current understanding on women's rights and VAW.

The same elements that make the enforcement mechanism in the BdPC preferable than that established by the Optional Protocol for what concerns the protection of victims, affect the different perspectives on the national impact that the respective Institutions' case law can have, beyond the facts of the concrete cases and besides the States directly involved in the decisions. Indeed, the influence of Inter-American jurisprudence rests on the legitimacy built during years of successful experience in the region, on the multilevel structure of a system in which regional instruments are generally given constitutional status in domestic systems and on the familiarity developed by, on the one hand, Latin American societies with the regional protection mechanism and, on the other hand, by Inter-American Institutions themselves with national contexts. We do not argue that these features are completely absent in the Universal System, which counts on its own legitimacy and on human rights instruments of inherent *constitutional substance* (Cassese, 2006). Nevertheless, the fact that their impact and legally binding nature are weaker compared to

regional experiences is hardly controversial. Consequently, while the parallel development of principles and standards in CEDAW Committee's case law on VAW constitutes a relevant contextual element, corroborating the arguments and increasing the strength of IACrTHR's jurisprudence on the BdPC, its potential to exercise a direct effect on Latin American countries is significantly lower than that of Inter-American Institutions.

Besides our previous considerations, we shall underline that the relatively high degree of cultural homogeneity in the Inter-American System provides a valuable precondition for a wide reception of standards and principles elaborated in Inter-American case law, beyond the limits of the cases and of the States concretely involved, facilitating regional convergence. Indeed, the likelihood of "spontaneous" adaptations is higher when national contexts share similar features, in particular when recommendations concern structural changes and systematic patterns elaborated through contextual analyses. In other words, for instance, Guatemala would find easier and more appropriate to adopt an approach suggested in a case involving Argentina, rather than, let us say, Philippines or Austria. At the same time, considering that the limited influence of the *margin of appreciation* doctrine in the Inter-American System, if compared to the European System, the IACrTHR maintains a high degree of control on States' discretionality, restricting their room for manoeuvre.

These considerations bring us to the second dimension of regional systems' bi-focused perspective (Garlicki, 2012), i.e. their influence in the harmonisation of national solutions. Controlled "spontaneous" solutions are endogenously harmonised in domestic legal structures and better identify contextual specificities than enforced adaptations, while, at the same time avoid sharp divergence from Inter-American standards and principles. This is a direct implication of the subsidiary nature of supranational systems of human rights protection.

From our comparative review of national legislations on VAW enacted in the region since the adoption of the BdPC, we can conclude that both the ratification of the instrument itself, and the interpretive role of Inter-American Institutions, which often clarified the meaning and content of the regional instrument, had a crucial influence in promoting national adaptation to the new international understanding on VAW. The evolution of national

compliance for what concerns adapting and reforming national legal orders rests on the structural preconditions provided by the regional multilevel system of protection, where the BdPC was adopted reflecting the consensus reached in the Universal System.

Formality determines the hierarchical position of international instruments in national legal orders, affecting the degree of influence that international law and jurisprudence exercise at domestic level, although, when it comes to human rights, formality is increasingly overshadowed by the subject matter of such instruments. Overall, most Latin American constitutions are currently open to international human rights law (De Vergottini, 2010), in some cases also providing explicit provisions to guarantee direct effect to IACrTHR's jurisprudence (Pinto Bastos, 2007). Indeed, through a comparative review, we found that different but functionally equivalent solutions provide effective mechanisms of enforcement of international human rights law and IACrTHR's jurisprudence in Latin American countries. The IACrTHR, since its early rulings, endorsed the supra-constitutional/constitutional status of human rights law (e.g. Advisory Opinion 2/82; *Ivcher Bronstein Case*, 1999, par. 42). Additionally, the Court performs an actual *control of conventionality* when called to judge on the compatibility of national legislation with respect to conventional provisions and, although its rulings require specific acts to be applied by the State found responsible of violating the Convention, the *praxis* has increasingly been to guarantee to them *ex tunc* and *erga omnes* effects (De Vergottini, 2010).

Besides BdPC own high hierarchical status in Latin American domestic systems, given the generalised open attitude towards human rights law, the strength of such instrument is further reinforced on the basis of its complementarity with the ACHR. In this sense, Article 2 ACHR implicitly requires the adoption of legislative (or other) measures necessary to give effect to rights enshrined by the ACHR read in conjunction with BdPC provisions.

CEDAW ratification process in Latin American countries pre-dates that of the BdPC. By 1990 all States Party to the Inter-American System had ratified CEDAW. As seen, four apposed reservations to Article 29.1, granting the International Court of Justice (ICJ) with the competence on arbitration upon dispute between States concerning the interpretation of CEDAW. Mexico and Brazil presented further declarations or reservations, which affect more

substantially the content of the instrument. On the contrary, Inter-American States Party ratified the BdPC (almost) immediately and without reservations. While this difference can be partially explained on the basis of the growing international and regional awareness on women's rights, and BdPC ratification was probably facilitated by the precedent constituted by CEDAW, we cannot overlook the fact that the higher familiarity of Latin American countries with the Inter-American System played a role in the rapidity and absence of reservations in the ratification process of the BdPC.

Let us recall that the content of the two instruments is not identical. As mentioned in the First section of this research, while the BdPC explicitly refers to VAW, CEDAW Committee had to elaborate an additional Recommendation on the issue in 1992. More importantly, the protection mechanism established by Article 12 BdPC is stronger than the monitoring function assigned to CEDAW Committee until the adoption of the Optional Protocol in 2000. Moreover, although the substance of the two Women's Conventions is the same, the fact that the BdPC is an Inter-American instrument reinforces its status in national constitutional structures, through the direct link with the ACHR.

The differences in BdPC and CEDAW enforcement mechanisms, an increased international awareness on VAW, emerged at universal level and reflected in the BdPC, and the specific features of the Inter-American System in terms of structure, procedures and context of action, contributed to the different impact that the two conventions had on national implementation. Our findings provide significant evidence of the success of the Inter-American System in promoting regional convergence in national legislations on VAW. Although a direct causal link might be difficult to establish conclusively, we argue that the generalised adoption of national legislations on VAW, substantially reflecting the standards elaborated by Inter-American Institutions on the basis of the BdPC, as well as its timing, cannot be considered coincidental.

The first generation of laws on VAW represents an immediate response of States willing to show their compliance to the BdPC. This timely effect is a consequence of the mentioned structural preconditions provided by the Inter-American multilevel system of human rights protection, extremely favourable bases to guarantee national implementation of regional instruments. At the

same time, their specific focus on domestic violence is largely explained by the raising international awareness on that specific issue, which gained momentum in 1992, with CEDAW Committee's General Recommendation 19.

The second generation of laws, with its timing and broader scope, provides evidence of the critical function of Institutions with a strong legitimacy in the region. Following several Commission's decisions on petitions invoking the BdPC, constituting first examples of concrete evaluations of States' responsibilities for what concerns VAW (in particular, *Maria da Penha*), the second generation of laws coincides with the years of the *Castro-Castro* case, As thoroughly analysed in the Third Section of this research, with *Castro-Castro*, not only the BdPC officially acquires full justiciability in the Inter-American System, but the IACrTHR also sends a message of significant symbolic meaning, grounding its arguments on the *jus cogens* nature of the principles of substantial equality and non-discrimination. Through Article 1.1 ACHR, such principles imply the complementarity of the ACHR and the BdPC, with the specific content of the latter integrating the catalogue of general rights and guarantees. Since this path-breaking case, besides the deterrence effect of a stronger enforcement mechanism, through its interpretive function the IACrTHR provided a crucial contribute to the effectiveness of the rights enshrined in the BdPC. The timing and generalised convergence towards the adoption of new legislations, which reflect the standards elaborated by Inter-American Institutions through the previously analysed incremental process, cannot be considered coincidental. Through these laws, States provided national solutions shaped on the basis of BdPC wider scope, as interpreted by both the IACrTHR and the IACommHR.

Our previous conclusions on the features of Inter-American Institutions' process of internalisation of BdPC paradigm shift, signal some important elements that influenced the impact of Inter-American case law on States' legislations. As mentioned, given the suitable preconditions provided by the rules of procedure of Inter-American Institutions, a multi-level coalition of civil society actors and scholars contributed to facilitate the adoption of a gender perspective that such institutions had not yet introduced in their analyses, directly influencing the process of internalisation of the new paradigm on VAW and even providing the IACrTHR with the occasion to clarify its contentious jurisdiction on the BdPC and overcome an *impasse*. In the previous Section we

referred to this interaction as a process of mutual alimentation. Indeed, on the one hand, external contributions facilitated the gradual adaptation of Inter-American Institutions' interpretive tools and the increasing production of Country and Thematic Reports providing contextual information for structural analyses, on the other hand, Institutions' endorsement of conceptual elaborations suggested by scholars and petitioners (e.g. the concept of *femicide*), introducing them in the legal discourse on human rights, provided civil society actors and public officials with authoritative judicial precedents with significant public legitimacy, which could be held before national institutions to trigger legal reforms and the adoption of appropriate public policies, increasing the influence of Inter-American case law at national level and beyond the limits of the concrete case.

Overall, the Inter-American System provided a favourable context and structure for the internalisation of the BdPC paradigm shift. For what concerns the jurisprudence on VAW, we found evidence of civil society organisations and scholars' critical role in compensating Inter-American Institutions' lack of previous experience with gendered analyses, enabling a "learning process" leading to the integration of a gender perspective in Inter-American evaluations of concrete cases. Let us consider the criticisms raised by feminist legal scholars on the inherent gender-blindness of, on the one hand, international human rights law, due to the male-bias of "neutral" general norms and, on the other hand, of international institutions, given women underrepresentation. On the basis of our findings we can argue that, both the availability of a specific instrument complementing ACHR norms and the permeability of Inter-American Institutions to external sources and frameworks of analysis, represented crucial conditions compensating such shortcomings, providing the Inter-American System with the normative framework and the necessary expertise to appropriately address gender-based violations. To a certain extent, these conditions allowed to overcome the potential negative effect of the persistent male-bias in Inter-American Institutions' memberships, which might have had, however, a partial responsibility in slowing down the process of internalisation of BdPC paradigm shift.

However, based on the reviewed tools of analysis provided by the feminist literature, our findings signal that Inter-American Institutions' analyses of

VAW still largely fail to appropriately respond to the complexities emerging from intersectionality and cultural diversity in concrete cases. Nevertheless, as we will argue, a strategic use of the recognised favourable features of the regional system's structure and procedures will prove a valuable tool to develop a method able to overcome this problem.

As it was the case when gender had yet to be included as a relevant factor in evaluating specific cases, we consider the found limited sensitivity to intersectional factors due to, on the one hand, the obvious increased complexity of multiplying the factors at stake in an analysis, on the other hand, the inherent unlikelihood (current and future) to be able to count on Institutions with an adequate level of sensitivity and appropriate expertise to grasp interconnections in any given context at any given time. Intersectionality and cultural diversity require multi-factorial cultural-sensitive analysis able to address, at the same level of elaboration, issues belonging to completely different fields, and harmonise solutions with the normative framework provided by the multiple human rights instrument, often specific, provided in the regional and universal context. Notably, on some issues (e.g. the analysis of the systemic patterns of women discrimination), cultural diversity can give rise to clashes of fundamental rights for which appropriate (or acceptable) solutions still need elaboration.

As argued, if we consider "gender" as a uniform category, balanced representation in international institutions' memberships is, generally, more likely to shorten their process of internalisation of a gender perspective. Such a facilitating condition is hardly a viable option to promote intersectional perspectives and accurate representation of cultural diversity, since it would imply being able to design institutions' compositions representing all possible subjective identities of both men and women. When it comes to analyse the causes of discrimination, intersectionality *and* cultural diversity are complex problems, which depend on subjective and context-related factors that preclude standardisation. In this perspective, we argue that virtuous processes and solutions need to be facilitated focusing on the procedural level.

In our analysis of VAW case law, we found that the need to develop intersectional analyses was largely overshadowed by Inter-American Institutions' need to construct appropriate tools to develop a gender-

perspective. This focus presents conceptual limitations that should not be underestimated, both for what concerns the emphasis on the uniformity of gender as a category and for its limited usefulness when considering issues emerging from cultural diversity. Given the transformative approach of the BdPC, specifically at Article 8, and its endorsement of an intersectional perspective at Article 9, these issues should not be overlooked. Notwithstanding its limitations, we argue that the recently experienced process can be considered, somehow, *propaedeutic*.

As argued, Inter-American Institutions developed significant familiarity with national contexts and local specificities. At the same time, Inter-American Institutions provide appropriate institutional and procedural preconditions to encourage a dialogue with several societal actors, which “inform” the cases, contributing to the development of specific and context-related analyses. As we saw in the case of VAW, this is a successful *praxis* in the system, already experienced on several other specific issues. Counting on the contributions of civil society movements with specific expertise, anthropologists, sociologists, NGOs and international organisations, Inter-American Institutions were able to develop evolutionary conceptual constructions, as happened in the case of collective property rights for what concerns indigenous communities. We argue that, besides the obvious need of a dialogue with the stakeholders, an increased focus in coordinating different expertise in a dynamic multi-level coalition, will facilitate Institutions’ internalisation process of these further challenges, providing them with the necessary information and specific experience to consistently evaluate concrete cases in which several subjective and contextual factors concur to determine the facts.

The crucial element to guide coordination is the conceptual tool provided by the dominance approach, endorsed in both BdPC and CEDAW with the recognition of unequal relations of power as structural discrimination. The origins of this approach, and its reception in the Women’s Conventions, promoted its use to ground the new understanding on sex discrimination. Nevertheless, limiting its scope to the analysis of discrimination only on the basis of gender is bound to prove insufficient to consistently address complex concrete social contexts, in which multiple factors concur to determine unequal power relations. A coherent contextualised analysis should be able to consider, on the one hand, how (and if) gender and other societal structures contribute

to place in a subjugated position a particular woman in a concrete context and, on the other hand, how women's social position is structured in different cultural-context.

We shall now briefly explain the features that an analysis of VAW should present in order to appropriately internalise the intersectionality of causes of discrimination and unequal relations of power, through an extended understanding of the dominance approach. Incidentally, we note that the extension of this approach to encompass all vulnerable groups would prove crucial to guarantee appropriate evaluations of all forms of discrimination, regardless of the gender of the victim. Notably, Judge Cançado Trindade supported this approach, stating that *"It is perfectly possible, besides being desirable, to turn the attentions to all the areas of discriminatory human behaviour, including those which have so far been ignored or neglected at international level (e.g., inter alia, social status, income, medical state, age, sexual orientation, among others) [...]"* (Advisory Opinion 18/03, Concurring Opinion, Cançado Trindade, para. 62-63).¹ However, given the focus of this research, we will restrict our considerations on intersectionality to cases of VAW, in which the sex of the victim constitutes one, arguably the primary, cause of discrimination.

Extending the dominance approach, the social position of the victim with respect to that of the perpetrator needs to be analysed considering the intersection of multiple factors such as gender, race, religion and economic status. The identification of all intersections in the causes of discriminatory violence is crucial to address institutional deficiencies that affected the concrete case, as well as systemic failures and social and cultural patterns creating a conducive context, i.e. the context in which the subjective identity of the victim ("intersectionally" understood) placed her in a position of subjugation, in order to provide redress and reparation as well as adequate guarantees of non-repetition. An analysis able to hold together multiple factors needs to count on the availability of extensive contextual information, provided through the continuous (non-contingent) reporting activity of an Institution able to coordinate relevant external sources of information as well as identify diverse specific expertise that might be needed to evaluate a concrete case. Such open attitude when investigating the facts, overcomes the practical problem of counting on a judicial, or monitoring, body expected to present an

extremely varied range of expertise and sensitivities, enabling pre-existing institutions to rapidly internalise new available human rights instruments or evolving shared understandings. As argued, the Inter-American System presents the preconditions to make plausible such an ambitious objective. For what concern the BdPC, we found that the interpretive function of Inter-American Institutions was crucial to guarantee its *effect utile*, since the multiple causes and consequences of discrimination are unsuitable to be standardised and encompassed by a written convention. Additionally, the mentioned bi-focused perspective of the IACrTHR implies that, on the one hand, regional standards and principles are harmonised with the universal framework and, on the other hand, counting on the multi-level structure of the regional system, they exercise a strong influence on domestic systems facilitating regional convergence on shared solutions.

But what happens if this analysis uncovers other patterns of discrimination, unrelated to the social position of the victim *vis-à-vis* the perpetrator? This is a complex issue that needs to be systematically addressed.

When considering the facts of a case of gender-based violence, the analysis focuses on how the victim's subjective identity, created by an intersection of factors, places her in a position of subjugation in relation to the perpetrator. The discriminatory causes of violence are, hence, analysed with respect to a given socio-cultural context, unequally structured, that both perpetrator and victim "inhabit," a shared context. However, people may contemporarily "inhabit" other social contexts, with their own specific structures and features. There might be cases where investigations on a concrete case uncover other forms of discrimination that the victim experiences, which emerge from a social context she inhabits not shared with the perpetrator, that do not hold a causal relation with the abuse suffered (although, as we will see, they might emerge as a consequence of the abuse). Now, considering the normative framework of the BdPC, in particular Article 8 BdPC, and the shared international consensus on women's rights, States' positive obligations require addressing sociocultural patterns and practices causing women's discrimination. In this perspective, evaluating cases of VAW, Inter-American Institutions increasingly include in their decisions a broad variety of measures to be adopted to eradicate conducive contexts for VAW as well as more general measures considered appropriate to eradicate discrimination against

women, on the basis of the *jus cogens* nature of the principles of equality and non-discrimination. VAW is a human rights violation because it *manifests* generalised patterns of discrimination, otherwise it would be “just a crime,” undifferentiated from acts of violence directed to men. Consequently, and redundantly, existing discriminatory patterns must be eradicated even imagining a society in which VAW does not occur as a manifestation of unequal social relations. On this basis rests the broad mandate of Inter-American Institutions, which extend the scope of their recommendations beyond the facts of the concrete case.

From the findings of our research on VAW case law, we argue that Inter-American Institutions proved to unsatisfactorily consider the implications of their broad mandate when it happened to (apparently) clash with other fundamental rights, related to the principles of equality and non-discrimination, giving rise to “fundamental clashes.”

In order to clarify this complex issue we shall refer to the *Ana, Beatriz, and Celia González Pérez v. Mexico* case, ended with a Report of the IACommHR in 2001. While successive IACrTHR’s case law on similar facts shows some improvement both in the ability to consider intersectional factors, we found no contemporary improvement for what concerns appropriately addressing the challenges posed by cultural diversity. On the basis of the facts of the mentioned case we can provide an explanatory example to clarify the implications of our considerations.

We shall not address all the features of the case, which has been extensively described in the Second Section of this research and analysed in the Third Section. Let us recall that the case concerned sexual abuses against indigenous women, allegedly participating to a dissident group, by members of the armed forces. As previously argued, we found no evidence of particular gender sensitivity, the indigenous origins of the victims are explicitly singled out as aggravating State’s responsibility. This particular gravity is established on two grounds: a) because the abuses “*led [the victims] to flee their community in a situation of fear, shame, and humiliation,*” (para. 52) given the *ostracism* experienced in their communities of origin because the abuses suffered and b) given State’s obligation to *respect indigenous cultures*. The Commission finds that the *ostracism* suffered aggravates the consequences of the violations,

nevertheless, it fails to recognise that the rejection of the victims constitutes a *second* violence they suffer, perpetrated *by* their communities of origin. This second violence is a consequence of the sexual abuses, but holds its autonomous nature.

During the proceedings, the testimonies provided uncovered this consequent suffering experienced by the victims, unrelated to the social position of the indigenous women with respect to the perpetrators of their sexual abuses. The Commission considers State's responsibility particularly grave *given* its obligation to respect indigenous cultures. In this argumentation lays the crucial conceptual error, which implicitly legitimates the discriminatory nature of the *ostracism* suffered. The final decision establishes an ambiguous link between the aggravating circumstance and the right to cultural diversity. In our view, on the basis of such right, State's positive obligations imply eradicating discriminatory social structures which place indigenous individuals and communities in a position of subjugation *vis-à-vis* non-indigenous individuals, whereas by no means imply that a discriminatory pattern emerging from the social structure of a given indigenous community might be reductively, and incoherently, identified as aggravating State's responsibility on the basis of the obligation to respect indigenous communities, while it undoubtedly aggravated victims' suffering.

This case constitutes an example of contradiction that signals a "fundamental clash," emerging from within the conceptualisation of the principles of equality and non-discrimination. During the proceedings, the testimonies uncovered another pattern of subjugation. In this perspective, the practice *ostracising* sexually abused women constitutes a second discriminatory violence suffered as a consequence of the abuses, which manifests unequal relations of power between the sexes in the context of the indigenous communities concerned. This specific social context, which the perpetrators of the sexual abuses do not share, does not, *per se*, contribute to the causes of the first violation.

Let us try and go beyond the critique: what should have done the Commission?

In the concrete case, considering the early stage in the internalisation of BdPC understanding, we reckon that avoiding ambiguity in the final decision would have been already a partially satisfactory solution. However, we shall use the

case to develop our argumentations on the basis of the tools and experience *currently* available to appropriately encompass the implications of the paradigm shift on women's rights, considering its transformative scope.

Considering the analysed evolutionary interpretations of the content of States' positive obligations and due diligence in relation to the principles of equality and non discrimination, and having found evidence of the generalised tendency of Inter-American Institutions to include in their recommendations a wide range of measures addressing systemic patterns of discrimination beyond the limits of the facts of a case, we could argue that measures directed to the eradication of the practice of ostracism of sexually abused women should be included amongst the requirements. Such delicate issue could be coherently addressed provided that, through the processes described in the Third Section of this research, the Commission gathered a sufficient amount of contextual information to be able to appropriately address a culturally specific context, bearing in mind the concurrent need to avoid legal ethnocentrism.

However, when it comes to determine the range of the measures that might be included in the final recommendation, several issues emerge. In the first place, the legitimacy of the inclusion of measures to modify culture-specific patterns of discrimination, unrelated to the causes of the sexual abuses, cannot be argued on the basis of their contribution to the generalised context of discrimination that caused the reported violations. As mentioned, ostracism emerges as a consequence of the violations suffered, and its discriminatory causes are unrelated to those causing sexual violations. The perpetrators of the sexual abuses do not "inhabit" the social context in which ostracism emerges, and are not influenced by the social structures that determine relations of power between individuals *within* the indigenous community. In our view, this consideration explains the tendency, found in successive IACrHR's jurisprudence, to avoid getting involved with this second dimension in similar cases. Indeed, in rulings such as *Fernández-Ortega et al. v. Mexico* and *Rosendo-Cantú et al. v. Mexico* (2010), the Court analyses the facts integrating an intersectional perspective, correctly considering the victims' indigenous identity as contributing to determine their subjugated position in the social structure which caused their sexual abuses. At the same time, it does not mention elements signalling victims' social position in their communities, since they do not emerge during the proceedings. On the other hand, in *Ana, Beatriz,*

and *Celia González Pérez v Mexico*, testimonies uncovered an additional and autonomous discriminatory pattern that gave rise to an additional problem requiring a consistent solution. While in the mentioned successive cases the Court could avoid incurring in conceptual inconsistencies, we argue that this was possible due to contingent circumstances that allowed overlooking the issue, while the problem remains unsolved would such additional elements emerge in other cases.

From a cultural relativist standpoint, characterising post-modernist and post-colonial scholars (e.g., Nicholson, 1990; Ashe, 1988), one might argue that the Commission could not consider the State as holding positive obligations with respect to changing socio-cultural patterns of indigenous communities, given their concurrent right to cultural diversity and self-determination. Moreover, the legitimacy of State intervention might be criticised as based on ethnocentrism, incapable to account for diversity (Villamoare, 1991; Morse, Sayeh, 1995; Chow, 1991). However, such arguments carry an inherent essentialism, depicting specific cultures as protected by a special deference, regardless of the fact that this might imply the preservation of structures infringing human rights (Nussbaum, 1999). These claims clash with the paradigm endorsed by Women's Conventions, which assumes that (all) socio-cultural patterns are capable, and required, to adapt to changing circumstances and understandings (Mayer, 1996) and implies that, when it comes to guarantee equality and non-discrimination, interventions to facilitate social transformation are legitimate.

In the normative framework provided by the BdPC, hence, the obligation to change an uncovered discriminatory practice cannot be questioned. Nevertheless, the problem arises when it comes to determine who holds the positive obligation to intervene. This are, indeed, the only terms in which the *impasse* can be coherently overcome, finding solutions consistent with both the understanding of women's rights and the right to cultural diversity.

Let us continue in our example. We argued that the Commission could not have included in its decision measures to address the practice of ostracism, given that such recommendations cannot be consistently grounded on the (broadly defined) responsibility of the State for what concerns eradicating the discriminatory patterns that caused the sexual abuses reported. At the same

time, discrimination is illegitimate *per se*, and VAW constitutes a human right violation because it manifests structural inequality. In this perspective, ostracism of sexually abused women constitutes, itself, a manifestation of unequal social relations being, indeed, another form of VAW. A second petition, invoking protection from the suffered ostracism would overcome the technical problem of the Commission's switch of focus. Nevertheless this possibility can hardly be considered a solution, on several grounds. The first, obvious, technical problem is that the admissibility of this second petition would also be conditioned to the exhaustion of domestic remedies. Consequently, we still confront the problem of determining who holds the positive obligation to intervene, providing the first instance to seek protection and redress.

If State's judicial system were the domain in which remedies should be exhausted, this would imply that the State should intervene to provide redress and reparations for victims of ostracism. Provided that a national court admitted the case, we can assume that the petition would not reach the Commission. Indeed, we shall exclude that, in a State like Mexico in our example, the judicial system would (and could) adopt a cultural relativist standpoint allowing the practice, whereas a national court would plausibly rule in favour of the victim of such practice. However, this possibility does not conclusively solve the question since, for instance, a problem emerges in identifying the perpetrator responsible for the violation, given the collective nature of the practice of ostracism. Assuming that we can single out the perpetrator, on the basis of the individuation of the individual, or community institution, that took the decision to ostracise the victim of a sexual abuse, the collective nature of the practice requires addressing the socio-cultural patterns that contribute to its reproduction. The issue would, hence, come down to define a method through which the State should promote a process of endogenous change in an indigenous community, avoiding breaches to the right of cultural diversity and self-determination. The problem is complex, but not unsolvable consistently. Such terms would imply participatory processes in which State's Institutions and representatives of the communities would have to collaborate to a common objective. We found mentions to similar processes in Inter-American jurisprudence; for instance, IACrTHR's recommendations in *Fernández-Ortega et al.* and *Rosendo-Cantú* require the State to undertake programmes for reinserting victims of sexual abuses in their communities of

origin.

What happens in the case of those States recognising indigenous jurisdiction¹⁹¹?

Considering that ostracism is a legitimate practice in the community, it is plausible to assume that indigenous jurisdictions would not consider it a violation of the victim's rights. In such cases, we would have to determine whether the implicit unavailability of effective remedies in the community would allow the Commission to admit a specific petition, or if the impossibility to obtain redress and reparation implies that the victim might refer the case to the national judicial system, in which case, the process previously described would apply. Countries that recognise indigenous jurisdiction have recently addressed this technical issue, through attempts of coordinating legal pluralism.¹⁹² These experiences allow drawing on existing knowledge to define a consistent procedure. However, this is an issue that extends its implications beyond the limits of the focus of our analysis, therefore, we shall address it in future developments of our research.

Let us underline, that all previous considerations imply that discriminatory socio-cultural practices *within* indigenous communities should be eradicated, consistently with an interpretation of the right to cultural diversity harmonised to BdPC normative framework, while the State holds the duty to create the conditions for such an endogenous transformation to occur. In other words, the State ends up performing the same role as that of regional human rights institutions in relation to States' positive obligations and due diligence, i.e. functioning as an external engine to promote social change while allowing a certain degree of discretionality for what concerns shaping the measures through which the final scope should be accomplished. Like the IACrTHR, hence, State's judicial institutions should adopt a bi-focused perspective, able to harmonise, on the one hand, their decisions with the supra-nationally defined principles and standards and, on the other hand, harmonise locally constructed solutions with those adopted at national level. The supreme judges of this

¹⁹¹ Recently, Bolivia, Colombia, Ecuador, Mexico, Nicaragua, Paraguay and Peru modified or adopted new constitutions, which recognise the multicultural nature of their societies.

¹⁹² For an analysis of the processes through which Latin American countries recognising indigenous jurisdiction are adapting their domestic systems to internal legal pluralism, refer to: Lee Van Cott, 2000, Inksater, 2010.

multi-layered process would, ultimately, be Inter-American Institutions.

If these considerations allow the development of satisfactory processes minimizing the risk of fundamental clashes, we cannot overlook the fact that their plausibility rests on a controversial assumption, i.e. that besides suffering because of the ostracism, victims would also perceive such practice as illegitimate. Recalling what argued by Crenshaw in relation to black women (Crenshaw, 1988), about the inherent unsuitability of an approach to their rights that would have put them in contraposition to the men of their racially defined community, we argue that expecting indigenous women to seek protection against indigenous men, sharing with them an identity primarily defined by their ethnic origin, is not a viable option. More likely, in the case of ostracism, they would consider the sexual abuse suffered more odious given that it exposes them to that practice. It should be noticed that this is, indeed, exactly the “aggravating” perception adopted by the Commission in *Ana, Beatriz, and Celia González Pérez v Mexico*, which we considered unsatisfactory given that it implies the legitimization of a discriminatory practice, inconsistent with the *jus cogens* nature of the principles of equality and non-discrimination.

This problem brings us back to the initial issue of the fundamental clash. On the basis of the conceptual tools elaborated in feminist scholarship, analysed in the First Section of this research, we shall now define the terms in which the mentioned clash should be addressed through an approach that holds together the issues emerging from both intersectionality and cultural diversity, in their respective dimensions, analysed in the framework of the dominance approach, constructing a plausible viable method to address difficult cases.

Let us recall the issues at stake:

- a) Consistently with the BdPC normative framework, the analysis requires a balancing process, able to accommodate cultural diversity without rejecting the universality of a set of minimum standards, derived from the *jus cogens* principles of equality and non-discrimination.
- b) At the same time, such an analysis should avoid adopting a single-factor focus, encompassing all subjective dimensions concurring to

determine an individual's position in the structure of social relations, and considering possible contemporary "inhabitation" of culturally diverse contexts.

Let us consider the features of an analysis coherent with the requirements clarified at point (a).

Assuming the autonomy of individuals pursuing self-realization, understood as freedom of choice and action (Garlicki, 2012), poses serious limitations to the transformative power of the BdPC approach. Feminist scholars stress the influence of contextual constraints on agency (Chinkin, Charlesworth, 2000), ruling out self-determination of women, and individuals in general, placed in subjugated positions in unequally structured societies. Social and cultural transformation is, therefore, an instrument to achieve women substantial equality. Consequently, differences in culture-specific traditions or practices within a State's society cannot be invoked to justify breaches of the principles and standards of women's rights protection (Binion, 1995), in the same way as States are not allowed to invoke national socio-cultural patterns to avoid international responsibility. Indeed, Merry stresses that, in Western societies, battered women did not perceive this violence as illegitimate until enabled by a framework that provided the instruments to challenge the normalization of discrimination (Merry, 2003). Interventions on the contextual constraints to agency are, hence, legitimated by the *jus cogens* nature of the objective. In this perspective, all cultures are considered capable of dynamic adaptations, without changes implying inherent clashes with the right to cultural diversity (neither at State or community level), since socio-cultural transformation can be expected to happen through endogenous processes promoted on the basis of the framework provided by the BdPC.

In order to coherently respond to the requirements clarified at point (b) we can draw on the conceptual tools elaborated by feminist scholars focusing on intersectionality, presented in the First Section of this research and previously recalled.

The concept emerged from the Black Women movement, which pointed at the shortcomings of a feminist theory developed creating a consciousness of (white) women in opposition to (white) male (Crenshaw, 1988; Thornhill,

1985). In their view, such gender-based alliance overlooked other social structures, which constituted black women's identities, such as race. Crenshaw argued that, for black women part a community defined by race, a challenge of patriarchal structures created in opposition to black man and through an alliance with white (privileged) women was not a viable solution (Crenshaw, 1988).

These claims are of crucial significance for what concerns our example with *Ana, Beatriz, and Celia González Pérez v Mexico*. They uncover the criticalities in determining on which basis to construct instruments that would make unconstrained individual agency plausible, eventually triggering endogenous processes of change. In other words, the instruments to enable indigenous women's perception of the illegitimacy of ostracising sexually abused women, should not be constructed on the assumption that the path to enable this perception passes through a direct challenge to indigenous women subjugation in their communities of origins, created in alliance with non-indigenous women and in opposition to indigenous man.

These considerations might be criticized for assuming, eventually, a convergence towards "reasonable understandings" (Gunning, 1992). We cannot completely discard this challenge, however, we argue that its weight should not be overestimated. Through our research, we could single-out those features of the Inter-American System that, if further developed and structured, provide the tools to construct a method capable of balancing both the need to provide the instruments of protection against perceived violations, and that of promoting socio-cultural change through endogenous processes.

Concluding the analysis of our example, we go back to our initial question: on the basis of the *currently* available tools of analysis, what should have done the Commission in *Ana, Beatriz, and Celia González Pérez v. Mexico*? And, consequently, what should a competent supranational institution do to coherently address fundamental clashes when, in developing an intersectional analysis sensitive to cultural diversity, additional violations emerge from the investigation?

On the basis of our previous considerations, we shall conclude that, technically, evaluating the abuses reported such an institution could not include in its

suggestions measures to eradicate discriminatory practices belonging to a context unrelated to that in which the *first gender-based violation* occurred, on the grounds of States' positive obligations to eradicate socio-cultural patterns that caused it. On the other hand, we argued that supposing to address the problem on the basis of a separate complaint invoking protection from the *second gender-based violation*, whether in front of community bodies, national courts or submitting a specific petition to the Commission, might not be a viable option, given possible constraints on victims' agency or the difficulties in overcoming obstacles posed by other dimensions of their identities, such as ethnicity. In our explanatory case, we argued that depending on the subjectivity of the victim, if her ethnic origins constitute the primary determinant of her identity, this might decrease the likelihood of challenging a culture-specific social structure on the basis of her gender and against the men of her community. This possibility creates the conditions for the preservation of the *status quo*, in a context in which, in absence of a complaint, nobody can be held responsible for the discrimination suffered. We confront a parallelism with the challenges posed by domestic violence: in our explanatory case, ostracism as a discriminatory violation is invisible and naturalized, in the same way as it happened with domestic violence when the phenomenon was not perceived as a crime, therefore not reported and preserved by the refrain of the State from intervening in a sphere protected by the right to cultural diversity, as it was the case when the right to privacy prevented intervention in cases of violations perpetrated within the family, where the autonomy of the individual had to be entitled to the highest deference. As discussed at length, the discriminatory nature of VAW justified the rejection of the public/private divide, and led to accept that individuals' autonomy in the private sphere could be limited on the basis of *jus cogens* principles. Through the process analysed at length in this research, the paradigm shift on women's rights gave battered women the instruments to perceive such violence as undeserved. Refraining from addressing gender-based discriminations on the basis of an absolute interpretation of the right to cultural diversity generates exactly the same consequences, resulting in the invisibility, impunity, tolerance and naturalization that we recognised, *mutatis mutandis*, in the case of domestic violence.

In our problem-solving approach, the impossibility to single out a responsible institution generates an unacceptable *impasse*, against the scope and the spirit

of the BdPC, which reproduces and legitimates unequal power relations granting deference to culture-specific discriminatory practices. To finally answer our initial question, in *Ana, Beatriz, and Celia González Pérez v Mexico*, given the *jus cogens* nature of the principles of equality and non-discrimination and principle of effectiveness, the Commission's refrain from addressing ostracism as a *second gender-based violation* cannot be justified, regardless of the potential obstacles signalled. A viable coherent solution is to tackle the issue gathering additional context specific information, through the mutual alimentation process thoroughly described, and resorting to possibly available external frameworks of analysis and sources of interpretation. Inter-American Institutions have past experiences of a similar method, not only for what concerns the construction of a gender perspective, but also in relation to the construction of analytical tools to address cultural specificities of indigenous communities, referring to the normative framework provided by the 1989 International Labour Organisation (ILO) Convention 169 on Indigenous and Tribal People (Oliva-Martínez, 2012). In a similar way, Inter-American Institutions could have appropriately addressed ostracism as a separate problem and account for cultural diversity producing a balanced solution,¹⁹³ such as that found to limit individual autonomy in the private sphere.

Provided that such an additional analysis gave grounds to recognise ostracism as a form of violence manifesting a pattern of discrimination against women, hence, illegitimate, the Commission could include in its recommendations the duty of the State to adopt participatory policies to promote endogenous change in indigenous communities. The mentioned recommendations of the IACrTHR in *Fernández-Ortega et al.* and *Rosendo-Cantú* show a tendency to take this path, although the suggested measures primarily focus on the reinsertion of abused women in their communities.

We argue that Inter-American Institutions can ground this apparent extension of their mandate on the basis of *State's obligation to harmonise the diversity of socio-cultural practices*, pursuing equality and non-discrimination between men and women in a context of cultural (and, in some cases, legal) pluralism.

¹⁹³ Notably, these balancing efforts led to interesting attempts to harmonically adapt deeply controversial practices, such as Female Genital Mutilation (FGM), to turn them into safe and hygienic symbolic female circumcision or rituals. On this complex and crucial issue see, *inter alia*, Lane and Rubinstein, 1996.

Such measures could be shaped drawing on existent available national experiences in countries that recognise indigenous jurisdiction and have already experienced “fundamental clashes.”¹⁹⁴ In this way, we are able to identify a responsible institution, the State, with a limited mandate to intervene as a facilitator, while the indigenous community maintains the agency on dynamic adaptation, accommodating it on the basis of its cultural specificities, harmonised with the international normative framework, being entitled to a certain degree of discretionality (or, if preferred, *margin of appreciation*¹⁹⁵). Such an approach minimises the likelihood of ethnocentric solutions and avoids the limitations that impede cultural change, or assume it as immutable, while supranational institutions maintain a certain degree of control on the local processes.

Final remarks and reform proposal

On the basis of the conceptual tools provided by feminist scholarship we described the structural, institutional and procedural preconditions needed to facilitate the consistent internalisation of an instrument such as the BdPC in a regional system of human rights protection. Analysing Inter-American case law

¹⁹⁴ For invaluable informative material on national experiences, refer to the jurisprudence of the Colombian Constitutional Court on the limits to indigenous jurisdiction posed by the need for harmonisation with human rights law, with particular reference to decisions T-496/96; T-349/96 and T-523/97. For an overview of the Colombian constitutional jurisprudence on the issue see Solano-González, 2004. For perspectives on practical implications of the recognition of indigenous jurisdiction in Colombia see, *inter alia*, Blanco-Blanco, 2006; Holguín-Tafur, 2012, Sampedro-Arrubla, 1993. For a general overview of the questions emerging from legal pluralism and indigenous jurisdiction see: Oliva-Martínez, 2012; Odello, 2012; Carbonell, 2003, Kuppe, 1994.

¹⁹⁵ Garlicki summarizes the factors that contribute determining the scope of the margin of appreciation: a) the nature – subject matter – of the right in question; b) the nature of State’s duties, in particular their positive or negative aspect; c) the nature of the aim pursued by the contested State action; in particular the link of the aim with one of the “legitimate aims” enumerated in different articles of the convention; d) surrounding circumstances (the doctrine of the margin of appreciation had been, at first, used in the context of emergency situations of the fight against terrorism, hence, not to protect cultural diversity); e) the existence of a common ground between the laws of the member states (legislative consensus or common trend); f) the existence of a common cultural context (i.e. of particular traditional combination of moral, religious, ideological, political and constitutional values and attitudes) in which particular rights operate within the society (Garlicki, 2012). Notably, the factors summarized at point e) and f) emerge as particularly problematic, given the transformative approach reflected in Women’s Conventions. On the influence of the margin of appreciation see, amongst the many: Ovey, White, 2002; De la Rasilla-Del Moral, 2006.

on VAW, we evaluated through which processes the new understanding on women's rights influences Institutions' analyses and singled out their crucial elements, highlighting strengths, shortcomings and obstacles. We then proceeded to a comparative analysis of the evolution of national legislations on VAW in the region, to evaluate the impact of BdPC adoption and Institution's interpretation on regional convergence towards a holistic approach to the eradication of VAW. On the basis of our findings we drew some preliminary conclusions on the valuable opportunity that some of the identified features provide for further improvements in Institutions' tools of analysis, to construct standards and principles to reach the ambitious scope set by the BdPC and enhancing domestic implementation. We argued that IACrTHR's contentious jurisdiction on the BdPC gave a significant impulse to the development of such processes, and that its interpretive function played a crucial role in clarifying the implications of the new paradigm, providing valuable guidelines and authoritative precedents. On the other hand, we identified the Commission as the crucial engine for extending and coordinating the availability of contextual information and specific expertise, necessary to appropriately address concrete cases in a way that is consistent with the paradigm endorsed by the BdPC.

On the basis of our preliminary conclusions we suggested how the Inter-American System could construct a method to better respond to the increasing complexities emerging from fundamental clashes, and provided an explanatory case to describe its features and implications.

Given the inherent incompleteness of the BdPC, and the other Women's Conventions, Institutions with competence to interpret such instruments appear as crucial actors in the internalisation at all levels of their paradigm shift and implications, fundamental engines of the vertical and horizontal interactions on which conventional effectiveness rely. The structural, institutional and procedural preconditions of the Inter-American System create the context for a process of inclusive regional dialogue, open to external sources and harmonised with the universal framework, which creates favourable *conditions for plausibility* for the effectiveness of women's rights, understood through a complex socio-legal. In this sense, Inter-American Institutions are enabled, on the one hand, to "translate" and introduce in the regional human rights discourse principles and standards emerging from an

evolving international consensus, exercising a crucial influence for their reception at national level while, on the other hand, they are enabled to produce pioneering solutions to unaddressed critical issues raising from complex fundamental clashes.

In conclusion, we claim that our method allows us to elaborate on Judge Cançado Trindade's critique of the Commission's filtering function, which rests on the recognition of an increased maturity of petitioners in the region, currently able to appropriately present their claims without the need to be represented by an intermediate institution. On the basis of our findings, while we share Cançado Trindade's opinion, we also believe that there are strong grounds to argue that, given the multiple functions of the Commissions and its crucial political role in the Organization of American States, this body should not be excluded from the protection mechanism. Nevertheless, we suggest that the Commission's Rules of Procedure should be reformed in two directions:¹⁹⁶

a) Removing its filtering function, allowing all petitions that cannot be rejected as manifestly inadmissible to reach the Court, without the possibility to remove from the application to the Court provisions invoked by the petitioners. However, the Commission should be allowed to include additional provisions under which the Court should evaluate the facts. This change "capitalises" increased petitioners' maturity, removing the possibility of the Commission's potential "slowing-down effect" on processes of internalisation and adaptation to dynamically changing understandings, as it was possibly the case, besides the analysed technical obstacle of Article 12 BdPC, in the long delay before the IACrthR could rule on a VAW case on the basis of the BdPC. The Commission would, hence, maintain a limited filtering function, discarding *manifestly inadmissible* petitions, to decrease the possibility of clog up in the Court as cases multiply.

b) Strengthening and extending Commission's Rapporteurships, which should become its main activity. Considering the increased complexity of analyses, Rapporteurships need to be organized in order to allow better coordination of information gathering and on-site investigations, extending

¹⁹⁶ The IACommHR would maintain its current function in cases involving a State that does not recognise the competence of the Court.

their articulations and structuring continuous interactions with civil society actors, experts, scholars, NGOs, governmental bodies, international institutions and advocacy networks. The crucial role of the Commission would be providing the Court with extensive documentation on concrete cases, as well as additional information necessary to consider their systemic and structural dimensions. Commission's applications to the Court would, thus, turn into valuable informed opinions attached to the petitions received by the Court, signalling the criticalities of a case and possibly identifying the specific expertise required. In this way, the Commission would serve as a facilitator for increasingly complex multidimensional systemic analyses.

The proposed reform consistently holds together, on the one hand, the current viability of a (preferable) direct recourse to the Court and, on the other hand, the contemporary necessity of appropriately informed cases, while accounting for Court's fallibility, i.e. the inherent unlikelihood of its "self-sufficiency" in counting with the appropriate specific expertise and experience to address all relevant dimensions in any given case. In this perspective, a shared-function between the IACommHR and Inter-American Commission of Women (IACommW), in the in the first phase of the admissibility control and in coordinating activities to gather specific information, would prove particularly suitable to improve appropriate handling of gendered cases, considering the specific composition and expertise¹⁹⁷ of the IACommW.

Further developments of this research

Conditions for plausibility of the Istanbul Convention

In the following paragraphs we present our future research directions. Following up to the motivations presented in the General Introduction, we use this opportunity to show how our findings can contribute to the current debate on the Istanbul Convention in the European System, providing valuable

¹⁹⁷ Incidentally, we note that, had the BdPC provided for a more active role of the IACommW in processing of individual petitions, the learning process identified in our research could have been shortened.

informative material of an analogous instrument with twenty years of experience in a comparable regional system.

On the basis of our findings, we shall develop a brief *a priori* assessment of the perspectives of the Istanbul Convention, not yet come into force, in order to present a workable outline for further research, in which we will thoroughly evaluate to what extent the conclusions drawn from the Inter-American experience are “exportable,” whether and how they can be adapted to a different context, and single out favourable structural, institutional and procedural preconditions available in the European System, which might enhance the effectiveness of the Istanbul Convention.

We believe that the evolution of the BdPC in the Inter-American System provides a crucial informative experience for the development of the European response to VAW. ECrtHR case law currently provides an enormous *corpus juris* that proves sufficient to serve as a norm of reference to solve the majority of problems involving human rights. Indeed, the longer experience of the ECrtHR often provided the IACrtHR with crucial authoritative solutions when confronting similar issues. However, this should not lead to believe that the European System is capable, by itself, of always finding appropriate solutions to new emerging questions (Garlicki, 2012). Even if it were, it would prove time consuming to work out each solution from scratch, without drawing on consolidated experiences of systems with comparable long successful history and *auctoritas*.¹⁹⁸ However, some of the choices made in drafting the Istanbul Convention, particularly for what concerns the enforcement mechanisms established, appear to have overlooked the lessons learnt from previously enacted Women’s Conventions.

Three decades after CEDAW, and nearly two decades after the BdPC, in 2011 the Council of Europe adopted the Istanbul Convention, currently open for ratifications. As thoroughly analysed in the First Section of this research, while substantially reflecting both CEDAW and BdPC content, the more recent Istanbul Convention actualised the understanding of women’s rights and VAW, internalising doctrinal evolutions and currently consolidated approaches. Of

¹⁹⁸ On the continuous nature of the violation of the right to effective legal proceedings, the ECrtHR referred to the doctrinal elaborations of IACrtHR’s jurisprudence on the *desaparecidos* (Massolo, 2012).

the 47 countries of the Council of Europe, 29¹⁹⁹ have signed it and, to date, only 5 ratified this instrument: Albania, Montenegro, Portugal, Turkey and Italy. All 29 States signatories are contemporarily CEDAW members and all but 2 countries, Malta and Monaco, have additionally ratified the Optional Protocol. The Istanbul Convention is also open for signature and ratification from five countries non-members of the Council of Europe (Canada, Holy See, Japan, Mexico, United States) and the European Union. To date, none of these has either signed or ratified the convention, which will enter into force once reached 10 ratifications, including 8 CoE Member States.

In order to present a workable outline for further research, we shall adopt the same approach used analysing the internalisation process of the BdPC in the Inter-American System, and present some preliminary considerations on the perspectives of the Istanbul Convention in the European System.

On the basis of CoE studies and reports on the implementation of Recommendation 2002/5 on VAW, we can argue that, in CoE Member States, most specific laws tend to restrict their scope to criminal responses to VAW in cases of harm to a family member or intimate partner (Hagemann-White, Bohn, 2007; Hagemann-White, 2008, 2009, 2010). These legislations extend their coverage to abuses on children or elderly, violence between siblings and other relations of this sort. Provisions on domestic violence are highly diverse, with several laws focusing on forced marriages and Female Genital Mutilations (FGM), in countries where such practices are “exogenous,” i.e. encountered within migrant communities, more than on forms of violence originating in their own socio-cultural contexts. Consequently, the recognition of the need to eradicate the discriminatory causes contributing to domestic violence is still partial and ambiguous, with a wide spread persisting perception of the phenomenon as exogenous (Hagemann-White, 2010).

Indeed, although Recommendation 2002/5 lays down clear guiding principles, it is rather vague about the appropriate measures to fulfil them. Only Spain and

¹⁹⁹ Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, Finland, France, Germany, Greece, Iceland, Italy, Luxembourg, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Serbia, Slovakia, Slovenia, Spain, Sweden, Macedonia, Turkey, Ukraine, United Kingdom. The constantly updated interactive map is available on the CoE website at: http://www.coe.int/t/dghl/standardsetting/convention-violence/source/flash/map/map_en.htm.

Sweden have introduced gender-based definitions of violence in their criminal codes, addressing a range of forms of VAW broader than those perpetrated within partnerships or family relations. On the other hand, the CoE Campaign to Combat VAW and domestic violence had a sustained impact on the availability of information about women's right to a life free from violence (Hagemann-White, 2010), which countries disseminated through various initiatives, including school programmes and media coverage. However, the CoE Reports signal that the efforts in awareness-raising campaigns were not matched with an increased attention to legislative reforms, enhanced police investigations and prosecutions of those responsible of acts of VAW. Overall, no significant legislative change occurred after the mentioned first wave of domestic adaptation. In this sense, the CoE *"seems to have reached a plateau of legislative approaches for the time being, while at the same time, very few cases of violence against women are actually being prosecuted, measured against the prevalence data. (...) Limits to consensus have also become visible. Especially in a period of financial crisis, with severe impact on many member states, expansion of services has not been pursued, and the human rights obligation to ensure that every women threatened by discriminatory violence be effectively protected has not been fulfilled"* (Hagemann-White, 2010, p. 30). The 2010 CoE analytical study, while emphasising the crucial need for a European Women's Convention, endorsing new international standards of protection against and prevention of VAW, concludes: *"It will remain to be seen to what extent this future convention will enhance the realization of women's right to a life free from violence"* (Hagemann-White, 2010, p. 31)

Given the unavailability of a specific convention amongst the instruments of the European System of Human Rights, individual petitions coming from within CoE Member States and concerning VAW are currently almost evenly distributed between the ECtHR and CEDAW Committee. All but two cases of VAW decided by CEDAW Committee under the Optional Protocol involve CoE Member States.²⁰⁰ As argued previously in this Section, in a context of generalised early underutilization of the new protection mechanism provided by CEDAW Optional Protocol, the significantly higher tendency of petitioners

²⁰⁰ *Ms. A.T. v. Hungary* (2005); *Ms. A.S. v. Hungary* (2006); *Goekce v. Austria* (2007); *Yildirim v. Austria* (2007); *Ms. N. S. F. v. U.K.* (2007); *Vertido v. Philippines* (2010); *Ms. V.K. v. Bulgaria* (2011); *Abramova v. Belarus* (2011); *S. V. P. v. Bulgaria* (2012); *Jallow v. Bulgaria* (2012); *Kell v. Canada* (2012).

from within CoE Member States to seek protection resorting to CEDAW Committee, is due to their relatively higher familiarity with supranational mechanisms of protection and, in general, with the human rights discourse, given their participation to a regional system of human rights protection.

For the scope of these final considerations, from the enormous amount of cases arguably concerning gendered violations decided by the ECtHR primarily on the basis of the ECHR, we selected only those concerning domestic violence, more suitable to provide a general overview of the degree of internalization of the new international understanding on VAW.

We shall now briefly describe how, in absence of a specific convention, the ECtHR addressed cases of domestic violence. Although the phenomenon might be analysed under Article 3 ECHR (Prohibition of torture and inhuman or degrading treatments), the ECtHR preferred to address it focusing on the sphere in which it occurs. Extending the interpretation of the content of Article 8 (Right to respect for private and family life),²⁰¹ the Court generally recognised breaches in cases of bodily injuries or threats (e.g. in *Bevacqua v. Bulgaria*²⁰², *A. v. Croatia*²⁰³, *Hadjuova v. Slovakia*,²⁰⁴ *Kalucza v. Hungary*²⁰⁵). Notably, however, referring to Article 8 the Court overlooks the discriminatory causes of domestic violence, disregarding the nature of this violation and the origins of the structural deficiencies of the national judicial system.

²⁰¹ The relevant principles at the bases of ECtHR's assessments under Article 8 are recalled in *Hajduová v. Slovakia* (2010).

²⁰² In *Bevacqua v. Bulgaria* (2008): “there were at least four separate incidents of violence towards the applicant by her husband, in the course of custody and divorce proceedings. The authorities’ failure to impose sanctions or otherwise ensure that the applicant’s estranged husband refrained from unlawful acts was critical, as it amounted to a refusal to provide the applicant and her son the immediate assistance they required” (para. 83).

²⁰³ *A v. Croatia* (2010) concerned frequent episodes of violence, over three years. The perpetrator had been diagnosed with mental health disorders. The Court found that the Croatian authorities had failed to implement measures, which had been considered adequate and necessary by the Croatian courts, in order to address the violence directed against the applicant.

²⁰⁴ In *Hajduová v. Slovakia* (2010) the applicant was attacked and threatened by her former husband A. During the criminal proceedings, A. was diagnosed with serious personality disorder and in-patient psychiatric treatment was ordered. The Court found that the domestic authorities had failed to ensure that A. was duly detained for psychiatric treatment, which enabled him to continue to threaten the applicant and her lawyer.

²⁰⁵ In *Kalucza v. Hungary* (2012) the Court recognised, *inter alia*, a failure by the domestic courts to promptly decide on the applicant’s request for a restraining order on her common law husband, which was ultimately refused.

Some of the cases present broader argumentations, including the consideration of Article 2 (Right to life) and 13 (Right to effective remedies), e.g. *Kontrova v. Slovakia*,²⁰⁶ or Article 3, e.g. *E.S. and Others v. Slovakia*. Such differences were relevant mainly for what concerned determining the amount of compensations.

*Opuz vs. Turkey*²⁰⁷ presents a more articulated reasoning, that better responds to the specific requirements of the current understanding of the right of women to a life free from violence. Notably, besides considering the facts under Articles 2 and 3, respectively in reference to the killing of the applicant's mother and to the battering of the applicant herself, in this case the Court recognised a violation of Article 14 (Prohibition of discrimination), in conjunction with both Article 2 and 3, recognizing the discriminatory origins of the failure of the national judicial system to protect the victims from reiteration and punish the perpetrator. Significantly, the ECtHR clarified that, in order to imply a breach on Article 14, omissions in guaranteeing equal protection do not need to be intentional (*Opuz v. Turkey*, para. 191). While for several years this remained the only example of a reference to the discriminatory causes of domestic violence, the Court adopted again this approach this year, in *Eremia et al. v. Republic of Moldova*. Notwithstanding the efforts of the State, during the proceedings, to argue its reasonable handling of the case, the Court's evaluation of authorities' responses to the victims' complaints led resulted in the recognition of a violation of Article 14, identifying a pattern of tolerance of domestic violence and a discriminatory attitude towards the applicant *as a woman* (para. 89). We shall notice, incidentally, that the reference to Article 14 appears in two cases involving States that are not contemporarily members of the EU.

Although, as seen, the ECHR contains provisions suitable for grounding and developing interpretations on the nature of domestic violence, their overall

²⁰⁶ In *Kontrová v. Slovakia* (2007), the applicant's husband had shot himself and their two children dead, after reiterated violence on her and their children. The Court observed that the police had an array of specific statutory and administrative obligations but they had failed to ensure that these obligations were complied with.

²⁰⁷ In *Opuz v. Turkey* (2009), there was a series of serious assaults and threats directed to the applicant and her mother, from the applicant's husband, which resulted in the mother's killing. He was sentenced a low punishment and released pending an appeal. The Court recognised, *inter alia*, violations of Articles 2 and 3 ECHR, considering that Turkey's criminal law system does not provide a deterrent capable of preventing these acts, and that domestic authorities' response was manifestly inadequate.

underutilization signals that the unavailability of a specific convention might be delaying the European System's full internalisation of the paradigm shift in the understanding of VAW. In absence of a regional specific convention, we found evidence of frequent references to external normative frameworks and precedents, when the specificities of the cases of domestic violence so required. In this way, the Court has often been able to ground evolutionary interpretations, using internationally established standards to justify new approaches²⁰⁸ that might not have been accepted otherwise by States' Party.

Evidence of the tendency of the Court to use available specific instruments can be found, for instance, in its references to those adopted in the Universal System. In *Bevaqua v. Bulgaria*, referring to due diligence, the Court mentions Article 4(c) of the 1993 UNGA Declaration on the Elimination of Violence against Women (1993) and, in *Opuz v. Turkey*, generalised discriminatory judicial passivity, disproportionately affecting women, was identified on the basis of the Report prepared by CEDAW Committee. Citing CEDAW Committee's decisions in *Fatma Yıldırım v. Austria* and *A.T. v. Hungary*, in *Opuz* the Court underlines that, in cases of domestic violence, perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity. Judge Albuquerque's Concurring Opinion to *Valiuliene v. Lithuania* is particularly noteworthy for his extensive reference to all available sources and instruments on VAW, as well as to both Inter-American and CEDAW Committee's specific case law, when reviewing the evolution of ECtHR's approach to domestic violence, and for his elaboration of an articulated interpretation of the facts on the basis of the new international understanding on VAW.

The ECtHR presents an open attitude towards the explicit consideration of IACtHR case law on the BdPC. In *Bevaqua v. Bulgaria*, the ECtHR recalls IACtHR's doctrinal elaborations on due diligence referring to *Velasquez Rodriguez v. Honduras* and, with particular reference to the interpretation of due diligence in cases of VAW, to IACommHR's decision in *Maria da Penha Maia Fernandes v. Brazil*. In *Opuz v. Turkey*, the Strasburg Court quotes an entire paragraph of *Maria da Penha*, which provides a thorough analysis of impunity.

²⁰⁸ See, for instance, ECtHR's *Baytan* and *Cudak* cases.

Somehow prematurely, since only half of the ten ratifications needed for the Istanbul Convention to enter into force have been deposited, recently the ECtHR began to mention the new instrument when addressing facts of domestic violence. It was the case of *Valiulienė v. Lithuania* and *M.T and S.T. v. Slovakia*, although the latter was then declared manifestly inadmissible. This tendency strengthens the arguments for the need of a specific convention complementing the ECHR, and highlights the criticalities of the decision not to grant the ECtHR contentious jurisdiction on the instrument.

The general tendency to date has been that of referring to Article 8 (Right to respect for private and family life), evaluating States' due diligence in fulfilling their positive obligations to prevent, investigate, punish and provide reparations for acts domestic violence perpetrated by private individuals. However, besides identifying State's omissions, when determining the compensation granted to the applicant, the Court does not usually include specific requirements to guarantee non-repetition, nor it suggests appropriate measures to adopt to address systemic deficiencies. Indeed, the reviewed cases signal ECtHR's deference to States' margin of appreciation when it comes to define recommendations to eradicate discriminatory patterns.

In *Hajduová v. Slovakia* the Court stresses that its task is not to replace competent domestic authorities in determining the most appropriate methods for protecting individuals from attacks on their personal integrity, but rather to review their decisions under the ECHR, allowing a margin of appreciation. In *Bevaqua v. Bulgaria* the Court reiterates the same position clarifying that, within the limits of the ECHR, the choice of the means to comply with Article 8 ECHR falls within domestic authorities' margin of appreciation. In the more recent *Valiulienė v. Lithuania*, although recalling the margin allowed, the Court includes a stronger requirement for what concerns establishing effective criminal law provisions to abide to Article 3 ECHR (Prohibition of torture and other inhumane or degrading treatment), while we found a similar increased precision in *M.C. v. Bulgaria*, with respect to Article 8 ECHR.

If we consider the decisions adopted in cases of domestic violence where discriminatory patterns have indeed been recognised, i.e. *Valiulienė v. Lithuania*, *Opuz v. Turkey* and *Eremia et al. v. Republic of Moldova*, we notice that such recognition affected primarily the decisions on victims'

compensation. On the contrary, discriminatory patterns against specific groups have been more comprehensively addressed in previous cases that do not concern VAW, where the Court suggested specific measures to address States' omissions or reform non-neutral, or apparently neutral, legislations (e.g. *Hugh Jordan v. the United Kingdom*, *Hoogendijk v. the Netherlands*, *Oršuš and Others v. Croatia*).

In conclusion, if compared to our findings for what concerns the Inter-American States, currently both ECtHR's case law and CoE Member States legislations on VAW, with particular reference to domestic violence, appear to be still at an early stage in the process of internalisation of the new international understanding endorsed in Women's Conventions. While, on the one hand, this constitutes a further evidence of CEDAW limited impact on national legislations, these considerations acquire a particular meaning in relation to the expectations on the recent adoption of the Istanbul Convention, once (and if) it will enter into force.

Necessity and feasibility of granting contentious jurisdiction to the ECtHR

As mentioned, the objective of these final considerations is to present a workable outline for future developments of our research and to make a case for the crucial relevance of systematically analyse comparable previous experiences to draw useful lessons for decisions, actions and processes concerning the adoption and implementation of the Istanbul Convention in the European System.

We refer to the First Section of this research for the arguments in favour of enhancing the effectiveness of women's rights through regional conventions, where possible, rather than relying on a less accessible universal convention adopted in a system that does not present a comparably suitable structure. Further developments of this research will identify and analyse the differences between the Inter-American and European Systems to assess whether and how they influence the perspectives of the respective Women's Conventions. A particular attention will be focused on the higher diversity of national solutions for what concerns ECHR hierarchical status in national constitutional

structures (see Stone Sweet, Keller, 2008); the significantly lower degree of cultural homogeneity within the 47 CoE Member States and, in particular, amongst the 29 signatories of the Istanbul Convention signatories; the influence of the margin of appreciation doctrine in ECtHR's jurisprudence and the issue of gender representation in CoE Institutions' memberships. In the following paragraphs we follow up to our final objective and develop a brief *a priori* assessment of the perspectives of the Istanbul Convention, in order to show how our findings for what concerns the Inter-American experience with the BdPC can be used to provide valuable comparable information to contribute providing favourable conditions for plausibility for women's rights in the European System.

On the basis of the analytical studies elaborated within the CoE, we argued that ECtHR's case law and national legislations on VAW are still at an early stage, if compared to the current Inter-American context, notwithstanding some improvements in European jurisprudence and despite CoE countries' ratification of both CEDAW and the Optional Protocol.²⁰⁹ In the following paragraphs, we will focus on one significant element of difference between the BdPC and the Istanbul Convention that, in our view, might imply the latter's limited prospective influence in the region, i.e. its lack of a strong enforcement mechanism and, in particular, the missed opportunity to grant competence on the new instrument to the ECtHR.

We argued that Inter-American Institutions, particularly since the Court clarified BdPC full justiciability, performed a crucial role to guarantee its effectiveness and national implementation, applying of its provisions in concrete cases and shaping regional standards and principles interpreting its content. Given the high degree of comparability between the two systems, and in the light of our previous considerations with respect to ECtHR's case law and CoE national legislations on VAW, we shall argue the need to reconsider ECtHR's role with respect to the Istanbul Convention.

Similarly to the ACHR, the BdPC allows the Inter-American Commission of Women and States Party to request IACtHR's Advisory Opinions on its

²⁰⁹Only two countries did not sign the Istanbul Convention: Estonia and Latvia. Monaco signed, but did not ratify the instrument.

interpretation (Article 11). This crucial instrument for dialogue does not exist in the Istanbul Convention, whereas the ECHR allows it in very restrictive terms (Article 47).²¹⁰ The Istanbul Convention establishes an independent group of experts (GREVIO) for monitoring national implementation, adopting reports, conclusions and general recommendations concerning the measures to enact in abidance to the Convention. However it does not, implicitly or explicitly, refer to any role of the ECtHR.

Furthermore, Article 74 provides an alternative procedure for the settlement of disputes:

The Parties to any dispute, which may arise concerning the application or interpretation of the provisions of this Convention, shall first seek to resolve it by means of negotiation, conciliation, arbitration or by any other methods of peaceful settlement accepted by mutual agreement between them. The Committee of Ministers of the Council of Europe may establish procedures of settlement to be available for use by the Parties in dispute if they should so agree.

Considering the long delay and the significant actualisation effort that its content reflects, the adoption of the Istanbul Convention carries a high symbolic meaning. However, notwithstanding the detailed organisation of GREVIO's functions, we argue that excluding the ECtHR from the protection mechanism carries the risk of creating a new instrument with similar features to those that caused the limited impact of 1979 CEDAW. As previously argued, it took ten years to tackle the problem allowing CEDAW Committee to receive and consider petitions, and the 2000 Optional Protocol had to undergo a separate additional ratification process. Similarly, the lack of an explicit reference to the IACtHR in the BdPC, although possibly unintended, arguably delayed its internalisation in the Inter-American System and had to be overcome, somehow controversially, through a lengthy systematic and

²¹⁰ Article 47: 1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto. 2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention. 3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the committee.

teleological interpretation of a procedural provision (Article 12 BdPC), resulting in BdPC full justiciability on the basis of IACrTHR's implicit competence.

Considering the slow pace of Istanbul Convention's ratification process, manifesting a generalised lack of political will possibly worsened by the European financial crisis, we can assume that ECrtHR's exclusion from the protection mechanism intended, *inter alia*, to encourage ratifications. Nevertheless, this issue will require a thorough analysis in our future research, where we will review the *travaux préparatoires* for the new CoE instrument. On the basis of our findings on the critical role of the IACrTHR's in guaranteeing BdPC effectiveness, we argue that the weak mechanism established by the Istanbul Convention hinder its potential. At the same time, paradoxically, it appears to have failed in overcoming States' reluctance. This objective might have been more appropriately pursued allowing an opting-out clause on ECrtHR' contentious jurisdiction, by which States unwilling to be subject to the Court for what concerns Istanbul Convention's requirements could explicitly consent to the more limited monitoring mechanism led by GREVIO.

We make a point on the controversial legitimacy of the weak choice made by the CoE, on the bases of the lessons learnt from the history of the older Women's Conventions and recalling the concerns raised by feminist scholars with respect to the marginalising impact on women's rights, which are prevented from officially integrating and complementing ECHR provisions and ensured by a judicial body with a broad mandate and a long successful history in the region.

However, given the slow pace of the ratification process, we believe that the CoE is allowed some room of manoeuvre to reconsider the missed opportunity and modify its approach before it is too late. In this perspective, we shall now briefly present our proposal with respect to possible changes to be discussed in order to guarantee more favourable conditions for the effectiveness of the new CoE instrument. Incidentally, we underline that there are no grounds to assume that our proposal would necessarily imply a success rate in the ratification process lower than the current, disappointing, one.

On the basis of the findings of our research on the Inter-American System,

which specific tools would the European System provide to the ECtHR for appropriately addressing cases of VAW under the Istanbul Convention?

Let us consider the implications of the *jus cogens* nature of the principles of equality and non-discrimination, with the consequent complementary nature of Istanbul Convention with respect to the ECHR, and ECtHR's tendency to refer to available international specific instruments, including premature references to the Istanbul Convention, and relevant Inter-American case law. We argue that, even if excluded from the protection mechanism, the ECtHR counts on strong grounds to use conventional provisions as additional tools for interpreting the ECHR, if the gendered nature of the violations so required. Nevertheless, this option is left to the discretionality of the Court, since the Istanbul Convention does not belong to the instruments under its jurisdiction, and might encounter States' objections, as it was the case in the early phases of BdPC application by the IACtHR.

Naturally, the possibility to use specific provisions as interpretive tools would not imply an expansion of ECtHR's public function resulting in Istanbul Convention's full justiciability, since the European instrument does not offer an occasion similar to that provided by Article 12 BdPC, thoroughly analysed in the Third Section of this research. Additionally, the limited use allowed restricts the influence that the convention can exercise when it comes to include specific measures in the recommendations to the State considered appropriate to modify structural deficiencies or discriminatory patterns, even more so if we consider that Court's intervention is already limited by its deference to the national margin of appreciation. This is a relevant consequence, if we recall the crucial implications of an extended interpretation of States' positive obligation based on the new paradigm adopted in Women's Conventions, analysed in the First Section of this research.

After these substantial considerations, in the following paragraphs we shall adopt a problem-solving approach to present our proposal, arguing the *feasibility*, besides the necessity, of granting full justiciability to the Istanbul Convention.

A concrete proposal

The first problem to consider is that, precisely given the early stage of adaptation of national legislations to the new understanding on VAW in CoE Member States and amongst perspective Istanbul Convention Parties, attributing contentious jurisdiction to the ECtHR might overload an already clogged-up system. This is a critical issue, which possibly contributes to reasons that led to the establishment of GREVIO and the exclusion of the Court from the protection mechanism. However, we argue that the likelihood of a negative impact of this choice with respect to national implementation *as well as* its unacceptable consequences of implicit marginalization women's rights, reduce the justifiability of such argument. At the same time, the problem cannot be overlooked, as it carries the risk of neutralizing Court's effective intervention, both in cases of VAW and with respect to its whole activity. Therefore, on the basis of the finding of our research, we shall suggest a solution that might hold together the need to avoid Court's overload and to guarantee effectiveness to the Istanbul Convention.

As it was the case prior to the 1998 reform of the European System, which abolished the European Commission of Human Rights (ECommHR), the Inter-American protection mechanism presents an intermediate stage before a case can be presented to the Court. We argued that IACommHR's filtering function had the negative effect of delaying the Court's first ruling on the BdPC. Besides the technical problem of Article 12 ambiguous wording, we found that part of the reason of this early neglect can be attributed to the early lack of a gender perspective in an institution with general competences and no previous specific experience. For these reasons, given the current maturity of petitioners in presenting their cases, building on Judge Cançado Trindade's opinion we suggested a reform of the IACommHR, limiting its filtering function and reinforcing its Rapporteurships, as strategic engines for the coordination and organisation of necessary informative material and specific expertise to facilitate IACrHR activities.

On this basis, in absence of the ECommHR, we suggest that such intermediate function might be performed by GREVIO. This possibility presents several positive features: on the one hand, it attributes to a body with specific expertise and experience the first stages of the proceedings of gendered

violations, overcoming the problem encountered with respect to the IACommHR; on the other hand, it provides the ECtHR, a body with a broad mandate, with extensive information and valuable analytical contributions to appropriately address such cases. In this way, GREVIO would be able to reject ill-founded cases before they reach the Court, while facilitating its work once a case is submitted to its consideration.

We argue that the Pilot-judgment Procedure²¹¹, developed since 2004 and codified in 2011 in Rule 61 of the Rules of the Court, is a suitable tool to guarantee the *feasibility* of Istanbul Convention's full justiciability. If dealing with a significant number of repetitive cases caused by an identifiable systemic dysfunction, this procedure allows the Court to select only one or a few of them for priority treatment, seeking to achieve a solution that extends beyond the facts of the concrete case and provides a guidelines to States for solving structural problems. The Court might also adjourn related cases on the condition that the State concerned fulfils the requirements of the Pilot-judgement, under the control of the Committee of Ministries.

This procedure appears to provide a particularly suitable tool to guarantee the *feasibility* of Istanbul Convention's full justiciability and, hence, the *plausibility* of the rights enshrined. Building on our previous considerations about turning GREVIO into an intermediate facilitator, and given CoE Member States' (and Istanbul Convention Signatories') disappointing legislations on VAW, we suggest that GREVIO could also perform a crucial function organising the Pilot-judgement Procedure in cases of VAW. As a body with specific expertise, with the possibility to gather relevant contextual information for admissible cases, compared to the ECtHR, GREVIO is better endowed to identify systemic problems in repetitive cases, whether they be procedural or emerging from socio-cultural patterns. Therefore, we suggest that GREVIO should be given the competence to select the Pilot case to be submitted to the Court and, would the ECtHR adjourn related cases of VAW, replace the Committee of Ministers in monitoring States' compliance with the judgment.

Coming to the issue of Advisory Opinions, we recall that the ECHR allows this possibility on very restrictive terms (Article 47). Following the 2012 Brighton

²¹¹ For an extensive and exhaustive analysis of the Pilot-judgement Procedure, see Haider, 2013.

Declaration, the Committee of Ministries drafted Protocol No. 16, currently open for signatures, extending ECtHR's advisory competence to on the interpretation of the ECHR. This Protocol is the result of a lengthy process, due to the diversity of views on the issue. Moreover, the prospective EU accession to the European System is triggering an internal reorganization that will need to coordinate the competences of supranational regional Courts *vis-à-vis* national legal systems. In this framework, strengthening ECtHR advisory competences would constitute a significant instrument for dialogue with national and EU institutions, preventing competence overlapping and minimising the risk of contrasting priorities. For what concerns an instrument with broad structural implications such as the Istanbul Convention, extending ECtHR advisory competence would constitute a significant tool for dialogue.

Nevertheless, considering the difficulties encountered in reaching an agreement on ECtHR extended advisory competence on the ECHR, we believe that a viable alternative for the Istanbul Convention would be granting advisory competence to GREVIO, which, in the framework of our previous proposal, as an intermediate body of experts represents a valuable tool for clarifying the implications of the paradigm shift on women's rights. We suggest reconsidering the procedure established at Article 74 Istanbul Convention, which currently requires States to settle disputes on the application of the convention by means of negotiation, arbitration or other mutually agreed methods, leaving to the Committee of Ministers the competence to establish specific procedures of dispute settlement that States Party may use. In our proposal, such function would be performed by GREVIO, integrating the report-based monitoring procedure on States' compliance currently established at Chapter IX of the convention (Monitoring Mechanism). Such integration would prove a powerful tool to guarantee effectiveness to the Istanbul Convention, uncovering potential challenges and possibly contributing to decrease the number of prospective applications invoking the convention, would the Court be also granted contentious jurisdiction.

In the previous paragraphs we outlined how the findings of our research on the Inter-American experience with the BdPC provide valuable comparable informative material to design better conditions for plausibility for the Istanbul Convention in the European System. After a brief evaluation of the ECtHR performance in handling cases of domestic violence, without counting on a

specific regional instrument, and an overview of the trends in CoE Member States' national legislations on VAW, we used the information drawn from our research to argue the need to reconsider ECtHR's role, and made some proposals with respect to potentially appropriate reforms, considering their actual feasibility in the current European System's context.

While what we presented constitutes a brief *a priori* assessment, our prospective research objective is to thoroughly assess the feasibility of our proposal to grant the ECtHR with the contentious jurisdiction on the Istanbul Convention, focusing on the specific features possibly representing influential differences (e.g. higher diversity in the formal hierarchical status of human rights instruments in CoE Member States' constitutional structures, lower cultural homogeneity, relations with EU Institutions and EU Treaties, influence of the margin of appreciation doctrine, ...). Our goal will be to evaluate the degree of "exportability" of the findings of our research on the Inter-American experience with the BdPC, in order to avoid reproducing known errors and contribute designing the best *conditions for plausibility* for the Istanbul Convention in the European System.

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