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The treatment: re-conceptualising states' obligations in countering VAWH

Starting from the beginning: the nature of state obligations

This chapter consists in the treatment, and it attempts to find an answer to the question which obligations states must abide by with regard to VAWH? There is often no univocal response – and hence a treatment – to a disease. However, the current legal instruments underestimate – to the point of not even mentioning women's rights to health and to reproductive health – the point that focusing on health is a way, in considering states' obligations as in other discussions, to counter VAW committed, whether by private or public actors (or both), in interpersonal relations, or perpetrated through policies, laws and, as underlined in chapter 2, accepted practices in the public or private health sector, in the field of health and reproductive health.

In the analysis of VAWH as conceived in this book, I will reconceptualise states' obligations including both dimensions. In the horizontal dimension, interpersonal violence, it is easier to find elaborations of states' positive obligations, expressed as 'prevention, protection, prosecution and policies,' to use the pillars of the Council of Europe Istanbul Convention – and jurisprudence is quite abundant in that respect. In the vertical dimension, as Rebecca Cook has argued, 'the challenge remains of requiring States to satisfy the positive duty of providing qualified services where women have no access to them on their own.'[1] This is especially true, for example, in the field of access to contraceptives, since this 'may depend on governments' financial resources and the political will to allocate them to the service of such rights.'[2] If, on one hand, 'the right to reproductive choice as a negative right has been successfully asserted in many countries by judicial decisions restricting governmental intervention,' the right to such choice 'has not been as successfully advanced as a positive right, since courts are less willing and able to direct governmental discretion on resource allocation.'[3]

My paradigm will allow us to put the two dimensions 'under the same umbrella' in terms of states' obligations, and to find that states' obligations 'specialise' along one or other of the dimensions. In this section, I will elaborate further the intuition of the CEDAW in GR No. 35 of 2017, which stressed that states have obligations stemming from actions committed by state and non-state

actors and, with regard to the former, to ensure that laws, policies, programmes and procedures do not discriminate against women.[4] The recommendation does not refer, however, or only partly, to cases in which it is the state that, through its policies in the field of health, causes violence against women. The GR then refers to due diligence obligations under the paragraph on 'responsibility for acts or omissions of non-State actors,'[5] missing the opportunity to clarify the concept better and to conceive due diligence obligations in terms of the vertical dimension of violence as conceptualised in this book, as well as the horizontal dimension.

It is necessary to start, although briefly, from states' obligations and state responsibility. In exploring the literature, the different ways in which states' obligations have been 'categorised' have not always been clear. In particular, the framework used in international human rights law – to respect, to protect and to fulfil human rights – was confused with other 'categories,' such as obligations of conduct and of result. There might be some overlap, but distinctions should be made. After analysing possible ways to pigeonhole states' obligations, I will find the category within which my paradigm works, in order to proceed with the legal analysis of states' obligations in countering VAWH, as conceived in its double dimension. The concept of due diligence, despite being criticised and put to the test by legal scholarship, will also play a pivotal role, and cannot be neglected, given the fact that it has been elaborated by jurisprudence,[6] by UN bodies including the Special Rapporteurs on State Responsibility,[7] and scholars alike. A categorisation of states' obligations with regard to VAWH is not devoid of meaning and cannot be considered merely descriptive, because, as has been pointed out, 'la différente nature et la différente structure de l'obligation internationale a nécessairement une influence sur la nature et la forme de la responsabilité en cas de violation de cette obligation.'[8]

To discuss state responsibility it is worth starting from a key text, the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001, whose Article 2 reads as follows: 'there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.'[9] The text does not provide a definition of international obligation, except that it can consist in an action or an omission, and can derive from any legal instrument, not necessarily a treaty. As outlined by the then UN SR on State Responsibility James Crawford:

> One notable feature of this provision consists in the absence of any requirement concerning fault or a wrongful intent on the part of the State in order to ascertain the existence of an internationally wrongful act … it reflects the consideration that different primary rules on international responsibility may impose different standards of fault, ranging from 'due diligence' to strict liability.[10]

A major objection can be raised here from a feminist point of view. In their pioneer work, Christine Chinkin and Hilary Charlesworth argued that 'the traditional rules of State responsibility have provided a number of obstacles to

the recognition of women's concerns as issues of international law.'[11] That was attributable to the distinction between 'public' actions and 'private' ones, the latter not triggering state responsibility, until the disruption of the public/private divide in the 1990s. Hence, the question could be posed this way: why is it plausible to rely on traditional concepts of international law to counter VAW, and in particular VAWH? Why, in other words, use categories that have proved to be guided by a patriarchal view of international law?

The answer will find its way in this chapter. What is indisputable is that it is not worth creating a parallel system of states' obligations, and a parallel regime of state responsibility in case of breach of these obligations, but better to challenge the traditional categories of international law from a feminist law perspective. The recognition of state responsibility for acts or omissions that originate in actions of non-state actors 'eliminates distinctions between public and private sector conduct in a way that feminist analysis endorses,'[12] for example, and its development has started with the traditional rules on the protection of foreigners. The concept of due diligence, which is not unknown to international law,[13] is another illustrative example. Despite being criticised and considered too vague, it is the key concept for the identification of the content of states' obligations and the determination of the responsibility of states for violations of women's rights. Some remarks on the long-standing debate in international law seem therefore unavoidable.

Obligations of conduct and of result

The first coherent structure for the rules on state responsibility was conceived by the then SR Roberto Ago, whose mandate lasted from 1969 to 1972. He argued in favour of a distinction between obligations of conduct and obligations of result, or rather, between 'obligations that call categorically for the use of specific means' (conduct), and those that leave the state free to choose among various means (result).[14] This is the first category that I will analyse, to see whether or not it is suitable for my paradigm. In the fifth report elaborated by Ago, Article 20 of the Draft Articles on State Responsibility referred to obligations 'calling for the State to adopt a specific conduct,'[15] and the specific conduct of the state required by the international obligation could be 'a course of action,' such as enacting laws, or an 'act of omission,' meaning not adopting particular laws or regulations.[16] In terms of state responsibility, an action or omission not in conformity with the 'specifically required' conduct constituted 'an immediate breach of the obligation in question.'[17] Applying the two dimensions elaborated in this book, both the failure to adopt laws on preventing and suppressing DV, for example, and the adoption of laws criminalising abortion without exceptions, would constitute violations of an obligation of conduct. This approach is not devoid of interest, even though, as I found in chapter 1, it is far from what the jurisprudence means by 'conduct', which is linked more to the standard of 'due diligence.' Article 21 of the Draft Articles proposed by SR Ago concerned violations of an 'obligation requiring the

State to achieve a particular result.' Obligations of result require a state to ensure a particular outcome, leaving the state a free choice of means to achieve it.[18] More problematic was the article on obligations of prevention (Article 23). Two conditions *sine qua non* were required:[19] 'the event to be prevented must have occurred,' and, secondly, it must have been 'made possible by a lack of vigilance on the part of State organs.'[20] Lack of vigilance and occurrence of the event had to be in a causal relation.

These definitions prompted criticism among international scholars. The distinction between obligations of conduct and obligations of result is indeed known to civil law countries, but has a meaning different to the one elaborated by Ago. Special Rapporteur Crawford, in his second report of 1999, argued concerning the basic distinctions between conduct, result, and prevention, that 'there is a strong case to simply delet[e] them,' and that 'means and ends can be combined in various ways,' being that the distinction is a 'spectrum' rather than a dichotomy.[21] Dupuy explains that Ago's position created confusion, since he meant the obligation of conduct in a sense that was opposite to the classic civil law tradition.[22] According to the latter, the obligation of conduct is an obligation of endeavour, a 'best efforts' obligation, whereas the obligation of result is aimed at achieving a precise result, with the consequence that 'lack of due diligence is a breach of the obligation of conduct.'[23] The debate on the obligation of prevention surrounded the question whether it was an obligation of conduct or of result, and it was not clear at the time which position Ago had taken in that respect.[24] The International Law Commission departed from the notion elaborated by the Special Rapporteur, and approved at a first reading this version of Article 23:

> When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.[25]

What determined breach of the obligation was the failure to achieve a result and not the actual conduct of the state. *Contra*, Dupuy clearly argued that it was necessary to 'get rid of the idea that obligations of prevention are obligations of result.'[26]

The distinction between obligations of conduct and obligations of result has rarely been mentioned by UN Treaty bodies, except in some soft law acts, such as General Comment No. 3 on Article 2 of the ICESCR, elaborated by the ESCR Committee in 1990. The Committee considered that Article 2 encompassed both obligations of conduct and obligations of result.[27] As for the latter, they referred to the basic commitment by the parties to the 'full realisation' of the rights enshrined in the Covenant, whereas obligations of conduct consisted in the adoption of measures, 'including legislative measures.' The Committee was extremely clear, however, in contending that 'the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties.'[28] In 1994, Rebecca Cook considered obligations of means and of result

with regard to the CEDAW, contending that an example of the latter was to embody the principle of equality between women and men, whereas an obligation of means was provided in Article 2(c), 'to establish the legal protection of women,' which, in Cook's view, 'leaves to State parties choice of means.'[29] Her position departs from the framework elaborated by Ago, and adheres to the version of obligation of means as a 'best efforts' obligation. In GR No. 28, the CEDAW Committee argued that Article 2 CEDAW entails both obligations of means or conduct and obligations of results.[30]

The distinction, which led to some confusion, was soon abandoned. As anticipated, the categorisation was not eventually included in the final Draft elaborated in 2001. The debate around it never stopped, though. In Italian scholarship, for example, Antonio Marchesi proposed a tripartite structure of international obligations, in order to reconcile the different approaches that had emerged over time: obligations of conduct as elaborated by the International Law Commission at the time of Ago's mandate; obligations of conduct according to the 'French' traditional understanding of it (due diligence); obligations of result.[31]

Positive and negative obligations

Positive and negative obligations have become, write Dinah Shelton and Ariel Gould, 'a major part of human rights law,' to the extent of expanding in some cases 'both rights and obligations beyond the strict textual confines of international instruments.'[32] This opinion is mirrored in Pisillo Mazzeschi's complete study for the Hague Academy of International Law, where he affirmed that positive obligations have become more and more of interest in international law, especially after the development of international human rights law.[33] This does not come as a surprise, given the fact that, to use Alston's words, 'the world is much more poly-centric than it was in 1945,' and that 'non-State actors are looming even larger on the horizons of international and human rights law.'[34] If the obligation to prevent was conceived at Ago's time as referring to the protection of foreign nationals, and in particular foreign states' ambassadors – and hence, to a certain extent, his definition as obligation of result was understandable – in today's world the state is required by international human rights law to prevent private parties, under specific circumstances, from committing actions such as DV, for example by a person against his/her partner or a former partner.

UN treaty bodies and regional human rights courts often refer to positive obligations as a unique category of obligations, under which several obligations can be included, from obligations towards an individual who has suffered a specific violation to more general obligations. The distinction between negative and positive obligations seems adamant: the former are conceived as obligations to abstain from interfering in the sphere of rights and individual freedoms, the latter require the state to perform certain actions, to intervene, and they are meant to promote the 'realisation of individual rights and freedoms.'[35] The two types of obligation are not so neat as this; they may overlap, and the state may be

able to abide by both in a particular sector. Even though the debate on negative and positive obligations gained momentum with the affirmation of human rights law, Pisillo Mazzeschi warned against the separation of this branch of international law from international law itself. The category of obligations developed in international human rights law must be brought under the general umbrella of international law, because the principles underpinning it were drawn 'from the more traditional doctrines of the law of State responsibility.'[36] It is interesting to note that, despite being relevant for the affirmation of women's human rights, from a feminist point of view positive obligations have rarely been explored; much more attention has been devoted to a specific aspect of positive obligations, namely due diligence obligations.

Pisillo Mazzeschi explained the notion of positive obligations having horizontal effects, which can be compared to the responsibility to protect elaborated at UN level.[37] It refers to the responsibility of the state for the acts of individuals. Despite considering the category negative/positive obligations relevant, he identified three sub-categories to better grasp the consequences in terms of state responsibility for the violation of a specific obligation: positive obligations of result, positive obligations of *due diligence*, positive obligations of progressive realisation.[38] The former can include legislation which respects and protects human rights; the positive obligation of due diligence encompasses concrete activities and measures of prevention which are however subject to *alea* (risk) in relation to the result;[39] the third type of obligation consists in the progressive adoption of measures with the aim of guaranteeing the effective exercise of particular rights. To go back to the previous categorisation, due diligence can be conceived as an obligation of conduct,[40] and a positive obligation. If it is correct to argue that all due diligence obligations are positive obligations, it cannot be said that all positive obligations are due diligence obligations.[41]

… in particular the positive obligation of due diligence

Literature on due diligence is significant, and it is not the purpose here either to provide the entire history of the evolution of this concept or to challenge its use in the field of VAW. The purpose is rather to stress the importance of due diligence in the protection of women's rights. Due diligence can be conceived as a standard, a tool, an approach, a process, to measure whether the state has undertaken all necessary steps to, for example, prevent a violation of women's rights, or to protect a female victim of violence, or to investigate a violent act. Condorelli defined due diligence as a 'basic principle of international law.'[42] Due diligence stems from the law of neutrality, and has developed in specific areas of law: the security of aliens and representatives of foreign states, the security of foreign states, the conservation of the environment[43] and, more recently, the protection of human rights, investment law[44] and security in cyberspace.[45]

In the field of human rights law, Sarkin points out that due diligence 'means that states take reasonable steps to stop human rights abuses from occurring, and

use the means they have to adequately investigate abuses committed to determine who was responsible, to take appropriate steps against such individuals, and to guarantee victim redress and reparations.'[46] As clearly outlined by the African Commission on human and people rights in the case *Zimbabwe Human Rights NGO Forum* v. *Zimbabwe*:

> [an] act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of *due diligence* to prevent the violation or for not taking the necessary steps to provide the victims with reparation … The established standard of *due diligence* … provides a way to measure whether a State has acted with sufficient effort and political will to fulfil its human rights obligations. Under this obligation, States must prevent, investigate and punish acts which impair any of the rights recognised under international human rights law … The doctrine of *due diligence* is therefore a way to describe the threshold of action and effort which a State must demonstrate to fulfil its responsibility to protect individuals from abuses of their rights.[47]

It can be said that the obligation of due diligence corresponds to the duty to protect, as I will see further elaborated at UN level, but unlike that duty, due diligence is a standard that already existed in international law, has been investigated by scholars,[48] was later included in legal instruments and has been used over time by courts in their decisions. Legally, it is a 'long-standing concept in international law,'[49] despite its vagueness, on which a significant jurisprudence has been elaborated over the years. Its vagueness should not necessarily be considered a point of weakness, but rather as expressing flexibility and adaptation to the context of different violations. Flexibility should be appreciated, indeed, in terms of 'variability', as pointed out by Karine Bannelier in her work on 'cyber due diligence':

> La due diligence n'est pas une norme indéterminée mais une obligation objective de comportement qui implique certains 'facteurs de variabilité.'[50]

These factors of variability consist in the state 'knowledge' of what is happening in its own territory, which is subject to a standard of reasonableness applied by international and regional courts;[51] in the state's capacity to prevent the use of its territory by non-state actors or, as in the case of women's rights, to prevent violations of human rights by private individuals; in the risk that a harm may materialise; and in the harm itself.[52] The degree of diligence varies 'in relation to the different standard of behaviour required by international law in each of the areas in which this concept is at issue.'[53]

Due diligence has been sometimes misinterpreted in the field of women's rights. Not every obligation to protect women's rights can be identified as a due diligence obligation. In her preliminary report of 1994, the then SR on VAW, Radhika Coomaraswamy, strongly argued that 'a State that does not act against crimes of violence against women is as guilty as the perpetrator.'[54] This affirmation anticipates the reasoning on due diligence obligations in the protection of women's rights.

In her outstanding report, a later SR on VAW, Yakin Ertürk, described the evolution of the due diligence standard as 'a tool for the elimination of violence against women.'[55] She did an excellent job of analysis, and the application of the standard in different contexts of violence is remarkable. However, some pivotal affirmations seem to depart from a rigorous international legal approach. For example, when she mentioned measures of protection, she stated that 'many measures undertaken by States in terms of their due diligence obligation to protect … consist mainly of provision of services to women, such as telephone hotlines, health care, counselling centres, legal assistance, shelters, restraining orders and financial aid to victims of violence.'[56] In these cases, however, it is hard to see obligations of due diligence; they are rather obligations either of result – to establish certain services – or of progressive realisation (therefore to guarantee the effective exercise of the rights). There is no indeterminate result, as conceived by Pisillo Mazzeschi in his work, in the adoption of laws that allow the establishment of shelters: they are a purpose, which the state can achieve progressively if it does not have the means to achieve it immediately.[57] Ertürk was right to argue that not much effort is required to analyse 'the more general obligation of preventing violence from occurring, including by supporting women's empowerment and engaging in transformative change at the community and societal level,'[58] but this does not necessarily correspond *in toto* to due diligence obligations; it might be a form of progressive realisation or, more likely, a combination of different obligations. The standard of due diligence is, according to Joanna Bourke-Martignoni, a 'yardstick against which the efforts of States to prevent and respond to violence against women must be measured.'[59] She correctly argues that the concept is not new – it is quite old, indeed, and was applied by arbitral tribunals during the nineteenth century;[60] it was mentioned in the judgment by the IACHR, *Velásquez Rodríguez v. Honduras*, in which the Court posited that the state is responsible when an action is performed by individuals 'because of the lack of due diligence to prevent the violation.'[61] In this case, security agents acting on behalf of the state abducted, tortured and murdered Manfredo Velásquez, so their behaviour was directly attributable to the state. Nonetheless, the more general reasoning followed by the Court paved the way for further regional human rights courts' jurisprudence. The standard of due diligence must be applied case-by-case, considering the context,[62] and, as the ECtHR explained with regard to DV, also taking into account the specific circumstances of the violation of women's rights.[63]

Due diligence is also included in several soft law and hard law legal instruments regarding women's rights. The 1993 Declaration on the Elimination of Violence against Women urged states to exercise due diligence to prevent VAW committed by private individuals.[64] GR No. 19, adopted by the CEDAW Committee in 1992, stressed that states are responsible for acts committed by individuals '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.'[65] The recent GR No. 35 on VAW does not follow the tripartite structure to respect, to protect and to fulfil human rights, and connects due diligence to the obligation of 'taking all

appropriate measures to eliminate discrimination against women' under Article 2(e) CEDAW:

> Due diligence obligations for acts and omissions of non-State actors … This obligation, frequently referred to as an obligation of due diligence, underpins the Convention as a whole and accordingly States parties will be responsible if they fail to take all appropriate measures to prevent as well as to investigate, prosecute, punish and provide reparation for acts or omissions by non-State actors which result in gender-based violence against women.[66]

One passage might appear misleading, but only at first sight. When the Committee states that 'under the obligation of due diligence, States parties have to adopt and implement diverse measures to tackle gender-based violence against women committed by non-State actors,' followed by, after a full stop, 'they are required to have laws, institutions and a system in place to address such violence,' this does not mean that the *adoption* of laws is a due diligence obligation. It seems to me that where the Recommendation reads 'in place,' it precisely means that it requires a precise outcome. The due diligence obligation rather arises in the *implementation* of laws, as stressed by the Committee: '[a]lso, States parties are obliged to ensure that these [laws] function effectively in practice and are supported and diligently enforced by all State agents and bodies.'[67]

Most importantly, echoing the jurisprudence of the ECtHR:

> The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women when its authorities know or should know of the danger of violence, or a failure to investigate, prosecute and punish, and to provide reparation to victims/survivors of such acts, provides tacit permission or encouragement to acts of gender-based violence against women. These failures or omissions constitute human rights violations.[68]

In GR No. 28 on core obligations of 2010, the CEDAW Committee explained that Article 2 CEDAW 'imposes a due diligence obligation on States parties to prevent discrimination by private actors;' it then adds that in some cases, 'a private actor's acts or omission of acts may be attributed to the State under international law.'[69]

The Council of Europe Istanbul Convention enshrines the standard of due diligence in its Article 5(2), according to which states must take 'the necessary legislative and other measures to exercise due diligence' in order to 'prevent, investigate, punish and provide reparation for acts of violence' covered by the Convention that are perpetrated by non-state actors.[70] The text here is fundamental. The Convention does not establish all the obligations it encompasses as due diligence obligations, but rather requires that due diligence must be exercised to prevent, protect, prosecute and provide reparations for acts committed by non-state actors. When it comes to the obligation on states to criminalise certain types of conduct, this is an obligation of immediate result, if I follow the distinction explained in the previous paragraph. The application of the law that criminalises rape, for example, must be then assessed under the standard of due diligence. In the explanatory report, due diligence obligations are (correctly) conceived

as obligations of means, which allow state responsibility for breach of these obligations to be determined for what otherwise are acts of private persons. In the words of the explanatory report, 'parties have the obligation to take the legislative and other measures' – as I understand it, with the aim of achieving a result in the short or long term – 'necessary to exercise due diligence,' and that 'failure to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms.'[71] It is true that the Convention or the explanatory report (or both) could have been more precise in distinguishing the different obligations, but it is also true that in no article or part of the explanatory report is it written that the standard should be applied to the adoption of laws, for example, which of course does not require a due diligence standard. In the first state evaluations, the Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) has shown great knowledge and competence in distinguishing legal obligations. In its report on Austria, for example, the Group does not apply the standard of due diligence throughout, but only in some chapters. In particular, the Group argued that 'if a State agency, institution or individual official has failed diligently to prevent, investigate, and punish acts of violence … victims and/or their relatives must be able to hold them accountable.'[72] This can be achieved by means of appropriate laws, which, in the case of Austria, were already in force.[73]

The obligation to respect, to protect and to fulfil human rights, and the meaning of core obligations

In international human rights law, three different types – 'layers' – of states' obligations have been elaborated: obligations to respect, to protect and to fulfil human rights. In 1983 the then Rapporteur to the UN Sub-Commission on prevention of discrimination of minorities, Asbjorn Eide, proposed four 'layers' of state obligations, namely obligations to respect, to protect, to ensure and to promote, later reduced to the three categories in his report on the right to adequate food as a human right, adopted in 1987.[74] From a philosophical point of view, it was Henry Shue in 1980 who showed that there is no distinction between rights and that the distinction can be only made in terms of duties, dividing them into the duty to avoid depriving, the duty to protect people from deprivation by other people and the duty to provide for security.[75]

While the obligation to respect human rights can be defined as a negative one – the state must abstain from various behaviours – the obligations to protect and to fulfil them are positive ones, because they require states to take steps to implement human rights. Taking one relevant General Comment for my analysis, No. 22 of the ESCR Committee, the obligation to respect human rights means that states must refrain from 'directly or indirectly interfering with the exercise by individuals of the right to sexual and reproductive health.'[76] The obligation to protect human rights consists in 'tak[ing] measures to prevent third parties from directly or indirectly interfering with the enjoyment of the right to sexual

and reproductive health.'[77] Even though it can easily be said that this obligation resembles the obligation of due diligence, this is only partly correct, since the duty to protect also requires 'States to put in place and implement laws and policies prohibiting conduct by third parties that causes harm to physical and mental integrity,' which seems to me to define a specific result, rather than an obligation to make best efforts. Finally, there is the obligation to fulfil human rights, requiring states to 'adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to ensure the full realization of the right to sexual and reproductive health.'[78]

The three layers of obligation aim at guaranteeing the implementation of economic, social and cultural rights, which have been considered the 'least justiciable' among human rights, precisely because their character means they must be realised progressively. However, as can be seen, the different layers can be referred to one or more of the traditional categories of state obligations conceived in international law. The difference is probably in the capacity of these three layers to encompass the complexity of human rights in their implementation, in particular states' responsibility for acts of non-state actors.

To further counter the risk that rights will be implemented weakly, in particular economic, social and cultural rights, the notion of core obligations, or minimum core obligations, was introduced in the 1980s. One of the 1986 Limburg Principles on the Implementation of the ICESCR obliges states 'regardless of their level of economic development, to ensure respect for minimum subsistence rights.'[79] It was then that Philip Alston, once appointed as Rapporteur of the ESCR Committee in 1987, mentioned that corresponding to each right there must be an 'absolute minimum entitlement.'[80] In an interesting analysis conducted by four scholars, including Lisa Forman and Audrey Chapman, the notion of 'minimum core obligations' is explored in depth, with specific regard to the right to health. They point out the many unresolved questions surrounding the concept, such as, for example, 'is the core fixed or moveable, non-derogable or restrictable, universal or country-specific?,' and 'what are acceptable methods to further develop the content of these entitlements and duties?'[81] The positions in legal scholarship range from denial of the concept to detailed accounts of minimum core obligations.[82] Minimum core obligations, as elaborated by the ESCR Committee, have four consequences: immediate effect, immunity from the excuse of 'insufficient resources,' not being retrogressive and being directly applicable.[83] As argued by Martin Scheinin, 'the ICESCR contains no underlying "deep theory" or positive law basis for the approach.'[84] He considered the 'minimum core obligation' 'a methodology.'[85] In GC No. 14 on the right to health, the Committee listed core obligations, which should include as a minimum the non-discriminatory access to health services; access to food, basic shelter, housing, sanitation and water; the provision of essential drugs; the equitable distribution of all health facilities, goods and services; and the adoption of a national public health strategy.[86] Obligations defined of 'comparable priority' were, among others, to ensure reproductive, maternal and child health care. As

clearly emphasised by Forman and the other co-authors, the debate surrounding the core is still open, and focuses on the question whether the core is a floor or a ceiling, and whether core obligations are obligations of conduct or of result.[87] The authors concluded that the concept is essential, but that greater clarity is required 'about its intended role in concretising, clarifying, enforcing and realising the right to health.'[88]

In GC No. 22, the ESCR Committee defined core obligations more precisely, contending that they 'should be guided by contemporary human rights instruments and jurisprudence, as well as the most current international guidelines and protocols established by United Nations agencies, in particular WHO and the United Nations Population Fund (UNFPA),' and should include 'at least' the following elements, which are worth reproducing *in extenso:*

> (a) To repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine access by individuals or a particular group to sexual and reproductive health facilities, services, goods and information;
> (b) To adopt and implement a national strategy and action plan, with adequate budget allocation, on sexual and reproductive health, which is devised, periodically reviewed and monitored through a participatory and transparent process, disaggregated by prohibited ground of discrimination;
> (c) To guarantee universal and equitable access to affordable, acceptable and quality sexual and reproductive health services, goods and facilities, in particular for women and disadvantaged and marginalized groups;
> (d) To enact and enforce the legal prohibition of harmful practices and gender-based violence, including female genital mutilation, child and forced marriage and domestic and sexual violence, including marital rape, while ensuring privacy confidentiality and free, informed and responsible decision-making, without coercion, discrimination or fear of violence, in relation to the sexual and reproductive needs and behaviours of individuals; (e) To take measures to prevent unsafe abortions and to provide post-abortion care and counselling for those in need;
> (f) To ensure all individuals and groups have access to comprehensive education and information on sexual and reproductive health that are non-discriminatory, non-biased, evidence-based, and that take into account the evolving capacities of children and adolescents;
> (g) To provide medicines, equipment and technologies essential to sexual and reproductive health, including based on the WHO Model List of Essential Medicines;
> (h) To ensure access to effective and transparent remedies and redress, including administrative and judicial ones, for violations of the right to sexual and reproductive health.[89]

It is clear that these are all positive obligations, and include obligations of due diligence, of result and of progressive realisation, following the categorisation set out in 'Positive and negative obligations'. An important aspect of this list is the emphasis put on the need for positive measures in fields where the state usually had a duty not to interfere. Core obligations are taken from the paragraphs of the GC related to the duty to respect, to protect and to fulfil. Nonetheless, the negative duty on the state 'to refrain from directly or indirectly interfering with the exercise

by individuals of the right to sexual and reproductive health' is not included in the core. Does this mean that core obligations only consist in positive obligations requiring an action by the state? It is hard to argue that this is so. In GR No. 28 of the CEDAW, on core obligations, the adjective 'core' is included in the title only, and therefore it seems that all the obligations included in the document must be considered to be 'core obligations'; they include negative obligations to 'refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment of women of rights.'[90] Non-retrogression, for example, can be considered as an element of a minimum core obligation, and it is negative in nature.[91]

The point is to consider how useful this category of core obligations is, in terms of state responsibility. In the part of GC No. 22 of the ESCR Committee relating to 'violations' (Part V), core obligations are not mentioned; the duties to respect, to protect and to fulfil may be violated. Similarly, GR No. 28 of the CEDAW does not refer to violation of core obligations. A second point is: to what extent are core obligations reflected in the views and concluding observations of the CEDAW and other UN treaty bodies? If we have a look at recent practice in CEDAW concluding observations, the analysis has been thematic rather than examining types of obligation separately.[92] Accordingly, for example, in its concluding observations on Saudi Arabia, the CEDAW Committee does not refer to 'core obligations,' but rather recommends and encourages the state to adopt measures that will allow the rights included in the Convention to be achieved.[93] Even though it refers to preceding general recommendations, the Committee does not structure the analysis to follow the three well-known layers (to respect, to protect, to fulfil human rights). In an interesting paragraph in the concluding observations, the Committee recommends the state not only to adopt provisions to legalise abortion, but also to provide 'comprehensive health services, in particular sexual and reproductive health services,' and 'ensure the availability and accessibility of affordable modern forms of contraception.'[94] Are these core obligations, or (merely) obligations to respect, to protect and to fulfil human rights? Similar detailed recommendations relating to the rights to health and to reproductive health are included in the concluding observations on Chile, where a verb recurrently used is 'to ensure.'[95] The recent concluding observations adopted by the ESCR Committee are also divided into thematic paragraphs, containing recommendations that combine, for example, the obligation to protect and the obligation to fulfil. In one of its observations, the Committee recommended that Niger 'take steps to outlaw and prevent child marriages contracted under customary law, including by adopting legislative and administrative measures and conducting culturally sensitive awareness-raising campaigns to encourage the abandonment of the practice.'[96]

Neither are core obligations included in the legal reasoning of regional human rights judicial bodies, although in a few cases courts and commissions have referred to the three layers of obligations and to the distinction positive/negative

obligations. The ECtHR mentioned the 'positive obligation to protect life' in *Osman v. United Kingdom*, for example,[97] and the African Commission referred, in *Equality Now*, to the obligations to respect, to protect and to fulfil the rights included in the African Charter.[98] The IACHR touched on the three layers in several judgments, including *Velásquez Rodríguez.*[99]

The tripartite structure and the theory of core obligations possess a lot of merit, despite being quite descriptive, in highlighting how each human right creates a wide spectrum of legal obligations, against which states' actions must be assessed.[100]A possible solution to the *impasse* could be to conceive core obligations as obligations that have consolidated as customary international law, thereby binding all states without requiring ratification of a specific treaty, but it is not my purpose here to dwell on their nature; rather to reflect on the most suitable 'type' to apply to my analysis.

A more practical perspective: the pillars of the Council of Europe Istanbul Convention

A more practical approach to the issue of states' obligations could be to refer to already existing legal instruments dealing with VAW. The Council of Europe Istanbul Convention is quite innovative in its structure, being at the same time a human rights law *and* a criminal law convention. It mirrors the 3Ps (plus 1) paradigm of state obligations that was elaborated in countering human trafficking: prevention, protection, prosecution and partnerships. The 2000 Protocol against Human Trafficking to the UN Convention against Transnational Organized Crime is precisely focused on 'prevention, suppression and punishment,'[101] and the Council of Europe Convention on Action against Trafficking in Human Beings of 2005 contains chapters on prevention, protection and prosecution.[102]

The four pillars of the Council of Europe Istanbul Convention are prevention, protection, prosecution and policies.[103] As I wrote earlier, even though Article 5 of the Convention provides due diligence obligations, this does not mean that all the obligations included in the Convention are of this nature. The value that the Convention adds to previous legal instruments is precisely to address VAW from multiple angles and provide a spectrum of obligations states must abide by. As for prevention, the Convention elaborates a general obligation in its Article 12 to 'adopt measures necessary to promote changes in the social and cultural patterns of behaviours 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.' Being a general obligation, 'this paragraph does not go into detail as to propose specific measures to take, leaving it within the discretion of the party.'[104] Article 12 is followed by more precise measures, such as awareness raising, education, training of professionals, preventive intervention and treatment programmes, and participation by the private sector and the media (Articles 13 to 17). The GREVIO Committee, established by the Convention, is competent to assess whether the measures adopted by states are sufficient to guarantee the scope

of the Convention, through mutual evaluation reports. Prevention also means ensuring that legislation is in force: Chapter V of the Convention is dedicated to substantive law, and requires states to have laws which criminalise certain behaviours (Articles 33 to 39), treat forced marriages as null and void (Article 32), subject sexual harassment to criminal or other legal sanctions (Article 40), provide grounds of jurisdiction (Article 44) and decide sanctions, measures and aggravating circumstances (Articles 45–6).

Under the second pillar, protection, the Convention provides a general obligation 'to take the necessary legislative or other measures to protect all victims from any further acts of violence,' and to 'ensure effective cooperation' among different actors, both public and private (Article 18). It then clarifies which measures it regards as protective, namely general support services, assistance in individual/collective complaints, the provision of shelters, telephone helplines and support for victims of sexual violence, and protection for children witnessing violence (Articles 20 to 26). Prosecution is based on Chapter VI of the Convention. It includes general obligations in Article 49, such as the obligation to adopt measures necessary to ensure that investigations are carried out 'without undue delay,' respecting the victim's rights. It then lays down more specific obligations, such as providing legislation on emergency barring orders, and on restraining or protection orders, and to ensure that investigations do not wholly depend on the victim filing a report or complaint (Articles 52, 53, 55). Specific measures are conceived for migrant women (Chapter VII). In effect, the policies pillar surrounds and supplements the other three, since it requires the activation of 'effective, comprehensive and coordinated policies encompassing all relevant measures to prevent and combat all forms of violence' (Article 7). Measures include the allocation of appropriate resources, partnership with different actors, data collection and research (Articles 7 to 11).

It is difficult to pigeonhole the measures states are obliged to adopt under the Convention into specific categories. It is possible to say that the obligations included in the Convention are positive obligations, of different – and sometimes intersecting – nature. The obligation to adopt measures to 'change attitudes' in society, it seems to me, confers a positive obligation to 'take steps,' which can be categorised as an obligation of 'progressive implementation' or, in the language of UN treaty bodies, 'to fulfil.' It means that, in assessing state compliance with the Convention, the GREVIO Committee will examine whether the state has taken steps towards this outcome. Conversely, the obligation to criminalise a specific behaviour is an obligation of result. The adoption of certain measures can amount to an obligation of conduct or an obligation of result, or both as intersecting. Christian Tomuschat has stressed that 'not infrequently obligations of conduct and obligations of result are intertwined to such a degree that the different component[s] can hardly be separated from one another.'[105] For example, adopting a measure could be a result, leaving discretion to the state on how to proceed (for instance, whether to provide a criminal or other sanction in response to a specific violent behaviour); at the same time, however, the Convention defines the result

in detail, recommends the means and guides the state in achieving the desired outcome. In light of the principle of effectiveness, the state has an obligation to choose its means diligently.[106] As highlighted in GR No. 28, to 'pursue by all appropriate means' a specific policy means to use 'means' or a particular course of conduct, which gives a state party 'a great deal of flexibility,' but, at the same time, 'each State party must be able to justify the appropriateness of the particular means it has chosen and demonstrate whether it will achieve the intended effect and result.'[107] Compensation, to take another example, can be an obligation of result but might also be a due diligence obligation, to create the conditions necessary to provide individuals access to compensation.

This very practical approach suits the Convention, and will easily guide the work of the GREVIO Committee in evaluating situation reports from states that have ratified the Convention.

Methodology for treatment: reconceptualising state obligations in countering VAWH

Having analysed the structure of state obligations under international law, I will now turn to apply one of these categorisations, or, better, elaborate one of them to fit my paradigm. As showed in chapter 2, VAWH is an innovative concept capable of encompassing two dimensions of violence against women as related to the rights to health and to reproductive health: on one hand VAW as a cause of violating a woman's right to health and to reproductive health; and on the other hand, health policies and laws, or the practices of actors having public functions (hospitals, for example), that cause VAW or contribute to causing it. In this section of this chapter, I will bring the two dimensions under the same umbrella, in order to outline which state obligations exist in countering VAWH as it emerges in state practice and in the jurisprudence and quasi-jurisprudence of judicial and quasi-judicial bodies.

I first need to choose one of the categories proposed. I could have developed the analysis conducted by the CEDAW Committee in its GR No. 35, distinguishing acts or omissions by state organs from acts or omissions of non-state actors, stressing how the actions of private bodies providing public services must be attributable to the state.[108] Nonetheless, the idea of VAWH is more elaborate than that of VAW as known at the international level, and encompasses two dimensions of violence which do not correspond to the nature of the actor (state or non-state) committing violence, but rather to the nature of the violence itself, which is represented in its horizontal dimension by forms of interpersonal violence and in its vertical dimension by state policies in the health field that cause violence against women. Furthermore, due diligence obligations are only mentioned in the paragraph of GR No. 35 that covers acts or omissions of non-state actors. My purpose is to find a structure that better describes states' obligations to counter VAWH as I conceive it in this book.

At first, I was fascinated by the elaboration of 'core obligations' in the ESCR Committee's GC No. 22. It was clear that it was the beginning of the evolution of positive 'core' obligations in fields such as the right of access to health services in cases, for example, of abortion. Nonetheless, the *anamnesis* and the diagnosis have led me away from this initial purpose. Despite being interesting and having scope to react to the 'vagueness' of the rights to health and to reproductive health, the concept of core obligations has rarely been invoked by courts and human rights bodies.

The layers 'respect', 'protect' and 'fulfil' human rights are of interest from a legal perspective, but they are limited to the sphere of human rights, and do not allow me to clearly distinguish between obligations of means and of result.[109] Furthermore, they tend to be merely descriptive, and to reduce the system of protection of human rights to a *self-contained* regime.[110] The structure of the Istanbul Convention has its appeal and has proved to guide the work of the GREVIO Committee, at the beginning, anyway. Nonetheless, it is too far linked to the specificity of a Convention, which, despite having potential to become universal, remains anchored to the European context.

Each categorisation I have previously discussed has some merit in systematising state obligations in the field of VAWH. I found however that the structure proposed by Pisillo Mazzeschi worked best for my analysis. It allows me to consider the two dimensions of VAWH together, and to elaborate states' obligations in a more coherent and rational way, contributing to the debate on due diligence in the protection of women's rights to health and to reproductive health. It also brings the feminist human-rights-law analysis of VAWH back to the general theories of the international law of state responsibility. It means, in other words, providing a gender perspective on already well-established categories of international law and challenging them, while at the same time contributing to establishing feminist legal scholarship within the international legal mainstream.

It especially provides more guidance in the elaboration of due diligence obligations, which I consider the cornerstone of my reflection. Accordingly, in the following sub-paragraphs and taking into account the *anamnesis* (analysis of some of the cases decided at the international, regional and domestic levels) and the diagnosis (the elaboration of the concept of VAWH), I will differentiate the following types of obligation: positive obligations of result, positive obligations of due diligence and positive obligations to progressively take steps. I will consider the negative obligation not to interfere when positive obligations intersect, to emphasise in particular that respect for women's autonomy is pivotal in the protection of women's rights to health and to reproductive health.

A positive obligation of result consists, in the words of Pisillo Mazzeschi, in requiring 'an enactment (in the broad sense of the term) which respects and protects human rights.'[111] This obligation derives from international treaties, 'but also from international human rights law as a whole, given that it is an obligation with the function of achieving the general scope of protection of these rights.'[112] In his view, it cannot be considered a due diligence obligation, because the state

is obliged to enact, amend or repeal laws, not just to make 'best efforts' in this direction, the outcome not being subject to any form of *alea*.[113] In the context of VAWH, it means that states must enact laws on DV, for example, or amend existing laws on rape to introduce lack of consent as an element of the offence, or decriminalise abortion, or repeal laws on forced sterilisation. To this list I will add the adoption of laws providing measures to grant women access to health services, as a preventive measure, and I will discuss the room for manoeuvre given to states in some cases (or margin of appreciation as the ECtHR puts it).

The second type is the positive obligation of due diligence, which (usually) includes the majority of obligations to prevent. However, as Pisillo Mazzeschi has pointed out, creating the apparatus to prevent violations of human rights is an obligation of result, whereas 'the concrete activities and the measures of prevention required of State authorities … are subject to uncertainty (*alea*) in their results.'[114] The justification of the distinction between obligations of conduct and obligations of result 'rests … on the objectively different content of two categories of obligations of the State, differing by how probable it is that the obliged State will achieve the result wanted by law.'[115] This argument is supported in my *anamnesis* by *V.K. v. Bulgaria*, in which the CEDAW Committee acknowledged the hiatus between the provisions of a legal instrument and its implementation by state organs. It argued:

> The Committee notes that the State party has *taken measures* to provide protection against domestic violence by adopting the Law on Protection against Domestic Violence, which includes a fast-track procedure for issuing immediate protection orders. However, in order for the author to enjoy the *practical* realization … the political will that is expressed in such specific legislation must be supported by all State actors, including the courts, which are bound by the obligations of the State party. The issue before the Committee is therefore whether the refusal of the Plovdiv courts to issue a permanent protection order against the author's husband, as well as the unavailability of shelters, violated the State party's obligation to *effectively* protect the author against domestic violence.[116]

To enact laws and to exercise due diligence in their implementation are both legal obligations; the difference lies in the consequences of violation: breach of a due diligence obligation mainly affects an individual's ability to obtain monetary compensation, and redress for the violation he/she has suffered, while failure to enact laws (and also of the obligation to progressively take steps) causes general recommendations to be raised in UN treaty bodies and the IACommHR, and references to what a state is required to do in the jurisprudence of the European and the Inter-American Courts of Human Rights.

Indeed, if I go back to my analysis, the cases in which the performance of due diligence has been assessed concerned *specific* activities by the authorities in *specific* individual cases ('procedural' due diligence). Hence, for example, in *Talpis*, the ECtHR found the Italian authorities responsible because they had not acted with the diligence necessary to prevent Talpis's son being murdered by her

husband. In the *Cotton Field* case, the IACHR found that Mexico had not exercised due diligence in investigating the abduction, sexual violence against and murder of women in Ciudad Juarez. In the sub-section below entitled 'Positive obligations of due diligence in specific cases – or "procedural" due diligence', I will reflect on the 'particular' due diligence necessary to counter, for example, DV, and on whether due diligence pertains to both the dimensions I have conceptualised in my book or only to the interpersonal one.

Finally, I will explore what Pisillo Mazzeschi called positive obligations 'à réalisation progressive' (of progressive realisation), which I call obligations to 'progressively take steps'. They impose on states an obligation to 'take steps,' 'through a series of measures of different nature, with the purpose of gradually and over time ensuring the effective exercise of these rights.'[117] They do not require an immediate, or at least reasonably immediate, result. An example will be the obligation to disrupt patterns of discrimination common to both dimensions. Decisions of human rights bodies and judicial bodies have shown that states can be held responsible for violating the norm prohibiting discrimination because they have 'condoned' or 'tolerated' violence against women. It is evident that to disrupt patterns of discrimination requires time – especially when we consider this pattern at the state *and* at the societal level – but this does not preclude state responsibility. In obligations of this type the requirement of diligence has a role to play, which is different, as I can prove by reference to the *anamnesis*, from ensuring due diligence in specific cases. When assessing respect for the obligation to take steps, monitoring bodies must consider whether the state has shown *diligence* in working to disrupt patterns of discrimination. I will discuss how and to what extent. As observed by Rebecca Cook:

> States can never guarantee that discrimination against women will not occur; they cannot be held liable simply because an act of discrimination is observed. States parties are liable only for failures to implement means the drafters considered reasonably achievable.[118]

In GR No. 28, the CEDAW Committee clarified that 'each State party must be able to justify the appropriateness of the particular means it has chosen and demonstrate whether it will achieve the intended effect and result.'[119]

The trend that I will show in state obligations is generated by state practice, jurisprudence and interpretation of the provisions of binding instruments. I will also show how, directly or indirectly, the right to health and the right to reproductive health permeate all state obligations.

Positive obligations of result

To enact, amend or repeal laws to counter VAWH

An obligation of result consists in the adoption, amendment or repeal of laws. These obligations can derive directly from a legal instrument, such as the Council of Europe Istanbul Convention, or indirectly from human rights law, since

legislation is the essential prerequisite to counter VAWH and guarantee to women the enjoyment of their human rights and the exercise of their autonomy. Hence, for example, in *A.T. v. Hungary*, the CEDAW Committee recommended that 'a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters.'[120] In *Bevacqua and S. v. Bulgaria*, to take another example, the ECtHR acknowledged that, at the time of the facts in the case, 'Bulgarian law did not provide for specific administrative and policing measures,' which were later added by the 2005 Domestic Violence Act.[121]

Which provisions must a law on DV include? States have *room for manoeuvre* in that respect. A law should at least establish the administrative and police apparatus capable of effectively investigating cases of DV, and prosecuting the alleged perpetrators; it should provide at least a minimal range of services for victims/survivors including shelters, notwithstanding the resources available at state level. In light of the impact of DV on women's health, laws must provide free medical and psychological treatment for the victim. A law need not necessarily – or the state or the authorities could be obliged to progressively take steps to – include the establishment of special courts on domestic violence,[122] or grant leave of absence to victims/survivors of DV.[123] Two possible provisions are worth mentioning, both included in the Istanbul Convention. One (Article 55) is for formal investigation or proceedings to continue even if the report of abuse is withdrawn by the victim; the other (Article 8) covers allocation of resources. In chapter 2, 'Challenges to the public/private divide', I showed that the state *must* intervene in cases of DV, and disrupting the public/private divide has proved fundamental when considering DV in terms of violation of human rights by states. The autonomy of the woman, who can decide to return to her home even if her partner is violent, is not infringed when the authorities intervene, not even if they do so after withdrawal of the complaint, provided that this intervention is gender-sensitive and does not cause another form of violence to her; it could include, for example, issuing victims of domestic violence with a bracelet or waistband as 'life-savers', to use if they approach a women's shelter but are reluctant to formally report to the authorities.[124] With regard to the second type of provision, the Istanbul Convention (Article 8) requires states to allocate resources to counter the violent behaviours it prohibits, such as DV. Resources are clearly fundamental in support of laws on DV, but it does not appear from the cases examined in the *anamnesis* that an obligation exists to define a specific budget heading, although this would clearly be desirable.

Identifying the elements of the offence has proved to be complex in criminalising rape. Chapter 1 showed that lack of consent is an essential element of the offence.[125] The CEDAW Committee, in its concluding observations and views, has repeatedly clarified this aspect.[126] In 2003 the ECtHR analysed state practice and concluded in the same way in *M.C. v. Bulgaria*. However, the Court did not exclude seeking 'the prosecution of non-consensual sexual acts in all

circumstances … in practice by means of interpretation of the relevant statutory terms ("coercion", "violence", "duress", "threat", "ruse", "surprise" or others) and through a context-sensitive assessment of the evidence.'[127] There must be no need to prove physical resistance to demonstrate lack of consent.

Many countries in the world do not criminalise marital rape.[128] Nonetheless, marital rape does constitute a form of VAWH, and criminalising it is encouraged at the international level.[129] With regard to specific cultural practices, the African Commission on Human and Peoples' rights, in *Equality Now*, recommended the state adopt measures 'to specifically deal with marriage by abduction and rape.'[130]

The trend at the international level, also confirmed by regional and national courts, as I showed in the *anamnesis*, is to adopt laws prohibiting FGM/C. The content of the legislation varies a lot from country to country, and can include extraterritorial application of the law to prosecute individuals performing the practice abroad on girls resident or domiciled in the home state.[131] As I argued in chapter 2, the element of lack of consent should be added to the definition of the offence. The Istanbul Convention provides, in Article 38, that 'coercing' a woman to undergo the practice must be made an offence. In light of the reasoning relating to rape, it seems likely that adding lack of consent – and presuming, also by law, that girls below a certain age are unable to give consent[132] – could better guarantee the protection of a woman's rights, and her autonomy. It could also be established by law that, upon women's genuine consent as assessed in courts, only re-infibulation will be permitted.[133] This legislation could inspire legislation on GCS, a practice that, as I pointed out in the chapter 2, has become widespread in European countries.

Turning to the vertical dimension, decisions of human rights courts and UN treaty bodies demonstrate that states must decriminalise abortion at least where it follows rape, sexual violence and/or incest,[134] and in cases of severe malformation of the foetus and risks to the life or health (including mental health) of the pregnant woman. States could still retain *room to manoeuvre*, the 'margin of appreciation' in the jurisprudence of the ECtHR, in deciding to what extent abortion can be limited, provided that, as I argue in this book, denial of abortion does not cause VAWH, in terms of intense suffering, and what the HRC has called a 'high level of mental anguish,' connected to an 'intense stigma and loss of dignity' for the pregnant woman.[135] In terms of negative obligations, states must also refrain from adopting laws that oblige practitioners to give 'false, misleading, and irrelevant' information to a woman seeking access to abortion.[136] Informed consent is a 'process … intended to ensure that a patient is left alone to make decisions based on a set of medical facts free from direct coercion.'[137] Laws must ensure appropriate and objective counselling, in order to allow women to make free decisions, without coercion, and ensure confidentiality. In *L.C. v. Peru*, the CEDAW Committee argued that, when it comes to state intervention in a personal decision, 'such intervention should be legal and regulated in such a way that, following due process, the person affected has the right to be heard,' and added that 'the contrary situation constitutes a violation of the right of protection

from arbitrary interventions in decisions that, in general, are based in the intimacy and autonomy of each human being.'[138]

In cases of involuntary sterilisation, it is an obligation well established at the international level that states must repeal eugenic laws. The issue is no longer whether or not such laws are in force – states have gradually repealed eugenic laws over recent decades – but whether sterilisation occurs *de facto* in public or private health structures and the state does not prevent it; and whether the state is capable of providing reparation for the harm caused by eugenic laws applied in the past.

In terms of state obligations, maternal health is the field in which the major steps have been taken, especially with regard to the obligation to provide access to health services. For what concerns the adoption of laws, an obligation that I consider as confirmed at the international level is the prohibition of perinatal shackling of women in prison.

One might wonder whether states are obliged to adopt a law on OV. For the time being, state practice is not sufficient to elaborate an obligation in that respect. Such an obligation might evolve in the years to come and might require states to enact laws that compel practitioners to obtain the objective and informed consent of a woman before performing a practice during childbirth, in order to avoid VAWH. Laws on malpractice, which are in place in many states, only address episodes of OV that have the severest consequences and fail to recognise the psychological and emotional harm caused by practices that sometimes are common in the maternity ward. A counter-argument might be that legislation risks 'freezing' the activity of practitioners, who might fear sanctions should they fail to comply with the will of their patient. If such a risk is faced, one might wonder whether a form of collective responsibility vested in the hospital, rather than in the individual practitioner, could be of any help.

To provide access to health services

The positive obligation to provide access to health services belongs to the category obligations of result, because it is not subject to the *alea* in the outcome that characterises due diligence obligations; it is not even an obligation to progressively take steps, because it requires the state to immediately provide, at minimum, an essential level of health care.[139] Since the provision of health services requires financial resources, one might ask what kind of services must be granted in cases related to the two dimensions of VAWH. It is clear that this minimum level has risen over time as the activity of human rights bodies, and the jurisprudence of domestic and human rights courts, have implemented the rights to health and to reproductive health of women who survive violence.

It means the state must have in place facilities that can respond to the needs of a woman exposed to DV (and her children). So, for example, shelters must be able to host disabled children, health personnel must provide immediate support to victims of domestic violence in a non-judgemental way and psychological support must be available.[140] In *Aydin v. Turkey*, the ECtHR contended that, when the

examination of a rape victim/survivor is necessary for an effective investigation to be conducted, this must be done 'with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination.'[141] Along the same line of reasoning, the IACHR, in the well-known *Ortega v. Mexico* judgment, explained that 'the psychological or psychiatric treatment must be provided by State personnel and institutions specialized in attending to victims of acts of violence,' and that, 'if the State does not have this type of service available, it must have recourse to specialized private or civil society institutions.'[142] The Court also made some suggestions concerning the characteristics of the service that must be provided: it must be designed to respond to the specific needs of the individual, and it must be provided, so far as possible, in the institutions nearest to the victims'/survivors' place of residence.[143]

In the vertical dimension, the evolution of the jurisprudence, and the quasi-jurisprudence of regional human rights courts and UN treaty bodies, have marked the most significant steps. The landmark *L.C. v Peru* decision, handed down by the CEDAW Committee in 2011, paves the way for an in-depth consideration of what positive obligations to provide access to health services entail in the context of abortion. The Committee acknowledged that L.C. had been the victim of 'exclusions and restrictions in access to health services based on a gender stereotype that understands the exercise of a woman's reproductive capacity as a duty rather than a right.'[144] On the nature of the obligation as one of result, the Committee considered that, 'since the State party has legalized therapeutic abortion,' it must establish 'an appropriate legal framework that allows women to exercise their right to it under conditions that guarantee the necessary legal security, both for those who have recourse to abortion and for the health professionals that must perform it.'[145] Furthermore, in some general recommendations, the Committee required the state to:

> [r]eview its laws with a view to establish[ing] a mechanism for effective access to therapeutic abortion under conditions that protect women's physical and mental health and prevent further occurrences in the future of violations similar to the ones in the present case.[146]

Access to abortion services must also include post-abortion services, including counselling, medical care and psychological support.[147] In Ireland, at the time of *Mellet*, women could get access to abortion abroad, but no protection and coverage from the public healthcare system, no paid leave of absence, no support from public or private insurance; once back in Ireland, Amanda Mellet could obtain medical care, but no form of public-funded post-abortion counselling, which was eventually granted by an association. When denial of access to abortion causes VAWH, there is an obligation on the state not only to abstain from certain behaviours – in this case abstain from interfering if the woman decided to travel abroad to get access to the service – but also to provide services in order to avoid physical and psychological consequences for the woman. The jurisprudence of

the ECtHR, in similar cases, focused more on the lack of access to effective remedies, and of provision of objective and appropriate information to pregnant women. Developments in the Inter-American jurisprudence, awaited in the case *Manuela y familia v. El Salvador*, might be relevant in defining what a positive obligation to provide access to health services means. One can object that this positive obligation only stems from the quasi-jurisprudence of UN treaty bodies, whose outcome is not binding. However, when denial of access to abortion services causes VAWH, there is a violation of the woman's rights to health and to reproductive health which the ECtHR might regard as a violation of the prohibition of torture, inhuman or degrading treatment or punishment. This trend towards the recognition of positive obligations in the provision of health services still needs to be developed, but the path has been traced, both directly, through the views of UN human rights treaty bodies, and indirectly, through the jurisprudence of regional human rights courts that take health concerns into consideration in their decisions. The HRC's GC No. 36 on the right to life clearly construes a 'duty to ensure that women and girls *do not have* to undertake unsafe abortions,' and acknowledges that 'States parties should ensure the availability of, and effective access to, quality prenatal and post-abortion health care for women and girls, in *all circumstances*.'[148]

It is well established that, in operating abortion services, practitioners can exercise conscientious objection, but the state must ensure that the law obliges conscientious objectors to refer their patients to other practitioners, and hospitals to provide an adequate number of doctors performing abortion.[149] Related to this aspect is physical accessibility of abortion services: access can be impaired by the exercise of conscientious objection and the absence of practitioners within a reasonable distance from the woman's habitual residence, or by provisions that impose requirements on service providers, justified by a declared purpose to protect the woman's health, which are not easy to meet and therefore reduce the number of the providers available.[150] This obligation might intersect with a due diligence obligation, when, for example, a woman reports to the authorities difficulties in gaining access to abortion and the authorities do not act with due diligence in monitoring whether the law is being correctly applied in a specific hospital.

One question could be whether abortion services must be free of charge. In other words, does the obligation to provide access to abortion services include the provision of free services? In GC No. 22 the ESCR Committee stressed that 'publicly or privately provided sexual and reproductive health services must be affordable for all,' and that 'essential goods and services, including those related to the underlying determinants of sexual and reproductive health, must be provided at no cost or based on the principle of equality to ensure that individuals and families are not disproportionately burdened with health expenses.'[151] Are these services essential? One might argue that these services are essential in all cases in which abortion is legitimate under national law, and they must be free. However, what about abortion when performed abroad? Must health insurance

cover it? There is no definite answer to these questions in light of state practice. Nonetheless, from the analysis in the *anamnesis* and from GC No. 22 it is possible to propose some reflections. In the latter, the ESCR Committee stressed that 'States parties [to the ICESCR] should … ensure that all individuals and groups have equal access to the full range of sexual and reproductive health information, goods and services, including by removing all barriers that particular groups may face.'[152] Furthermore, it is suggested that 'laws or policies revoking public health funding for sexual and reproductive health service' should be avoided.[153] As well as an interesting case at the national level, *Lakshmi Dhikta v. Nepal*, decided by the Supreme Court of Nepal, the economic issue has been addressed by the HRC in the *Mellet* and *Whelan* cases. The Committee stressed that discrimination based on social and economic conditions had occurred, because to gain access to abortion both Mellet and Whelan had to go abroad without any form of support:

> The differential treatment to which the author was subjected in relation to other women who decided to carry to term their unviable pregnancy created a legal distinction between similarly-situated women which failed to adequately take into account her medical needs and socioeconomic circumstances and did not meet the requirements of reasonableness, objectivity and legitimacy of purpose. Accordingly, the Committee concludes that the failure of the State party to provide the author with the services that she required constituted discrimination.[154]

Discrimination was therefore within the same gender, between women that miscarried and those who sought abortion abroad. Nonetheless, as argued by two members of the Committee in their concurring opinions, there had also been discrimination on the basis of gender because the prohibition of access to abortion services 'par son effet contraignant, indirectement punitif et stigmatisant, vise les femmes *en tant que telles* et les place dans une situation spécifique de vulnérabilité, discriminatoire par rapport aux personnes de sexe masculine.'[155] Another expert, Sarah Cleveland, added that state regulations must 'accommodate the fundamental biological differences between men and women in reproduction and … not *directly or indirectly* discriminate on the basis of sex,' hence they require states to protect 'on an equal basis, in law and in practice, the unique needs of each sex.'[156] Accordingly, I argue that, when this practice is allowed by law, abortion services must be free of charge, or at least affordable, to the extent that reproductive health services for men are free or affordable, and must respond to the specific needs of the different genders. The same can be said for post-abortion services, which the state must provide for free in all cases of abortion, even when abortion is illegal in one country and women undergo the procedure abroad before going back to their country of origin.[157] The lack of affordable access to these services would entail causing VAWH. It could also be argued that a possible future development of positive obligations consists not only in providing access to abortion and post-abortion services, but also in creating the economic and social conditions for the autonomous and uncoerced decision of a pregnant woman 'where pregnancy and motherhood are meaningful options.'[158]

The jurisprudence of some national courts, combined with the practice of UN treaty bodies, seems to support the argument that states bear the obligation to provide medically indicated health services to HIV-positive women, and pregnant HIV-positive women in particular; and that sterilisation is a failure to meet this obligation.[159]

It can be acknowledged that maternal health has been increasingly protected at the international level. It is striking to see how law has provided 'little significance to pregnancy as a source of rights worthy of consideration or as a special status needing of protection. In recent jurisprudence and quasi-jurisprudence, however, State obligations have evolved.'[160] An obligation to adopt laws that supply a legal framework for the provision of services to which women can have access can be identified, though: for example, a law that allows free access for poor women to prenatal, natal and post-natal services. An Indian Court required the state to provide access to hospital to women in labour, so they would not be obliged to give birth in the streets.[161] There is no coherent state practice or jurisprudence on home birth, regulation of which is left within the state's margin of appreciation, as emerged in the *Dubská and Krejzova v. Czech Republic* case decided by the ECtHR. It is worth mentioning, however, the opinion of five dissenting judges in *Dubská* who, although recognising that states have a wide margin of appreciation in regulating home births, concluded that the interference in Dubská's right to respect for private and family life had been unnecessary in a democratic society.[162] The dissenting judges explained that the single-option birth model, which stemmed from a regulation imposing strict requirements on maternity clinics, was *per se* problematic as regards Article 8 ECHR. In cases of low-risk pregnancies in women who were not first-time mothers, the interference was not considered to be justified.[163]

In *Xákmok Kásek Indigenous Community v. Paraguay*, the IACHR contended that 'States must *design* appropriate health-care policies that permit assistance to be provided by personnel who are adequately trained to attend to births, policies to prevent maternal mortality with adequate prenatal and post-partum care, and legal and administrative instruments for health-care policies that permit cases of maternal mortality to be documented adequately,' and added that 'pregnant women require special measures of protection.'[164] Moreover, the Court decided that the state must adopt general measures, obligations of result, since it was extremely clear in saying: 'The obligations indicated in the preceding paragraph must be complied with immediately.'[165] The list of measures that might concern pregnant or lactating women is worth mentioning here, because it is precisely the answer to my re-conceptualisation of states' obligations:

> (a) provision of sufficient potable water for the consumption and personal hygiene …
> (c) specialized medical care for pregnant women, both pre- and post-natal and during the first months of the baby's life;
> (d) delivery of food of sufficient quality and quantity to ensure an adequate diet;
> (e) installation of latrines or any other adequate type of sanitation system …[166]

In the ground-breaking decision *Alyne da Silva Pimentel Teixeira*, concerning the death of the applicant's daughter as a consequence of complications during childbirth, the CEDAW Committee presented several recommendations to the state, which can be considered as falling within all three types of obligation I have mentioned here. For example, it is possible to consider the obligations of the state to ensure that pregnant women have access to 'safe motherhood and affordable access for all women to adequate emergency obstetric care,' and 'that adequate sanctions are imposed on health professionals who violate women's reproductive health rights' as obligations of result.[167] The service must be affordable. This can be read in terms of intersectional discrimination: poor women are the ones that suffer the most from the lack of financial means to pay for health services. 'Affordable' might mean, in certain circumstances such as emergency maternal care, that the service, at least a minimum service, must be provided free of charge. This 'minimum level' was evoked by the High Court of Delhi, which, in *Laxmi Mandal*, reflected on the 'minimum standard of treatment and care in public health facilities, and in particular the reproductive rights of the mother.'[168] In a further judgment started *motu proprio*, the High Court obliged the state – and this is an obligation of result, not subject to any *alea* and not progressive – 'to demarcate or hire or create at least two shelter centres meant for destitute pregnant women and lactating women so that proper care can be taken to see that no destitute woman is compelled to give birth to a child on the footpath.'[169]

As for access to EC, the reasoning is similar to that on abortion. When limited access to EC is a cause of VAWH, an obligation falls on the state to establish the legal and regulatory framework to provide emergency contraception free of charge, and without obstacles attributable to conscientious objection. So, for example, in Latin American countries lack of, or limited access to, EC is an example of VAWH, because it is associated with high rates of clandestine abortion and of teen pregnancies, which are often the result of sexual violence. The debate on conscientious objection is also relevant when considering the case of EC: may a pharmacist or a hospital refuse to provide EC on the grounds of personal religious and cultural belief? One author has interestingly argued that, even though the general view in bioethics is that pharmacists should be allowed the right to refuse to provide EC in areas where pharmacies are numerous and EC can be obtained another way, there should be strong public policy requiring that *all* pharmacists dispense EC to customers who request it, notwithstanding moral or religious belief.[170] In countries where conscientious objection by pharmacists is permitted, a practitioner who does not provide EC on grounds of conscience must refer eligible women to an alternative pharmacist or hospital. Refusal to do so should constitute legally actionable negligence.[171]

What about public hospitals? Public hospitals might claim to have a moral identity, which is enshrined in their mission, or statute. This mirrors the right to conscience of individuals, although a hospital does not have a 'conscience'. Hospitals, however, have obligations to prevent harm to their patients, and are indeed the institutions that must deal as a matter of urgency with women who,

for example, have been raped. In the analysis that I am conducting in this book, concerning the vertical dimension of VAW, since states are responsible for the actions of health services providers, hospitals should ensure that rape victims have access to EC and the opportunity to receive information, no matter how old they are, or be taken, at the expense of any hospital that does not want to dispense the medicine, to the closest centre for rape victims.[172]

To provide effective remedies for violations of a woman's right to health and reproductive health

The obligation to provide remedies for violations of human rights is present in many international and regional legal instruments.[173] To reflect on the evolution of this obligation through the centuries, and to highlight the passage from a state-centred to a human rights-based approach to the provision of remedies, is not the purpose of this book.[174] Accordingly, I will only provide a few remarks on this issue, before dealing with state obligations to provide effective remedies in cases of VAWH. As outlined by M. Cherif Bassiouni, 'the existence of State duties to provide a remedy and reparations forms the cornerstone of establishing accountability for violations and achieving justice for victims.'[175] Dinah Shelton sees this obligation as composed of a procedural obligation (to afford remedies – complaints relating to the violation of human rights must be heard and decided by a competent judicial body) and a substantive obligation (to provide reparation, strictly speaking), related to the outcome of the proceedings and to its capacity to provide relief to the victim/survivor of the violation.[176] Redress consists in both 'the substance of the relief' and the procedures through which relief may be obtained.[177]

Starting from the procedural aspect, the state must have in place 'un appareil adéquat d'administration de la justice pour ce qui est des droits de l'homme.'[178] This is an obligation of result. For example, the CEDAW Committee found that Hungary had violated A.T.'s human rights because the state lacked specific legislation on DV and sexual harassment providing sanctions against perpetrators of violence, and also lacked provisions for protection orders.[179] In cases of DV and rape, the obligation to provide access to remedies is strictly related to other obligations on the state. For example, in *M.C. v. Bulgaria*, decided by the ECtHR, the Bulgarian prosecutor had refused to start a criminal proceeding against alleged rapists because 'in the absence of proof of resistance, it could not be concluded that the perpetrators had understood that the applicant had not consented.'[180] In *Equality Now v. Ethiopia*, the system was in place, but insufficient: even though the actions of a prosecutor and a judge led to the acquittal of the perpetrators, there was no mechanism capable of granting retrial of the perpetrators and punishment for the acts committed.[181]

Turning to the vertical dimension, a judicial remedy is fundamental in cases of abortion, to avoid the exercise of a completely discretionary power by medical personnel. In the landmark *L.C. v. Peru* case, the CEDAW Committee acknowledged that the medical decision – to delay spinal surgery and deny abortion – had

been guided by 'sociocultural pattern based on a stereotypical function of a woman and her reproductive capacity.'[182] L.C. had been at the mercy of the medical personnel, because of the lack of legislative measures regulating access to abortion, and her right to be heard, following due process, had ben violated.[183] Not all judicial procedures are suitable for granting an effective legal remedy. In the case at issue, *amparo*, a procedure that works as an extraordinary legal remedy against violations of constitutional rights by state organs, was not considered to have been adequate given the time frame.[184] According to the Committee, which analysed the issue for admissibility, the *amparo* procedure 'was too long and unsatisfactory,' and it had not been reasonable for the applicant to initiate 'a proceeding of an unpredictable duration.'[185]

In *Tysiac v. Poland*, the ECtHR found that an ordinance issued in 1997 governing access to therapeutic abortion did not provide any mechanism to solve disagreements arising between the pregnant woman and her doctors, or between the doctors themselves, therefore 'Polish law as applied to the applicant's case [did not contain] any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. It created for the applicant a situation of prolonged uncertainty.' The law, in this case, caused 'severe distress and anguish' to Tysiac.[186]

In cases of involuntary sterilisation, the IACHR clearly contended that a system ought to have been in place capable of 'criminalising certain violations,' and that it must allow the possibility for the patient to report to relevant authorities cases in which physician(s) have not complied with the ethical and legal requirements of medical practice, in order to establish responsibilities and have access to compensation.[187] The obligation on the state to provide access to remedies exists even where, at the time of the procedure, the law admitted the practices complained of for eugenic purposes. These proceedings can only start when the victims/survivors of the practice are capable of speaking out and of reporting cases, even though many years may have passed.[188]

Providing access to remedies is also fundamental in cases where violations relate to maternal health.[189]

Turning to the substantive aspect, the analysis will be conducted both here and in the next sub-section of this book, on due diligence obligations.[190] The obligation to provide reparations must aim not only at providing monetary compensation, but also, and most importantly, at 're-humanising' victims, 'restoring' them as 'functioning members of the society.'[191] My reasoning aims to understand how to 'gender' reparations, in terms both of obligations of result and of due diligence obligations. To 'gender' reparations means to rely on the 'transformative potential of reparations,' which seeks to disrupt the domino effect that condemns victims/survivors to continue suffering.[192] As Margaret Urban Walker has argued, the project of gendering reparations does not aim to disregard men's suffering, but rather to examine how, with women, 'the original violation is extended, ramified, and augmented in multiple ways.'[193] Ruth Rubio-Marín, though discussing large-scale reparation programmes in transitional societies,

has identified some elements that 'gender' reparations.[194] She observes that due recognition to victims should include recognition of the wrongful violation of the victim's rights, acknowledgement of state responsibility, recognition of the most serious harms resulting from the violation and a serious attempt to help victims cope with some of the effects of the violation, and to subvert, even though minimally, the structures of subordination.[195] These elements are scattered across the analysis of the jurisprudence and quasi-jurisprudence that I proposed in the *anamnesis* and discussed in the diagnosis.

Reparations can consist in the acknowledgement of state responsibility, plus monetary compensation. The obligation to provide the amount of compensation fixed in the judgment is meant to be an obligation of result. As UN treaty bodies require the state to provide 'appropriate' compensation, in that sense I might suggest that the obligation to provide reparations is an obligation of result, whereas the definition of the amount of financial compensation is an obligation of due diligence, subject to the *alea*, the uncertainty how the courts will decide the case. Where it finds that a state party violated one or more rights of the applicant, the ECtHR decides the amount of 'just satisfaction' in the victim's favour. Determination of reparations is not usually gendered, and the victim's rights to health and to reproductive health are only indirectly mentioned in the text of the judgment.

The jurisprudence of the IACHR has proved, quite to the contrary, to have broadened the scope of reparations, following a 'holistic gender approach.'[196] In *da Penha*, the state was required to adopt measures 'to grant the victim appropriate symbolic and actual compensation for the violence …, in particular for its failure to provide rapid and effective remedies, for the impunity that has surrounded the case for more than 15 years,' but also 'for making it impossible, as a result of that delay, to institute timely proceedings for redress and compensation in the civil sphere.'[197] The violation of the rights to health and to reproductive health is not only an essential element in determining the amount of compensation, but also leads to the inclusion, among reparation measures, of free medical and psychological treatment for the victim. For example, in *I.V. v. Bolivia*, which relates to the vertical dimension of my analysis, the IACHR required the state to 'immediately' provide I.V., at no expense to her, through its specialised institutions, medical treatment relating to her sexual and reproductive health, 'as well as psychological and/or psychiatric treatment,' including all medicines that might be necessary.[198] The Court also recommended the state to provide such treatment, whether necessary or not, for other members of the family. In a previous judgment on VAW, *Cotton Field*, which relates to the horizontal dimension of my analysis, the Court required the state to 'provide appropriate and effective medical, psychological or psychiatric treatment, immediately and free of charge, through specialized state health institutions to all the next of kin considered victims by this tribunal.'[199] In *Cotton Field* the women had been abducted, sexually violated and murdered, and the case was brought by their relatives, who were therefore entitled to receive compensation. The Court also ordered, as a measure of satisfaction, which is

clearly an obligation of result, the judgment to be published in the official journal of the state, and a public act acknowledging international responsibility to be organised.[200] (A similar order was made in *I.V. v. Bolivia*.)[201] In *Cotton Field*, the Court also required the state to create a legal mechanism 'for transferring cases from the civil courts to the federal jurisdiction when impunity exists or when serious irregularities are proven in the preliminary investigations.'[202]

Turning back to the vertical dimension of my analysis, in *I.V. v. Bolivia* the Court ordered the state, 'within a year', to adopt education and permanent training programmes for medical students and health personnel on informed consent, discrimination based on gender and stereotypes, and gender-based violence.[203] I consider this an obligation of result, because the Court clearly set a time frame within which the goal must be attained,[204] although it could be considered an obligation to progressively take steps. Despite the innovative legal reasoning in terms of reparations, however, in *I.V.* the element of discrimination against I.V. as a refugee, although mentioned in the merits, was not taken into account in determining the amount of compensation.[205] In comparison, the reasoning in *Cotton Field* was more advanced, since it considered that measures of reparation must be 'designed to identify and eliminate the factors that cause discrimination,' and be adopted 'from a gender perspective, bearing in mind the different impact that violence has on men and on women.'[206] This perspective on reparations, which contemplates a 'transformative redress' beyond mere restitution, should guide the legal reasoning of every court and UN treaty body.[207]

Positive obligations of due diligence in specific cases – or 'procedural' due diligence

To investigate without delay

The decisions that I put forward in the *anamnesis* show that it is well established that acts that constitute VAWH under the definition I propose must be investigated by national authorities with due diligence. This obligation is linked to the duty to prosecute the alleged perpetrator, which can be considered as standing at the intersection of the three forms of obligation: it can be seen as an obligation of result, because the outcome is to prosecute the alleged perpetrator and assess his criminal responsibility; of due diligence in the manner in which both the investigation and prosecution are conducted, without undue delay and in a gender-sensitive way;[208] and an obligation to progressively take steps, since it requires a process of training the authorities, including the judiciary, and a complex change of attitude in a given society.

It should be stressed that the state might be responsible for violating human rights, even where the victim obtained justice (arrest and conviction of the perpetrator, for example).[209] Due diligence means, in practice, ensuring that authorities act without 'undue delay,' and avoid any form of secondary victimisation which would place unbearable stress on injured party, with the consequence of causing her another form of gender-based violence. This aspect was evident

in particular in the decisions rendered on DV, and it is now enshrined as legal obligation in the Council of Europe Istanbul Convention (Article 49(1)). So, for example, in *Yildirim v. Turkey*, the CEDAW Committee recommended the state prosecute the alleged perpetrators promptly, and give due consideration to Fatma Yildirim's safety.[210] In *Opuz v. Turkey*, the ECtHR was not convinced that 'the local authorities displayed the required diligence to prevent the recurrence of violent attacks against the applicant,' and the proof was that 'the applicant's husband perpetrated them without hindrance and with impunity to the detriment of the rights recognised by the Convention.'[211] How may we clearly define the due diligence obligation to act without undue delay? It means to act when the authorities 'know or should know' the risk of harm for the victim, or, to borrow an expression used by the ECtHR, in the 'immediacy' of the risk.[212] Harm, as seen in chapter 2, consists in both physical and psychological suffering for the victim. In that respect, the rights to health and to reproductive health, despite being seldom invoked even by the CEDAW Committee in cases of DV, play a pivotal role. In *V.K. v. Bulgaria*, the CEDAW Committee argued that the risk does not manifest as 'a direct and immediate threat to the life or health of the victim,' because DV 'is not limited to acts that inflict physical harm, but also covers acts that inflict mental or sexual harm or suffering, threats of any such acts, coercion and other deprivations of liberty.'[213] In other words, the immediacy of the harm was determined by the consequences of DV for V.K.'s health. The argument elaborated by the ECtHR in *Talpis v. Italy* is of utmost interest, even though not yet consolidated by further decisions of the Court. As I have argued elsewhere,[214] in *Talpis* a revised '*Osman* test' – envisaging positive obligations on the state in situations presenting imminent risk to an individual's right to life caused by a non-state actor – as suggested by Judge De Albuquerque in *Valiulienė v. Lithuania,* gradually entered the legal reasoning of the Court. The case involved DV; it caused Loreta Valiulienė minor bodily injuries; but Judge De Albuquerque acknowledged that the stage of 'immediate risk' might be too late for the state to intervene, and that 'a more rigorous standard of diligence is especially necessary' in societies where the problem of domestic violence is widespread. Seeming to refer to a 'collective' harm caused by DV, which affects women in a given society *because* they are women, he reformulated the test as follows:

> If a State knows or ought to know that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations. The constructive anticipated duty to prevent and protect is the reverse side of the context of widespread abuse and violence already known to the State authorities.

The ECtHR, in *Talpis v. Italy*, followed the way paved by Judge De Albuquerque, in stressing the 'particular context' of domestic violence, and the aspect of repetition of violent acts.[215] The judges also used the expression 'particular due diligence,' which refers to the context of DV: a very interesting perspective, although

quite unique at the moment, which can be reinforced in future judgments by some considerations on the right to health of the woman who has survived violence. As outlined by the CEDAW Committee in *A.T. v. Hungary*, a general obligation on the state is to 'assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women.'[216] To borrow the expression used by Karine Bannelier on due diligence in cyberspace, '*qui peut et n'empêche, pèche*,' the state is responsible for violating a woman's rights to health and reproductive health if it knew or should have known (constructive diligence) that she risked a form of violence, had the means to prevent this and did not do anything.[217] Of course this might sound easy in theory and difficult *in concreto*; nonetheless, the jurisprudence has started to identify what a 'diligent' prevention of violence against women means.

In femicide and rape cases investigations are fundamental. In *Cotton Field,* despite Mexico admitting responsibility for the first stage of investigations, the Court found that the state had not displayed due diligence in the second stage of investigations, owing to the 'ineffective responses and the indifferent attitudes that have been documented in relation to the investigation of these crimes.'[218] In the *López Soto* report, the IACommHR concluded that, 'taking into account the extreme risk to which a woman who was reported missing is exposed' – López Soto had been abducted and raped – the state had failed to comply with 'its duty to prevent and protect once it became aware or should have known about the situation of risk she faced.'[219] The Court, to which the case was referred, highlighted how state responsibility stemmed from the 'insufficient and negligent reaction of the public servants who … did not adopt the measures that one could have reasonably expected to comply with the due diligence required to prevent and interrupt the concatenation of events.'[220] Interestingly, it also argued that an alleged episode of VAW requires 'a reinforced due diligence,'[221] evoking the 'particular due diligence' in the European jurisprudence. Judges then identified how stereotypes prevent appropriate investigations. This means, in other words, that states have due diligence obligations to investigate actual cases of gender-based VAW in an efficient and timely way, without being misled by stereotypes.

Investigation without delay must also characterise cases belonging to the vertical dimension. Here, for example, in *Andrea Szijjarto v. Hungary* the CEDAW Committee considered the complaint admissible even though the domestic remedies had not been exhausted, and the reason was the 'unreasonably prolonged' delay of more than three years from the dates of the incidents, 'particularly considering that the author has been at risk of irreparable harm and threats to her life during that period.'[222] Even though rarely stressed by the doctrine, investigation is also relevant in cases of abortion. In *Mellet v. Ireland*, the HRC found that a petition to a domestic court 'would have been ineffective and inadequate,' and that 'in the extremely unlikely event that a court found that she had a legal right to access abortion in Ireland, the author would have been unable to terminate her pregnancy there.'[223] Furthermore, the mechanisms available were insufficient and inadequate because they would have caused 'mental suffering by forcing [Amanda Mellet] to

undergo public litigation.'[224] In other words, states must provide an expeditious and confidential way to decide cases in which a woman may challenge a decision by physicians to deny her access to abortion. She must also be protected from interference by third parties, so her case must be anonymous and adjudicated without delay. This aspect emerged in *P. and S. v. Poland*, where the ECtHR found that the provisions of the civil law 'as applied by the Polish courts did not make available a procedural instrument by which a pregnant woman seeking an abortion could fully vindicate her right to respect for her private life,' and that, furthermore, the civil law remedy was 'retroactive' and 'compensatory' only.[225] When involuntary sterilisations are performed, according to the jurisprudence of the Inter-American Court of Human Rights, the investigation that follows must respond to an 'urgent and careful scrutiny of the circumstances of the case.'[226]

To provide access to health services and to information

As I investigated in chapter 1, the jurisprudence of regional human rights courts and the quasi-jurisprudence of UN treaty bodies has determined a significant development in the elaboration of an obligation to provide access to health services and to information, which is an obligation of result. Are there elements of due diligence? The answer is positive. In cases of DV and rape, for example, this means that real access must be provided to health services capable of providing support to a specific victim/survivor of violence. In other words, it must be possible for any woman to gain access to the forms of protection and support envisaged by the law. If the obligation of result consists in having in place adequate shelters and services to respond to victims of DV, the due diligence obligation means providing health services and information in actual cases, doing whatever is needed to grant protection to the victim/survivor and her children.

Since the vertical dimension includes state laws and policies in the field of health, it does not seem possible to find margin for the application of the due diligence standard. Nonetheless, I contend that there is margin. My conclusion in chapter 2 was that the vertical dimension is also characterised by policies and practices adopted by public or private bodies dealing with public services, such as the health service. Therefore, even though it may have put laws in place, the state is responsible when it does not exercise due diligence to prevent practices that cause VAWH in individual cases. In a case involving an entire indigenous community, including its women, the IACHR declared that Paraguay had 'failed to take the required positive measures, within its powers, that could reasonably be expected to prevent or to avoid the risk to the right to life.'[227] The death of many women before, during or after bearing children had been caused by the lack of an adequate state apparatus to provide minimum health services (an obligation of result), and because of the lack of due diligence in providing access to health services in the specific case.

The passage from obligations of result to due diligence obligations seems clear in the landmark *Pimentel Teixeira* decision, where the CEDAW Committee argued that 'the State is *directly* responsible for the action of private institutions

when it outsources its medical services and … furthermore, the State always maintains the duty to *regulate and monitor* private health-care institutions.'[228] Indeed, among the recommendations of the Committee to the state, 'ensure that private health-care facilities comply with relevant national and international standards on reproductive health care'[229] is relevant. It entails 'the policy … [ensuring] that there are strong and focused executive bodies to implement such policies.'[230] In a similar case, when a pregnant woman had to wait too long before getting medical support, the judges of the ECtHR were convinced that the negligence attributable to the hospital staff 'went beyond a mere error or medical negligence, in so far as the doctors working there, in full awareness of the facts and in breach of their professional obligations, did not take all the emergency measures necessary to attempt to keep their patient alive.'[231] The Court found that the state had violated the procedural obligation under Article 2 ECHR, in particular because, as I will discuss in the next sub-section, it had not provided an effective remedy to Mrs Şentürk. In a broader sense, as suggested by the CEDAW Committee, it can be argued that the state also has the obligation to 'regulate and monitor' healthcare institutions, both public and private, to avoid cases of malpractice.

The issue which challenges my paradigm in its vertical dimension is the instance of a state failing to allow pharmacists to conscientiously object to EC by law, but *de facto* allowing pharmacists to exercise conscientious objection. According to the analysis conducted in this book, the state bears an obligation to establish the legal framework necessary to grant to women access to EC (a law that, while permitting conscientious objection, compels pharmacists to refer the woman to another pharmacist, for example); to adopt all necessary measures to respond to an actual case in which a woman reports to the authorities difficulties in gaining access to the medicine; and to progressively take steps to disrupt the 'male' attitude in the medical sector.

I have already argued that the obligation to provide information is an example of obligation of result, because it implies the enactment of laws obliging appropriate and objective information to be given to women. I am arguing here that it can also be a kind of due diligence obligation, when the law is in place but its application is not effective. For example, in *P. and S. v. Poland* the ECtHR considered that, despite Polish law obliging practitioners to state in writing any refusal to perform abortion, and to refer the case to another physician, 'the staff involved in the applicants' case did not consider themselves obliged to carry out the abortion expressly requested by the applicants on the strength of the certificate issued by the prosecutor,' and that the applicants 'did not receive appropriate and objective medical counselling which would have due regard to their own views and wishes.'[232]

The provision of objective and reliable information is fundamental where a woman is to be sterilised. The state violates its due diligence obligations when it does not act in order to prevent the provision of misleading information or coercion by health personnel to undergo the practice. In *Szijjarto*, the CEDAW confirmed the reasoning in its GR No. 24, and considered that Hungary 'has not

ensured that the author gave her fully informed consent to be sterilised.'[233] In that respect, the Committee recommended the state 'monitor public and private health centres, including hospitals and clinics, which perform sterilization procedures so as to ensure that fully informed consent is being given by the patient before any sterilization procedure is carried out, with appropriate sanctions in place in the event of a breach.'[234] The ECtHR followed a similar reasoning in *V.C. v. Slovakia*, when it decided that the laws in force at the time of V.C.'s sterilisation had required her consent prior to medical intervention, but that '*in the applicant's case*, [they] did not provide appropriate safeguards.'[235]

The element of consent, which matters in a case of involuntary sterilisation but can be considered as a generally important element in all cases, was defined in the following terms by the IACHR in *I.V. v. Bolivia*: consent must be granted prior to the medical procedure; it must be given in a free, voluntary, autonomous way, without pressure of any kind; it must not be used as a condition for access to other procedures or benefits, and no coercion, threats or disinformation may be employed; it must be full and informed.[236] In particular, the Court argued that the obligation of 'active transparency' (*transparencia activa*) requires the state to provide information that is necessary so that individuals can 'exercise other rights;'[237] in other words, access to information is instrumental to the enjoyment of other rights. Consequently, according to the Court, the obligation of active transparency the state must abide by consists in the duty of health personnel to provide information which can contribute to the patient making free and responsible decisions regarding his/her own body and reproductive health.[238] Accordingly, the obligation of active transparency includes both an obligation of result to establish the limits to the medical action, and a due diligence obligation to guarantee that these limits are adequate and effective in practice.[239] As pointed out by the Court: 'in the implementation of the Bolivian laws which regulate access to sexual and reproductive health,' the state must adopt the necessary measures to 'ensure that in all public and private hospitals the prior, free, full, and informed consent is obtained from the woman before interventions that lead to sterilisation.'[240]

To provide access to an effective judicial remedy with due diligence

When laws are in place, states can be held responsible for violation of due process rights when a woman encounters difficulties in gaining access to judicial remedies. I list this aspect under both obligations of result and obligations of due diligence: on one hand, it is true that providing access to a judicial remedy is an obligation of result, but I contend that the way in which this access is provided is subject to an *alea* which characterises this obligation as an obligation of due diligence. So, for example, the IACommHR considered the application of Maria da Penha admissible, although she had not exhausted all domestic remedies, because of the length of the proceedings and the attitude shown to victims of DV by courts and lawyers.[241] In *V.K. v. Bulgaria*, the CEDAW Committee noted that the state party had adopted a law on protection against DV, which included

a fast-track procedure for issuing immediate protection orders, but that 'the political will that is expressed in such specific legislation must be supported by all State actors, including the courts, who are bound by the obligations of the State party.'[242] Accordingly, the Committee found that when the Plovdiv courts refused to issue a permanent protection order against V.K.'s husband, the restrictive definition of DV that was applied, along with the 'very high standard of proof' required, meant that the state had violated its obligation to effectively protect V.K. against DV. In *Valiulienė*, the ECtHR found that the national law provided 'a sufficient regulatory framework to pursue the crimes,' but that in the case at hand enormous delay had occurred in the proceedings: the criminal proceedings were discontinued, and this had been the opposite of a guarantee of effective protection.[243] In *Lenahan et al*. the IACommHR, despite considering the USA responsible for not protecting Jessica Lenahan and her daughters from DV, found that the state was not internationally responsible for failures to grant her access to courts.[244] Lenahan, whose daughters were killed by her husband who then committed suicide, had been able to reach the Supreme Court, which ruled against her, without any irregularities, omissions or delays. The due diligence obligation had been met.

An effective remedy should also be characterised by gender-sensitive proceedings, in which courts are capable of 'seeing' how gender matters in the prosecution of certain offences. This aspect was highlighted by the CEDAW Committee in *V.K. v. Bulgaria*.[245]

In a case of rape committed by state organs, the IACommHR found that Mexico had not acted with due diligence in investigating the violation of Mariana Selvas Gómez and another ten women's rights: their complaint to obtain justice was not thoroughly examined by courts during more than ten years after the facts complained of.[246] Judicial ineffectiveness, as argued by the IACHR in *Cotton Field* concerning femicides committed by private parties, 'encourage[d] an environment of impunity that facilitate[d] and promote[d] the repetition of acts of violence in general and sen[t] a message that violence against women [wa]s tolerated and accepted as part of daily life.'[247]

Turning to maternal health, the ECtHR stressed the procedural element of the right to life in *Byrzykowski v. Poland*, where the state was found in violation of Article 2 ECHR for not effectively investigating after Byrzykowski died as a consequence of epidural anaesthesia. In a similar, more recent case, *Z. v. Poland*, the Court pointed out that states are required to 'set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable,' and that the obligation to determine responsibility in the case at issue was an 'obligation of means only.'[248] Such a system could have considered, on one hand, the need to have a system in place competent to deal with the deaths of patients and to assess the possibility of granting compensation – a result – and, on the other hand, the margin the state has in choosing a type of remedy. As the Court further argued, in the specific sphere of medical

negligence the obligation may be satisfied through *different means*: a remedy in the criminal courts, or 'a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any responsibility of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and/or for the publication of the decision, to be obtained.'[249] This argument is upheld in the *Şentürk v. Turkey* judgment, where the Court referred to the state's positive obligation to establish an 'effective and independent system' to decide with promptness and due diligence cases of the death of patients, and to this obligation being violated when the protection afforded by domestic law 'exist[s] only in theory:' so 'it must also operate effectively in practice, and that requires a prompt examination of the case without unnecessary delays.'[250]

Beyond the obligation on states to establish a specific mechanism to provide remedies to the victims of human rights violations, there are due diligence obligations to provide effective remedy, in the sense that they are subject to the *alea* of the outcome.[251]

For example, in *Cotton Field* the Court ordered the state to 'effectively' conduct 'the criminal proceedings that were underway and, if applicable, those that may be opened in the future, to identify, prosecute and punish the perpetrators and masterminds of the disappearance, ill-treatments and deprivation of life' of the women, whose relatives had brought the case before the Inter-American human rights bodies.[252] In identifying the elements of the obligation, the due diligence standard emerges strongly: the Court asked the state 'to use all available means to ensure that the … judicial proceedings are conducted promptly in order to avoid a repetition of the same or similar acts as those in the instant case.'[253] In *Fernández Ortega*, the IACHR, amid a long list of measures to be adopted as reparation for the rape of a young woman belonging to an indigenous minority, pointed out 'the importance of implementing reparations that have a community scope and that allow the victim to reincorporate herself into her living space and cultural identity,' which required the state in this specific case, 'to provide the necessary resources for the Me'phaa indigenous community … to be able to establish a community centre.'[254] The determination of the resources 'necessary' constitutes an obligation of due diligence, on which the IACHR wished to stay informed. In assessing compliance with the judgment in 2015, the Court required the state to present a report every six months in order to verify that it had respected the obligation to provide redress to Inés Fernández Ortega in her status within the community.[255]

Positive obligations to progressively take steps

To change patterns of discrimination that contribute to VAWH

In the diagnosis, I argued that VAWH can be seen in terms of patterns of discrimination, both in its horizontal and in its vertical dimension. I further contended that patterns of discrimination are not just social and cultural patterns rooted in society, but also the persistence of and 'tolerance' states demonstrate for VAWH.

The question now is how to disrupt these patterns of discrimination, and in what sense this can be identified as an obligation to progressively take steps. The CEDAW Committee has repeatedly considered the prohibition of discrimination as an obligation of immediate effect,[256] and so it is, particularly when it comes to pursuing non-discrimination *de jure*, in the law, or, if read in terms of reparations, obliging the state to provide public acknowledgement of its responsibility, condemnation of discrimination. An element of due diligence obligation could also be identified, if we read the prohibition of discrimination in a specific case, for example when investigations are conducted. For instance, in *I.V. v. Bolivia*, where I.V. was sterilised without prior and informed consent, the IACHR posited that consent can be extorted by forms of violence, coercion or *discrimination*,[257] and that the relationship of power between the physician and the patient can be 'exacerbated by the unequal power relations that have historically characterised men and women, as well as by gender stereotypes … which, consciously or unconsciously constitute the basis of practices that reinforce the dependent and subordinate position of women.'[258]

The obligation to eliminate all forms of discrimination against women includes the obligation to eliminate discrimination based on gender stereotypes,[259] which can persist in society and in the attitude of organs of the state or of people working in public fields, such as health. It is an obligation to take steps progressively, which implies respecting, over time, obligations both of result and of due diligence.[260] Examples of these measures are the publication of a pamphlet on women's sexual and reproductive health that includes the requirement for informed consent.[261] This is a result, but one that requires time and an action by the state which is not immediate.

An interesting example of positive obligations to take steps to disrupt patterns of discrimination in cases of DV is found in the *Maria da Penha* case. The IACommHR acknowledged that 'the State has adopted a number of measures intended to reduce the scope of domestic violence and tolerance by the State thereof, although these measures have not yet had a significant impact on the pattern of State tolerance of violence against women, in particular as a result of ineffective police and judicial action in Brazil,' and recommended the state '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.'[262] In particular, the Commission called for a change in the pattern of discrimination both within society and within the state apparatus; the former, by the 'inclusion in teaching curriculums of units aimed at providing an understanding of the importance of respecting women and their rights recognized in the Convention of Belém do Pará, as well as the handling of domestic conflict'; the latter, through '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.'[263]

In a case of rape, the IACommHR considered, in the *López Soto* report, 'the more general contexts of gender violence and impunity for violence' and

recommended several mechanisms to ensure non-repetition, which can be grouped within my category of 'obligations to progressively take steps.' These include designing and implementing 'a national policy on prevention of violence against women and gender-based violence that includes effective supervision and oversight mechanisms,' and reinforcing 'the institutional capacity for responding to the structural problems identified in this case as factors of impunity in cases of violence against women.'[264] In the judgment in the same case, the Court required the state, '[with]in a reasonable time', to include in the education system a permanent programme named after López Soto with the purpose of eradicating gender-based violence.[265] In *Atenco*, the IACHR asked the state to draw up a plan addressed to police forces in order to assess respect for the standards elaborated by the court on the use of force during demonstrations, and the gender-sensitivity of their actions.[266]

In abortion cases, the CEDAW Committee, in *L.C. v. Peru*, recommended that the state should 'take measures to ensure that the relevant provisions of the Convention and the Committee's GR No. 24 with regard to reproductive rights are known and observed in all health-care facilities,' including 'education and training programmes to encourage health providers to change their attitudes and behaviour in relation to adolescent women seeking reproductive health services and [to] respond to specific health needs related to sexual violence,' and 'guidelines or protocols to ensure health services are available and accessible in public facilities.'[267] This obligation can also entail elements of due diligence, when the state, whose legislative apparatus is supposed to meet international obligations, must ensure that health services comply with laws in place. The CEDAW Committee found, in *Pimentel Teixeira*, obligations which can fall under the category of obligations to progressively take steps to protect maternal health, including the provision of 'adequate professional training for health workers, especially on women's reproductive health rights, including quality medical treatment during pregnancy and delivery, as well as timely emergency obstetric care,' training 'for the judiciary and for law enforcement personnel,' and 'the implementation of the National Pact for the Reduction of Maternal Mortality at state and municipal levels.'[268]

As highlighted in the provisions of the Istanbul Convention which, except for sterilisation and forced abortion, mainly focuses on the horizontal dimension of VAWH, it is fundamental to involve men and boys in changing patterns of discrimination (Article 12(4)). It is important to consider why perpetrators commit DV, why men rape women, why women continue to perform FGM/C on new-born girls, why a society limits women's access to abortion, why in hospital the will of the physician prevails when he/she forces a woman to be sterilised or to be subjected to damaging procedures while giving birth. An approach which combines both the dimensions of violence envisaged in this book and highlights the interconnections between the two in terms of states' obligations might prompt an evolution of state practice and of the jurisprudence of regional human rights courts and UN treaty bodies alike.

To establish mechanisms of non-repetition

The jurisprudence of the IACHR helps to identify obligations to progressively take steps by adopting mechanisms and procedures to counter gender-based VAW. So, for example, following the trend inaugurated by *Cotton Field*,[269] in *López Soto* the IACHR acknowledged that the state had already adopted a law establishing tribunals on VAW, and required Peru, 'within [a] reasonable time' to guarantee the adequate and efficient functioning of these mechanisms.[270] This obligation to take steps also entails an obligation of result – the establishment of efficient tribunals – but one which requires time, and action by the state which is not immediate. State practice would not allow me to assert that states are *obliged* to establish such tribunals; however, when they have enacted laws doing so, they must guarantee the efficient functioning of the tribunals. In *Atenco*, the Court recognised that Mexico had established mechanisms to monitor cases of sexual violence against women, but it asked the state to reinforce the system within two years, to include a process of diagnosis of the 'phenomenon of sexual torture against women,' and to draw up periodic proposals for public policies.[271]

In a case of involuntary sterilisation, the IACHR decided that the state must ensure that all hospitals adopt a document stating, 'in a concise, clear and accessible' style, women's rights with regard to their sexual and reproductive health, in conformity with the *I.V.* judgment and international obligations. This document must be available in all public and private hospitals in Bolivia, accessible to both patients and doctors.[272]

To provide data on VAWH

For similar reasons data must be collected on specific types of violence, such as DV and femicide; this has been encouraged both by the CEDAW in its GR No. 35, and by the Special Rapporteur on VAW.[273] There is an increasing trend to collect data on such practices to better counter them, but what about other forms of violence? It seems to me, but this is again *de jure condendo*, that states ought to collect and make available data covering all the types of violence I have discussed in these pages, namely DV, rape, FGM/C, abortion, involuntary sterilisation, OV and limiting access to contraception. The 'first and continuing task'[274] to collect data has preventative purposes in the fight against VAHW, but also raises awareness of the existence of a pattern of discrimination and can propel reforms or changes in society. In *López Soto* the IACHR required the state to collect and analyse data on VAW, and during the first three years to report annually on the steps taken in that direction.[275] As I mentioned in the *anamnesis*, the publication of data on OV in Italy paved the way for women to come forward and report maternity-room practices that damaged their physical and psychological health, while the recognition of a practice of forced sterilisation in Japan prompted the first case ever before a Japanese court. The EU Commission has affirmed, in its 'Strategic engagement for gender equality 2016–2019', that ending VAW entails 'ongoing actions' to improve the availability, quality and reliability of data on gender-based violence through cooperation with several actors.[276]

Conclusions on state obligations: a mutually reinforcing framework and some open issues

The strength of this chapter lies in the fact that both dimensions, the horizontal and the vertical as conceived in this book, can be unified while discussing the reconceptualisation of states' obligations. In both dimensions, I contended that, and provided examples of how, states bear legal obligations of result, due diligence obligations and obligations to progressively take steps.

At the beginning of the chapter, the first impression could have been that due diligence obligations only pertain to the horizontal dimension, because they concern interpersonal relations and the state is responsible for preventing and combating violence committed by private individuals. I showed that this is only partly true, since practices in the field of health causing VAWH can also be prevented by the state monitoring *with due diligence* the activity of health personnel operating both in the private and public sector, and responding in an efficient way to episodes of malpractice. It was perhaps tempting to argue that in the horizontal dimension positive obligations prevail, whereas negative obligations – plus some obligations of result – are present in the vertical dimension. I demonstrated that this is not the case.

The difference between the two dimensions does not lie in the 'type' of the obligations, but rather the fact that obligations 'specialise' along the line of one or the other dimension. I noticed that in cases of DV one crucial aspect of the state obligations stressed by courts and UN bodies alike is investigation. Be that as it may, DV affects women's rights to health and to reproductive health, it causes VAWH, and so the authorities must respond by providing services capable of supporting victims/survivors of DV. As for the vertical dimension, the emphasis could have been solely on repealing laws that criminalise abortion and eugenic laws, or on adopting laws relating to maternal health, because the dimension does concern state policies and laws in the health field, and practices within health services. Nonetheless, as I showed, investigation and access to justice are also fundamental. When a woman is denied proceedings that expeditiously analyse her request for reconsideration after abortion has been refused by a physician, this illustrates these aspects.

In this section I turn to consider a few issues that have been left aside or that will open the way for future research and analysis. Given the above, one might ask whether the obligations that I have reconceptualised in this chapter belong to the category of 'core obligations', in the expression used by UN treaty bodies. Considering the ambiguous nature of these obligations, it is difficult to pin down in a list what is a core obligation and what is not. Furthermore, in its GC No. 22 on the right to sexual and reproductive health the ESCR Committee has already performed the analysis. What seems clear to me is that there is a trend towards determining positive obligations, especially in fields in which it was difficult to conceptualise them, such as access to health services. This does not mean that all the obligations I have explored have been clearly established at the international

level. I could see a *trend* towards conceptualising positive obligations to provide access to health services, especially in the vertical dimension; but I also notice, in the horizontal dimension, that the provision of health services, such as psychological and psychiatric assistance for example, has become pivotal.

In this chapter I also argued that a minimum level of health care relating to both the horizontal and vertical dimensions should be provided for free, or at least be affordable, taking gender particularities into account, to the extent that men's access to reproductive services is free or affordable. This obligation stems from the rights to health and to reproductive health, and from the prohibition of discrimination on the basis of gender. Such care would include abortion services when abortion is legal in a given country, and post-abortion services in states that outlaw abortion. This argument is reinforced by the decisions and judgments that I analysed in the *anamnesis*. Nonetheless, this trend cannot be said to be entirely part of state practice, especially in countries such as the United States which are characterised by 'an individualistic system based on private health care insurance for the majority.'[277] This issue cannot be thoroughly explored here. Let us mention however that, in the USA, twenty-six states have laws that prohibit insurance companies from 'offering coverage of abortion as part of a comprehensive health care plan sold in the insurance marketplaces,' and that eleven among the twenty-six 'prevent all private insurers in the state – whether in the marketplace or elsewhere – from offering coverage of abortion as part of a comprehensive health care plan.'[278] According to my paradigm, the state can be held responsible for adopting laws that cause, or contribute to causing, VAWH. Such laws might cause anguish and mental suffering. Furthermore, they demonstrate a clear discrimination within the female gender, and among genders. Abortion, pre- and post-natal services, and services during birth should be provided for free or should at least be affordable, and hence covered in health insurance plans. As I investigated in chapter 2, however, insurance companies, in Europe and elsewhere, do not cover in their travel insurances complications deriving from abortion.[279] The pattern of discrimination that considers women as 'reproductive objects' is resilient. In this connection, one author has inspiringly argued that there is an 'ethical imperative' to take public health actions to eliminate the global problem of unsafe abortions, including family planning to reduce the need of abortion, the provision of safe abortion to the full extent of the law and the provision of post-abortion care.[280]

VAWH is a form of discrimination against women, and in both dimensions I identified the existence of resilient patterns of discrimination, which manifest in society and in attitudes of tolerance shown by the state. As argued in a study by the Office of the High Commissioner for Human Rights (OHCHR), 'discrimination against women includes those differences of treatment that exist because of stereotypical expectations, attitudes and behaviours towards women.'[281] How can patterns of discrimination in the field of VAWH be disrupted? I found obligations to progressively take steps to that end, but it is true, as contended by Simone Cusack, that 'many States are … unsure about the steps they should take to implement their obligations fully, which is undermining efforts to modify or transform

harmful stereotypes and eliminate wrongful stereotyping.'[282] Guidelines elaborated by the OHCHR might be useful in this area, and could stem from the jurisprudence and quasi-jurisprudence analysed in the *anamnesis*. In particular, they might address 'taking measures to train public officials and the judiciary to ensure that stereotypical prejudices and values do not affect decision-making,' and 'adopting positive measures to expose and modify harmful gender stereotypes within the health sector.'[283] This has emerged in both dimensions under investigation in these pages.

FGM/C could be considered as atypical. It was condemned in all the judgments that I have analysed. However, no relevant cases have reached UN treaty bodies or regional human rights courts, except a few complaints citing it as persecution. In the analysis, I recommended that lack of consent be added as an element of the offence. This paved the way for some consideration of universalism and the relativism of human rights. I am convinced by the arguments in favour of universal human rights, and do not feel that reading FGM/C in relative terms would help new-born girls who are forced to undergo a procedure which impairs their reproductive health. Nonetheless, the phenomenon cannot be appreciated without considering the 'context' in which these practices are performed. If we examine context, we can understand how not only FGM/C, but also GCS, must be prohibited when a woman has not given fully informed consent. Accordingly, the perspective should not be on which culture determines the 'standard' to be respected at the international level – something that could be dangerous – but rather which lines of discrimination, in a given context, prompt the perpetrating of VAWH. This means, in other words, conceiving intersectionality as a tool for understanding VAWH. Based on which grounds is VAWH perpetrated? On the basis of sex or gender, or also on ethnicity, religious or social and economic conditions (here, for example, girls who at the age of 12 want to change their genitals because they 'do not like them' and have the money to undergo cosmetic surgery)? Intersectionality is rarely considered by legal scholars, and courts find enormous difficulty in seeing in this concept a tool not only for understanding whether discrimination has occurred, but also for determining the amount of compensation for the victim/survivor, and which measures the state must adopt to comply with its obligations.[284] Intersectionality should enter legal scholarship and the practice of courts and tribunals. For example, in *López Soto*, the IACommHR clearly found that women face enormous obstacles in gaining access to 'suitable and effective judicial remedies,' and that these obstacles were especially critical 'because victims suffer[ed] from a combination of forms of discrimination – because they are women, because of their ethnic or racial background, and/or because of their socioeconomic condition.'[285]

One final comment, *de jure condendo*, concerns reparations. States have been required by human rights courts and UN treaty bodies to adopt general measures, such as repealing or amending laws, and/or providing reparations to victims/survivors of violence. The missing point is the gender of the reparations offered, which means considering the gendered nature of reparations and envisaging

measures that specifically aim to address rooted causes of VAWH. This means that reparations cannot be limited to the victim/survivor, but must be extended to relatives, for example women's children; they must include general measures aimed at disrupting patterns of discrimination that persist in society, especially in the health sector.

The obligation to provide psychological support to a victim of rape, for example, should be combined with action at societal level that involves men and boys in eradicating VAW. Gendering reparations, despite some positive attempts, has not completely permeated the jurisprudence and quasi-jurisprudence of regional (especially the European) human rights courts and UN treaty bodies. In the Council of Europe Istanbul Convention, Article 30(2) provides that:

> [a]dequate State compensation shall be awarded to those who have sustained serious bodily injury or impairment of health, to the extent that the damage is not covered by other sources such as the perpetrator, insurance or State-funded health and social provisions. This does not preclude Parties from claiming regress for compensation awarded from the perpetrator, as long as due regard is paid to the victim's safety.

Even though this article refers only to the types of violence covered by the Convention, it could provide a model for both dimensions of violence and also an answer to the concerns relating to insurance coverage.

Unfortunately, this provision has not been welcomed by many state parties to the Convention, which have appended reservations to it. It is far from being an obligation well established at the international level, at least for the time being. Nonetheless, it clarifies that state compensation is particularly necessary when violence impairs women's rights to health and to reproductive health, supporting the importance of the relationship that I theorised.

Notes

1 Cook, 'Gender, health', p. 349.
2 Cook *et al.*, *Reproductive Health and Human Rights*, pp. 152–3.
3 Cook *et al.*, *Reproductive Health and Human Rights*, pp. 152–3.
4 GR No. 35, para. 22.
5 GR No. 35, para. 24.
6 In the words of the IACommHR, 'there is a broad international consensus over the use of the due diligence principle to interpret the content of state legal obligations towards the problem of violence against women; a consensus that extends to the problem of domestic violence:' *Lenahan (Gonzáles) et al*., para. 134.
7 See the First Report on State Responsibility by James Crawford, A/CN.4/490 (1998), para. 16.
8 R. Pisillo Mazzeschi, 'Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme', *Recueil des Cours de l'Academie de Droit International de la Haye* 333 (2008) 175, p. 192.

9 Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the GA (A/56/10). J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), p. 81.
10 J. Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts,* United Nations Audiovisual Library of International Law, 2012, available at www.un.org/law/avl, p. 3. Legal doctrine on state responsibility is enormous and it is not possible even to try to mention the most important texts. See, *inter alia,* D. Carreau and F. Marrella, *Diritto internazionale* (Milan: Giuffrè, 2018); B. Conforti, *Diritto internazionale* (Naples: Scientifica, 11th edn, 2018); A. Cassese*, International Law* (Oxford: Oxford University Press, 2nd edn, 2005) and the Italian version edited by M. Frulli; M.D. Evans, *International Law* (Oxford: Oxford University Press, 5th edn, 2018).
11 Chinkin and Charlesworth, *The Boundaries of International Law*, p. 148.
12 R. Cook, 'State responsibility for violations of women's human rights', *Harvard Human Rights Journal* 7 (1994) 125, p. 143.
13 See the 1872 award rendered on the Alabama claims of the United States against Great Britain (in *Reports of International Arbitral Awards*, UN, 8 May 1871, XXIX, pp. 125–34, reprinted 2012).
14 A/CN.4/302 and Add.1, 2 and 3 (1977), Sixth report on State Responsibility by Roberto Ago – the internationally wrongful act of the state, source of international responsibility, para. 4.
15 'A breach by the State of an international obligation specifically calling for it to adopt a particular course of conduct exists simply by virtue of the adoption of a course of conduct different from that specifically required.'
16 Sixth report, paras 5–6.
17 Sixth report, para. 7.
18 'A breach of an international obligation requiring the State to achieve a particular result *in concreto*, but leaving it free to choose at the outset the means of achieving that result, exists if, by the conduct adopted in exercising its freedom of choice, the State has not in fact achieved the internationally required result.'
19 The formulation of the proposal by Ago was in negative terms: '[t]here is no breach by a State of an international obligation requiring it to prevent a given event unless, following a lack of prevention on the part of the State, the event in question occurs.'
20 A/CN.4/307 and Add.1 and 2 and Corr.1 and 2 (1978), Seventh report on State Responsibility by Roberto Ago – the internationally wrongful act of the State, source of international responsibility, para. 3.
21 A/CN.4/498 and Add.1–4 Second report on State Responsibility (1999), by James Crawford, para. 79.
22 P.M. Dupuy, 'Reviewing the difficulties of codification: on Ago's classification of obligations of means and of result in relation to State responsibility', *European Journal of International Law* 10 (1999) 371; R. Pisillo Mazzeschi, 'Le chemin étrange de la due diligence: d'un concept mystérieux à un concept surévalué', in SFDI, *Le standard de due diligence et la responsabilité internationale* (Paris: Pedone, 2018) 225, p. 228.
23 Dupuy, 'Reviewing the difficulties', p. 378.
24 A. Marchesi, *Obblighi di condotta e obblighi di risultato* (Milan: Giuffrè, 2003), p. 59.

25 A/CN.4/L.271 and Add.1, Draft Articles on State Responsibility. Text adopted by the Drafting Committee: articles 23–27 and title of chapter IV of the draft – reproduced in A/CN.4/SR.1513 and SR.1524 (1978), p. 206.
26 Dupuy, 'Reviewing the difficulties', p. 380.
27 GC No. 3 (1990) on the nature of States parties' obligations (ESCR Committee), para. 1.
28 GC No. 3, para. 4. On the debate in legal scholarship, see Marchesi, *Obblighi di condotta*, pp. 163–4.
29 Cook, 'State responsibility', p. 161.
30 GR No. 28 (2010) on the core obligations of States parties under Article 2 CEDAW (CEDAW Committee), para. 9.
31 Marchesi, *Obblighi di condotta*, p. 129.
32 D. Shelton and A. Gould, 'Positive and negative obligations', in Shelton, *Oxford Handbook of International Human Rights Law*, 582. See also the pioneer work D. Shelton, 'Private violence, public wrongs, and the responsibility of States', *Fordham International Law Journal* 13 (1989) 1.
33 Pisillo Mazzeschi, 'Responsabilité de l'état', p. 187.
34 P. Alston, 'The not-a-cat syndrome: can the international human rights regime accommodate non-State actors?', in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005) 3, p. 4.
35 Pisillo Mazzeschi, 'Responsabilité de l'état', p. 187.
36 A. Byrnes, 'Women, feminism and international human rights law – methodological myopia, fundamental flaws or meaningful marginalisation? Some current issues', *Australian Year Book of International Law* 12 (1992) 205, p. 227.
37 See 'The obligation to respect, to protect and to fulfil human rights, and the meaning of core obligations' below.
38 These correspond to the titles of chapters III, IV, V of his contribution for the Hague Academy of International Law.
39 Pisillo Mazzeschi, 'Responsabilité de l'état', p. 390.
40 T. Koivurova, 'Due diligence', in *Max Planck Encyclopedia of Public International Law* (last update 2010).
41 L. Grans ('The concept of due diligence and the positive obligation to prevent honour-related violence: beyond deterrence', *International Journal of Human Rights* 22 (2018) 733, p. 734) argues that 'due diligence says something both about the efforts the state has made, that it has actually tried to fix the problem and has dedicated reasonable resources to doing so, and about its competence in doing so (i.e. that it has chosen effective measures),' and that 'it is doubtful whether just referring to positive obligations will get the same message across.' Nonetheless, positive obligations are more than due diligence obligations, they also include obligations of result.
42 L. Condorelli, 'The imputability to States of acts of international terrorism', *Israeli Yearbook on Human Rights* 19 (1989) 233, p. 240.
43 In his first works, Pisillo Mazzeschi included the first three areas, while in the later study for the Hague Academy of International Law he extensively considered the application of due diligence in human rights law. R. Pisillo Mazzeschi, *Due diligence e responsabilità internazionale degli Stati* (Padua: Cedam, 1989) and 'The due diligence rule and the nature of the international responsibility of states', *German Yearbook of International Law* 35 (1992) 9.

44 E. De Brabandere, 'Host States' due diligence obligations in international investment law', *Syracuse Journal of International Law & Commerce* 42 (2015) 319.
45 For due diligence in cyberspace see S.J. Shackelford, S. Russell and A. Kuehn, 'Unpacking the international law on cybersecurity due diligence: Lessons from the public and private sectors', *Chicago Journal of International Law* 17 (2016) 1; K. Bannelier, 'Obligations de diligence dans le cyberspace: qui a peur de la cyber-diligence?', *Revue belge de droit international* 2 (2017) 612; P.Z. Stockburger, 'From grey zone to customary international law: How adopting the precautionary principle may help crystallize the due diligence principle in cyberspace', in T. Minárik, R. Jakschis and L. Lindström (eds), *2018 10th International Conference on Cyber Conflict* (Tallinn: NATO Cooperative Cyber Defence Centre of Excellence, 2018); L. Chircop, 'A due diligence standard of attribution in cyberspace', *International & Comparative Law Quarterly* 67 (2018) 643.
46 J. Sarkin, 'A methodology to ensure that states adequately apply due diligence standards and processes to significantly impact levels of violence against women around the world', *Human Rights Quarterly* 40 (2018) 1, p. 4.
47 Views of 15 May 2006, ACHPR, Appl. No 245/2002, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, paras. 143, 146, 147; also quoted in Pisillo Mazzeschi, 'Responsabilité de l'état', p. 392.
48 In the late sixteenth century, Alberico Gentili argued that the state can be held responsible for violations of rights committed by its citizens, hence 'the state, which knows because it has been warned, and which ought to prevent the misdeeds of its citizens, and through its jurisdiction can prevent them, will be at fault and guilty of a crime if it does not do so'. *De Jure Belli Libri Tres* (John Rolfe (tr.), Oxford: Oxford University Press, 1933), p. 100.
49 Shelton and Gould, 'Positive and negative obligations', p. 578.
50 Bannelier, 'Obligations de diligence', p. 639.
51 O. Corten, *L'utilisation du 'raisonnable' par le juge international* (Brussels: Bruylant, 1997), arguing that reasonableness is determined through rational methods and criteria. Hart clearly argued that 'the open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case' (V.H. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), p. 132).
52 Bannelier, 'Obligations de diligence', p. 639*ff*.
53 Pisillo Mazzeschi, 'Due diligence', p. 44.
54 UN Doc. E/CN.4/1995/42, para. 72. I would say: 'a state is as much responsible for the crime as the perpetrator is guilty (or criminally responsible).'
55 'The due diligence standard as a tool for the elimination of violence against women', Report of the SR on VAW, Yakin Ertürk, E/CN.4/2006/61, 20 January 2006.
56 Ertürk, 'The due diligence standard', para. 47.
57 Sarkin contended that the absence of state resources is not 'an excuse' for a state for not 'taking at least some measures to ensure compliance' (Sarkin, 'A methodology', p. 31).
58 Y. Ertürk, 'The due diligence standard: what does it entail for women's rights', in C. Benniger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Leiden, Boston: Martinus Nijhoff, 2008) 27, p. 28.

59 J. Bourke-Martignoni, 'The history and development of the due diligence standard in international law and its role in the protection of women against violence', in Benniger-Budel, *Due Diligence,* 47.
60 See Crawford, *ILC Articles*, p. 82. On the evolution of the concept in history, see, for example, J.A. Hessbruegge, 'The historical development of the doctrines of attribution and due diligence in international law', *New York University Journal of International Law and Politics* 36 (2004) 265. For cases relevant to the history of arbitration, starting from the famous Alabama case, see Pisillo Mazzeschi, 'Due diligence', p. 34.
61 Judgment of 29 July 1988, IACHR, *Velásquez Rodríguez v. Honduras*, para. 172. See L. Hasselbacher, 'State obligations regarding domestic violence: the European Court of Human Rights, due diligence, and international legal minimums of protection', *Northwestern Journal of Human Rights* 8 (2010) 190, pp. 193–4.
62 Bourke-Martignoni, 'The history', p. 57.
63 For example DV, which requires a 'diligence particulière' (*Talpis*).
64 Article 4(c).
65 GR No. 19, para. 9.
66 GR No. 35, para. 24(b).
67 GR No. 35, para. 24(b).
68 GR No. 35, para. 24(b).
69 GR No. 28, para. 13.
70 On the due diligence standard in the Istanbul Convention, see C. Chinkin, 'The duty of due diligence', 21 May 2010, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593fc8. Criticising Article 5, V. Stoyanova, 'Critical reflections on the due diligence standard under Council of Europe Convention on violence against women', in J. Niemi, L. Peroni and V. Stoyanova (eds), *Violence against Women: Transformations and Legal Challenges after the Istanbul Convention* (London: Routledge, 2020, forthcoming).
71 Explanatory report to the Istanbul Convention, para. 59.
72 Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), 'Baseline evaluation report', Austria, 27 September 2017, para. 123.
73 GREVIO, 'Baseline evaluation report'. Even though already in force, these laws established a 'very high threshold,' which was difficult to cross in individual cases.
74 Report E.CN.4/Sub.2/1987/23. See the evolution in O. De Schutter, *International Human Rights Law* (Cambridge: Cambridge University Press, 2014) p. 280.
75 H. Shue, *Basic Rights, Subsistence, Affluence, and US Foreign Policy* (Princeton, NJ: Princeton University Press, 1980) p. 52.
76 GC No. 22, para. 40.
77 GC No. 22*,* para. 42.
78 GC No. 22, para. 45.
79 Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights, Maastricht, 2–6 June 1986, UN doc. E/CN.4/1987/17, Annex, para. 25; also at *Human Rights Quarterly* 9 (1987) 122.
80 P. Alston, 'Out of the abyss: the challenges confronting the new UN Committee on economic social and cultural rights', *Human Rights Quarterly* 9 (1987) 332, p. 352.
81 Forman *et al.*, 'Conceptualising minimum core obligations', p. 532.

82 Forman *et al.*, 'Conceptualising minimum core obligations', p. 534.
83 M. Scheinin, 'Core rights and obligations', in Shelton, *Oxford Handbook of International Human Rights Law*, p. 538.
84 Scheinin, 'Core rights and obligations', p. 538.
85 Scheinin, 'Core rights and obligations', p. 538.
86 GC No. 14, para. 43.
87 The authors clearly investigate the existing literature on the topic, and I do not reproduce their summary here. See Forman *et al.*, 'Conceptualising minimum core obligations', p. 535*ff*.
88 Forman *et al.*, 'Conceptualising minimum core obligations', p. 543.
89 GC No. 22, para. 49.
90 GR No. 28, para. 9.
91 See Scheinin, 'Core rights and obligations', p. 538.
92 In the views of the CEDAW Committee, it is possible to find a general recommendation to the state to 'respect, protect, promote and fulfil women's human rights, including their right to be free from all forms of domestic violence, including intimidation and threats of violence,' without these three layers being explicitly affirmed. See, for example, *A.T. v. Hungary*, para. 9.6.II(a).
93 Concluding observations on the combined third and fourth periodic reports of Saudi Arabia, CEDAW Committee, 19 February–9 March 2018.
94 Concluding observations, Saudi Arabia, para. 48.
95 Concluding observations on the seventh periodic report of Chile, CEDAW Committee, 19 February–9 March 2018, para. 39.
96 Concluding observations on the initial report of the Niger, ESCR Committee, E/C.12/NER/CO/1, 4 June 2018, para 44.
97 *Osman,* para. 116.
98 *Equality Now*, para. 114.
99 Shelton and Gould, 'Positive and negative obligations', p. 578*ff*.
100 Pisillo Mazzeschi, 'Responsabilité de l'état', p. 247.
101 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2237 UNTS 319.
102 CoE Treaty Series No. 197. Sarkin proposed a 7P response: prevention, protection against, promoting awareness, probing, prosecuting, punishing, providing redress ('A methodology', p. 2).
103 See Explanatory report to the Istanbul Convention, para. 63.
104 Explanatory report to the Istanbul Convention, para. 85.
105 C. Tomuschat, 'What is a breach of the ECHR?', in R. Lawson and H. De Blois (eds), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* (Dordrecht: Martinus Nijoff, 1994) 315, p. 324.
106 Cook, 'State obligation', p. 161.
107 GR No. 28, para. 23.
108 GR No. 35, paras 22 and 24.
109 See the important intuition, as early as 1995, of D. Sullivan, 'The nature and scope of human rights obligations concerning women's right to health', *Health and Human Rights* (1995) 368, p. 389, applying the three layers of obligation as elaborated at the UN level.

110 In that sense, Pisillo Mazzeschi, 'Le chemin', p. 230.
111 Pisillo Mazzeschi, 'Responsabilité de l'état', p. 311. The translation is mine.
112 Pisillo Mazzeschi, 'Responsabilité de l'état', p. 311.
113 Pisillo Mazzeschi, 'Responsabilité de l'état', p. 313.
114 Pisillo Mazzeschi, 'Responsabilité de l'état', p. 390.
115 Pisillo Mazzeschi, 'Due diligence', p. 48.
116 *V.K.*, para. 9.4. Emphasis added.
117 Pisillo Mazzeschi, 'Responsabilité de l'état', p. 434.
118 Cook, 'State responsibility', p. 159.
119 GR No. 28, para. 23.
120 *A.T.*, para. 9.6.II(e).
121 *Bevacqua,* para. 83.
122 The provisions of the Maria da Penha law (Federal Law No. 11340), which was adopted in Brazil after the case of that name before the IACommHR, established special courts.
123 The Italian provisions in Article 24 of the Legislative Decree No. 80/2015 do this.
124 See chapter 2, 'Consent and autonomy in the horizontal dimension: Domestic violence'.
125 See above, the reflection on autonomy and consent in chapter 2, 'Consent and autonomy in the horizontal dimension: Rape' and also chapter 1, 'The horizontal, "interpersonal" dimension: Rape'.
126 See, for example, Views of 16 July 2010, *Vertido,* para. 8.7.
127 *M.C.*, para. 161.
128 See chapter 1, 'The horizontal, "interpersonal" dimension: Rape: Judgments and decisions'.
129 See, for example, the CEDAW concluding observations on Mauritius, CEDAW/C/MUS/CO/6–7, 21 October 2011, para. 22; and the concluding observations on Indonesia, CEDAW/C/IDN/CO/6–7, 27 July 2012, para. 25, observing the lack of criminalisation of marital rape in domestic law.
130 *Equality Now,* para. 160(d).
131 See, for example, the UK Female Genital Mutilation Act 2003, as amended by the Serious Crime Act 2015 (Section 70); also Istanbul Convention, Article 44 on jurisdiction.
132 In chapter 2, 'Consent and autonomy in the horizontal dimension: FGM/C', I mentioned the age of 18, in conformity with Article 1 Convention of the Rights of the Child. It should be borne in mind that in some countries majority is attained with puberty, which can be as early as 9 years old. This opens a debate that it is not my purpose here to analyse in depth.
133 This is not devoid of risks. In Uganda, for example, the trend has changed in favour of performing FGM/C on married women. Married women who are not circumcised receive a lot of pressure from their husbands and society. See www.monitor.co.ug/News/National/Married-women-now-undergoing-circumcision-FGM/688334–4269400-k8b075/index.html.
134 See, for example, *L.C.*, para. 8.18. See also GC No. 36 (HRC), para. 8.
135 *Mellet*, and GC No. 36 (HRC), para. 8.
136 See, in that respect, the US jurisprudence in chapter 1, 'The vertical, 'state policies' dimension: Abortion'.

137 Laufer-Ukeles, 'Reproductive choices', p. 378.
138 *L.C.,* para. 7.13.
139 See, in that respect, Pisillo Mazzeschi, 'Responsibilité de l'état', p. 342.
140 *A.T.* could not find support because the local shelters were not equipped to host her disabled child.
141 *Aydin*, para. 107.
142 *Fernández Ortega,* para. 252.
143 *Fernández Ortega,* para. 252. See also 'Access to justice for women victims of sexual violence in Mesoamerica', p. 98.
144 *L.C.,* para. 7.7.
145 *L.C.,* para. 8.17.
146 *L.C.,* para. 9(b)(i).
147 *Mellet*, para. 9.
148 GC No. 36, para. 8. Emphasis added.
149 See in that respect, for example, *CGIL v. Italy*.
150 *Whole Woman's Health*, for example. See, also GC No. 22, para. 16.
151 GC No. 22, para. 17.
152 GC No. 22, para. 34.
153 GC No. 22, para. 38.
154 *Whelan*, para. 7.12, and *Mellet*, para. 7.11.
155 Opinion individuelle (concurrente) du membre du Comité Yadh Ben Achour, in *Mellet*, para. 4.
156 Individual opinion of Committee member Sarah Cleveland (concurring), in *Mellet,* para. 7.
157 Erin Nelson supports the argument that abortion must be state-funded in *Law*, *Policy*, p. 238.
158 Rodríguez-Ruiz, 'Gender in constitutional discourses', p. 712.
159 In this sense, see R.J. Cook and B.M. Dickens, 'Human rights and HIV-positive women', *International Journal of Gynecology & Obstetrics* 77: 1 (2002) 55, p. 56.
160 Laufer-Ukeles, 'The disembodied womb', p. 4.
161 *Court of its own motion v. India*.
162 Dissenting opinion of judges Sajó, Karakaş, Nicolaou, Laffranque and Keller, para. 25.
163 Dissenting opinion, para. 35.
164 *Xákmok Kásek Community,* para. 233. Emphasis added.
165 *Xákmok Kásek Community,* para. 302.
166 *Xákmok Kásek Community,* para. 301.
167 *Pimentel Teixeira*, para. 8.
168 *Mandal*, para. 2.
169 See above, chapter 1, note 589 and related text.
170 J.P. Kelleher, 'Emergency contraception and conscientious objection', *Journal of Applied Philosophy 27* (2010) 290.
171 Cook *et al.*, *Reproductive Rights*, p. 292.
172 M.R. Wicclair, 'Conscientious refusals by hospitals and emergency contraception', *Cambridge Quarterly of Healthcare Ethics* 20 (2011) 130, p. 138.
173 See the evolution of victims' rights in M.C. Bassiouni, 'International recognition of victims' rights', *Human Rights Law Review* 6 (2006) 203.

174 See the whole work by D. Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2015).
175 Bassiouni, 'International recognition', p. 231.
176 Shelton, *Remedies,* p. 16.
177 Shelton, *Remedies*, p. 17.
178 Pisillo Mazzeschi, 'Responsabilité de l'état', p. 368.
179 *A.T.*, para. 9.3.
180 *M.C.,* para. 180.
181 *Equality Now,* para. 138.
182 *L.C.*, para. 7.12.
183 *L.C.,* para. 7.13.
184 *L.C.,* para. 8.16.
185 *L.C.,* para. 8.4.
186 *Tysiac*, para. 124.
187 *I.V.,* paras 300 and 310. On damage and redress in the IACHR system, see V. Madrigal-Borloz, 'Damage and redress in the jurisprudence of the Inter-American Court of Human Rights (1979–2001)', in G. Ulrich and L. Krabbe Boserup (eds), *Human Rights in Development Yearbook 2001. Reparations: Redressing Past Wrongs* (The Hague: Kluwer, 2001) 213.
188 See, in chapter 1, 'The vertical, "state policies" dimension, Involuntary sterilisation', the Japanese law on involuntary sterilisation.
189 See, in that respect, *Pimentel Teixeira*, para. 8.
190 Pisillo Mazzeschi ('Responsabilité de l'état', p. 369) considered the provision of compensation an obligation of result, whereas the adoption of specific measures could be either an obligation of result or an obligation of means.
191 Bassiouni, 'International recognition of victims' rights', p. 231.
192 C. Duggan and R. Jacobson, 'Reparation of sexual and reproductive violence. Moving from codification to implementation', in Rubio-Marín, *The Gender of Reparations* 121, p. 148.
193 M. Urban Walker, 'Gender and violence in focus: A background for gender justice in reparations', in Rubio-Marín, *The Gender of Reparations*, 18, pp. 50 and 53.
194 R. Rubio-Marín, 'The gender of reparations in transitional societies', in Rubio-Marin, *The Gender of Reparations,* 63.
195 Rubio-Marin, 'The gender of reparations', p. 71.
196 Rubio-Marín and Sandoval, 'Engendering the reparations', p. 1076. See also **'**Access to justice for women victims of sexual violence in Mesoamerica', para. 106.
197 *Da Penha*, para. 23.
198 *I.V.*, para. 332. The translation is mine.
199 *Cotton Field*, para. 549.
200 *Cotton Field*, paras 468–9.
201 *I.V.,* paras 334, 336.
202 *Cotton Field*, para. 519.
203 *I.V.,* para. 342.
204 See also below, 'Methodology for treatment, Positive obligations to progressively take steps, To change patterns of discrimination'.
205 The Commission addressed this aspect, as reported in the judgment of the Court, at para. 337.

206 *Cotton Field*, para. 451.
207 Rubio-Marín and Sandoval, 'Engendering the reparations', p. 1088. See also below, 'Conclusions on state obligations'.
208 'S'efforcer de capturer les personnes coupables de la violation': Pisillo-Mazzeschi, 'Le chemin', p. 231.
209 See for example *Yildirim*, and *Talpis.*
210 *Yildirim,* para. 12.3(b).
211 *Opuz*, para. 169.
212 The '*Osman* test' applied, for example, by the Court in *Talpis*.
213 *V.K.*, para. 9.8.
214 De Vido, 'States' positive obligations'.
215 *Talpis,* para. 130.
216 *A.T.*, para. 9.6.II(b).
217 Bannelier, 'Obligation de diligence', pp. 641 and 664.
218 *Cotton Field,* para. 164.
219 *López Soto* (IACHR), para. 224.
220 *López Soto* (IACHR), para. 169.
221 *López Soto* (IACHR), para. 136.
222 *Szijjarto,* para. 8.4.
223 *Mellet*, para. 3.27.
224 *Mellet*, para. 3.27.
225 *P. and S.,* para. 110.
226 *I.V.,* para. 300.
227 *Xákmok Kásek Community*, para. 234.
228 *Pimentel Teixeira*, para. 7.7. Emphasis added.
229 *Pimentel Teixeira,* para. 8.
230 Fredman, *Comparative Human Rights*, p. 256.
231 *Şentürk,* paras 104–5.
232 *P. and S.*, para. 108.
233 *Szijjarto,* para. 11.3.
234 *Szijjarto,* para. 11.5.
235 *V.C.,* para. 152. Emphasis added.
236 *I.V.,* paras 176, 181. See also 'Access to information on reproductive health from a human rights perspective' (IACHR), OEA/Ser.L/V/II. Doc. 61, 22 November 2011.
237 *I.V.,* para. 156.
238 *I.V.,* para. 158.
239 *I.V.,* para. 163.
240 *I.V.,* para. 341.
241 *Da Penha*, para. 32.
242 *V.K.*, para. 9.4.
243 *Valiulienė*, paras 78 and 85.
244 *Lenahan (Gonzáles) et al*., para. 197.
245 *V.K.,* para. 9.12.
246 As confirmed by the IACHR, *Mujeres Víctimas (Atenco),* para. 338.
247 *Cotton Field*, para. 388.
248 *Z. v. Poland,* para. 93.

249 *Z. v. Poland,* para. 94.
250 *Şentürk,* paras 81, 82.
251 Pisillo Mazzeschi, 'Responsabilité de l'état', p. 422.
252 *Cotton Field,* para. 455.
253 *Cotton Field,* para. 455.
254 *Fernández Ortega,* para. 267.
255 Resolución de la Corte Interamericana de derechos humanos, *Fernández Ortega y otros y Rosendo Cantú y otra v. México*, supervisión de cumplimiento de sentencia, 17 April 2015, p. 14.
256 GR No. 28, para. 15.
257 *I.V.,* para. 161.
258 *I.V.,* para. 186.
259 *I.V.,* para. 186.
260 Pisillo Mazzeschi, 'Le chemin', p. 231.
261 *I.V.,* para. 372.
262 *Da Penha*, paras 60 and 61.4.
263 *Da Penha*, paras 60 and 61.4.
264 *López Soto* (IACHR), para. 291(5).
265 *López Soto* (IACHR), para. 345.
266 *Mujeres Víctimas (Atenco*), para. 355.
267 *L.C.,* para. 9(b)(ii).
268 *Pimentel Teixeira*, para. 8.
269 Mexico was required to launch long-term programmes aimed at periodically reporting information on the efforts to discover the truth. *Cotton Field*, para. 475.
270 *López Soto* (IACHR), para. 324.
271 *Mujeres Víctimas (Atenco),* para. 360.
272 *I.V.,* para. 341.
273 38th session of the Human Rights Council, Statement by Dubravka Šimonović, SR on VAW, Geneva, 21 June 2018.
274 C. Chinkin, 'Violence against women: The international legal response', *Gender and Development* 3 (1995) 23, p. 24.
275 *López Soto* (IACHR), para. 349.
276 'EU Strategic engagement for gender equality 2016–2019', 22 January 2016, p. 15.
277 See L.O. Gostin and P. Fennell, 'Health: the health care system, therapeutic relationships, and public health', in M. Tushnet and P. Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2005), p. 439.
278 Data provided by the National Women's Law Center, 2017, available at https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/12/50-State-Insurance-Coverage-of-Abortion.pdf.
279 See chapter 2, 'Why is intersectionality appropriate for conceptualising the idea of VAWH?'.
280 M.F. Fathalla, 'Abortion and public health ethics', in A.C. Mastroianni, J.P. Kahn and N.E. Kass (eds), *The Oxford Handbook of Public Health Ethics* (Oxford: Oxford University Press, 2019).
281 'Gender stereotypes and stereotyping and women's rights', September 2014. Available at www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Gender_stereotyping.pdf.

282 S. Cusack, 'Building momentum towards change', in Brems and Timmer, *Stereotypes and Human Rights Law*, 11, p. 34.
283 'Gender stereotypes and stereotyping and women's rights', p. 2.
284 See also, with specific regard to the Inter-American system, L.P.A. Sosa, 'Inter-American case law on femicide. Obscuring intersections?', *Netherlands Quarterly of Human Rights* 35 (2017) 85.
285 *López Soto* (IACommHR), para. 267.